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PREVENTIVE DETENTION UNDER THE NATIONAL SECURITY ACT, 1980: BALANCING NATIONAL SECURITY AND CONSTITUTIONAL LIBERTY

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ABSTRACT

Preventive detention is a highly controversial measure in constitutional democracies, in that it allows for the deprivation of personal freedom without a typical criminal trial. Preventive detention is a procedure under criminal law in which liberty is curtailed based on an apprehension of the future conduct of the applicant, in contrast to criminal law which works after commission of an offence and requires a judicial determination of guilt. Preventive detention is constitutionally guaranteed in India under Article 22 of the Constitution, but is subject to other constitutional protections of equality, freedom, personal liberty and fair procedure. The key statute on preventive detention, where the matter of national security and public order is concerned, is the National Security Act, 1980 (NSA). This paper review the question of whether the NSA meets the constitutional requirements of proportionality, procedural fairness, judicial accountability and rule of law in the process of advancing legitimate security goals. The study is carried out through a doctrinal and comparative approach, as it involves the analysis of constitutional provisions, statutory provisions, judicial decisions, academic literature, international human rights standards and comparative practices of United Kingdom and United States. So far the literature has concentrated on the constitutional issues and judicial interpretations of preventive detention. Paper builds on the existing scholarly work on the NSA by examining it within a wider proportionality, rights protection, accountability of the Executive and democratic safeguards. It states that while preventive detention can be allowed in the "exceptional circumstances" referred to in the NSA, extensive powers of discretion granted to the executive branch by the NSA can give rise to cases of arbitrary deprivation of freedom of the person in the absence of more explicit procedural safeguards and institutional control. This paper ends with the conclusion that the goals of national security and constitutional liberty do not conflict with one another. A democratic State can, indeed, legitimately defend security interests only on the condition that their exercise is subject to the limits of constitutional morality, rule of law, transparency and respect for human dignity.

Keywords: Preventive Detention; National Security Act, 1980; Personal Liberty; Rule of Law; Human Rights, National security.

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Introduction

Curbing the exercise of individual liberty has always been considered an essential part of constitutional democracy. But in a democratic state, there may be circumstances when exceptional legal measures are necessitated for national security, public order and protection of the State. This balance of collective security and individual freedom is the root of preventive detention. It allows the State to take away someone's liberty not for an offence but simply because the authorities think that if they do not, the person may pose a risk to the public interests.[2]

The Indian constitutional scheme is a peculiar one in the field of preventive detention. Although the majority of democratic constitutions give significant safeguards against arbitrary detention to individuals, the Constitution of India explicitly provides for preventive detention in Part III. Article 22 explicitly provides for special safeguards granted to those who are detained under preventive detention laws, thus implicitly accepting exceptional powers and attempting to limit their exercise.[3]

Preventive detention provisions were brought about partly as a result of the security issues associated with achieving independence, such as Communal Violence, political instability and fears of undermining the unity of the nation. But the ongoing evolution and proliferation of such legislation has brought to the fore significant constitutional and human rights issues. However, critics contend that preventive detention raises the bar on the presumption of innocence as it results in deprivation of liberty without trial in the criminal courts, opening the door to executive overreach.[4]

The purpose of enacting the National Security Act, 1980 was to give governments the power to stop activities that it deems to be harmful to its national security, national defence, foreign relations and public order. The Central Government, State Governments and certain officials have been given powers to place detention orders under Section 3 if they are satisfied that the person is likely to do an act that is likely to be prejudicial to certain interests.[5]

The notion of "subjective satisfaction" in preventive detention law has been a source of concern about arbitrary administrative action for a long time, however. Detention is largely an executive exercise that relies heavily on the prior assessment, and so procedures are key. Abuse of the grounds, lack of full

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[2]. Derek P. Jinks, *"The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India"* 22 Michigan Journal of International Law 311 (2001).
[3].H.M. Seervai, *Constitutional Law of India* (Universal Law Publishing Co., New Delhi, 4th ed., 1991).
[4] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford Univ. Press 1999).
[5] The National Security Act, 1980, § 3, No. 65, Acts of Parliament, 1980 (India).

disclosure, slow or delayed judicial review, and reliance on executive authorities persist and pose constitutional problems.[6]

The Supreme Court has given a wide definition to the term personal liberty in Article 21. In A.K. Gopalan v State of Madras, the court took a narrow approach and decided that liberty could be curtailed by any lawful procedure, while in Maneka Gandhi v Union of India, the Court changed the nature of the test for the constitutionality of preventive detention laws by imposing conditions of fairness, justness and reasonableness to it.[7]

The Emergency period, in particular, the ADM Jabalpur v Shivkant Shukla decision, have shown how an unchecked executive can be dangerous. The case, however, is a reminder of the need for robust safeguards to the liberty during emergency situations.[8]

Today's discussion about the NSA isn't just about the constitutionality, but also about the constitutionality of the NSA's political, public demonstration and law-and-order use. There are concerns that the practice of preventive detention can sometimes be used instead of ordinary criminal process, thereby enabling authorities to avoid having to prove charges by trial.[9]

This chapter investigates the current conflict between national security and constitutional freedom, and identifies if the NSA, 1980 has a satisfactory constitutional balance. It follows a rights based approach based on constitutional morality, rule of law, proportionality and international human rights obligations.[10]

Conceptual and Constitutional Framework

The analysis of preventive detention under the National Security Act, 1980 in this study is done in a constitutional-human rights perspective. The framework does not see national security and personal liberty as opposed to each other; it examines the exercise of security measures within constitutional bounds. The analytical framework is composed of the following five principles which are mutually connected; personal liberty, procedural fairness, proportionality, rule of law and international human rights protection.[11]

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[6] A.G. Noorani, *Preventive Detention in India*, 26 Econ. & Pol. Wkly. 2608, 2608 (1991).
[7] *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.
[8] *ADM Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207.
[9] Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 Colum. J. Asian L. 93 (2006).
[10] *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.
[11] GAUTAM BHATIA, *THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY IN NINE ACTS* (2019).

The concept of "Personal Liberty" and Article 21

According to Article 21 of the Constitution, no one should be deprived of their life or their personal liberty unless as per law. There has been a significant shift in the meaning of Article 21. A.K. Gopalan used a formalistic approach on the issue of the existence of legal authority, Maneka Gandhi made it a point to assert that the process which was limiting liberty is fair, just and reasonable. The substantive standard of evaluation of preventive detention in this research is provided by Article 21. The main issue is: is there a constitutional fair procedure in place to deprive of liberty under the NSA or is it only legally authorised?[12]

Article 22

Article 22 establishes the special constitutional structure of the preventive detention. Allows Parliament to make preventive detention laws subject to some procedural protections. Constitutional protection mechanisms involve the notification of the reasons for detention, the ability to present a case and a hearing by Advisory Boards. Preventive detention, however, is an exception to the ordinary criminal justice principles as it is one in which the detainee is deprived of his/her freedom without undergoing a full criminal trial. The challenge to the constitution, then, is to prevent a free hand for the executive with the use of Article 22. Rather, Article 22 should be in harmony with Article 21 and the modern constitutional principles of fairness and dignity.[13]

Proportionality Principle

The concept of proportionality is now playing an increasingly significant role in today's constitutional case law. It is not sufficient that a fundamental right be restricted; it must have a legitimate objective, there must be a rational link between the objective and the restriction, the restriction must be necessary, and there must be a proportionality between the fundamental right and the restriction. When considering the issue of preventive detention, proportionality would involve considering whether detention is a real or actual necessity, or whether lesser restrictive measures under ordinary criminal law are likely to be equally effective in dealing with the perceived threat.[14]

Rule of Law

Institutional accountability and legal constraints are building blocks of the rule of law, and the rule of law means that executive power is subject to legal constraints and accountability. Preventive detention is

[12] *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.
[13] India Const. art. 22.
[14] Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 Colum. J. Transnat'l L. 72 (2008).

especially problematic as it allows executive powers to infringe on freedom before a court has ruled on it. In this regard, the present study investigates the extent to which sufficient mechanisms are available to limit the discretion of the executive power in the face of judicial review, transparency and oversight of the institutions.[15]

Human Rights Standards

International human rights law provides an additional analytical framework. Individuals are guaranteed protection against arbitrary arrest and detention in Article 9 of the International Covenant on Civil and Political Rights. While not altogether precluding the use of preventive detention, international law stipulates that any restrictions on the right to liberty shall be lawful, necessary and proportionate. The use of international standards enables this research to determine if the Indian preventive detention system is in line with the other principles of human rights.[16]

Critical Analysis of the National Security Act, 1980

Constitutional validity of preventive detention does not rule out the chances of an abuse of the constitution. A key issue with the National Security Act, 1980 is not only if the State has the power to detain people preventively but how this power is exercised in a legal, necessary and accountable manner. The protections related to the use of preventive detention are more important than in regular criminal trials, given that preventive detention is instituted prior to the question of criminal responsibility.

Executive Discretion

The most serious constitutional problem with the NSA has to do with the use of executive satisfaction to a large extent. The Act allows detention, if the competent authority considers it necessary for the purpose of preventing prejudicial activities, in Section 3. The rationale for the discretion granted is comprehensible in view of the fact that national security issues often have to do with intelligence information and situations that demand urgent action. But if the powers are discretionary, then institutional safeguards are important to avoid arbitrariness in exercising them as they relate to the enjoyment of fundamental liberty. The Supreme Court has time and again acknowledged that the satisfaction is not unlimited executive power. In *Khudiram Das* v. *State of West Bengal* it was observed that absence of material, inappropriate consideration and non-application of mind make the preventive detention orders subject to an appeal on a

[15] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed., Macmillan 1959).
[16] UN Human Rights Committee, General Comment No. 35: Article 9 (Liberty and Security of Person), U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

judicial level.[17] In *A.K. Roy* v. *Union of India*, the Court again stressed that preventive detention is an extraordinary measure that must be exercised with due procedure.[18] However, one problem is that it seems there is a structural issue. Judicial review is typically conducted after the loss of personal liberty; and the executive authority makes the initial decision on detention. Thus, constitutional protection is heavily reliant upon quality post-detention review systems. Proportionality is a principle that offers a way of limiting the discretion of the executive. Detention order(s) should reflect a finding of security concern, as well as a finding that detention is necessary and that less restrictive alternatives are inadequate. If an assessment is not made, the preventive detention might just become a means of the criminal law instead of using it as a security measure.

Procedural Safeguards

The constitutional protection for detention without trial is in Article 22 which is meant to minimize the severity of detention without trial. Such protections involve informing the detained of the grounds of detention, giving them the chance to make representation and having detention reviewed by an Advisory Board. The effectiveness of such safeguards however, is contingent on their effective implementation. A significant issue is that information that is provided to detainees is limited. Confidentiality may be required at times of intelligence and/or national security concerns but over-enthusiastic privacy may hamper the ability of detainees to effectively challenge the detention order. Under the doctrine of natural justice, a person who is affected by the actions of the State should be given some meaningful information on the premise of his actions. The Supreme Court has at various occasions held that the important procedural safeguards have to be observed strictly in preventive detention cases as detention is a serious infringement on personal liberty. The Court in Haradhan Saha v State of West Bengal observed that preventive detention and criminal prosecution are in different spheres but preventive detention cannot be a substitute to the ordinary criminal prosecution. There is a need to rethink the Advisory Board mechanism. It does offer institutional review but it is mostly within the administrative structure. A stronger framework would require greater independence, transparency, and reasoned evaluation of detention necessity.[19]

Judicial Review

The main constitutional instrument to check the powers of preventive detention is judicial review. In the past, however, judicial review in cases of preventive detention has been limited, as courts have accepted

[17] Lucia Zedner, *Preventive Justice or Pre-Punishment? The Case of Control Orders*, 60 Current Legal Probs. 174 (2007).
[18] *Khudiram Das v. State of West Bengal*, (1975) 2 SCC 81.
[19] *A.K. Roy v. Union of India*, (1982) 1 SCC 271.

the notion that security assessments are executive matters and the information related to such assessments can most efficiently be provided to executive authorities. Judicial restraint is related to the issue of institutional competence – courts do not generally assume the role of the executive in assessing threats to security. However, over-riding the procedures could undermine constitutional safeguards, since one of the main functions of judicial review is to hold executive power to account to ensure it does not go beyond the constitutional limits. The development of the jurisprudence of Article 21 shows that there is a need to scrutinize, the fairness and reasonableness, of the State action. When it comes to restrictions on liberty, Maneka Gandhi is the one who sets the standards as "substantive" standards of fairness. Thus, the necessity, proportionality and presence of substantive grounds for detention should be increasingly the focus of the review of preventive detention. The Supreme Court again reiterated the importance of effective judicial protection in the case of Rekha vs State of Tamil Nadu, highlighting that preventive detention can never be a substitute for the ordinary criminal proceedings and that the authorities have to show genuine necessity for the use of preventive detention powers.[20]

Political Dissent

The issue of the connection between preventive detention and democratic dissent is a major issue which is present today. Whereas in constitutional democracies, criticism of government policies, political disagreement and involvement in public demonstrations are integral parts of democratic governance and are peaceful. Preventive detention should, therefore, be separated from normal political differences. Article 19 of the Constitution guarantees freedom of speech and assembly, so any restrictions on people's legitimate freedom of expression must not limit their ability to participate in democracy, even if that inconveniences or challenges the authority of the government. Human rights groups and constitutional experts have raised questions about the use of preventive detention in cases involving protests, social movements or political activities where there are alternatives to the preventive detention that could be used under ordinary criminal law. The issue is not whether the State should be unable to take any effective action when faced with actual threats to public order, but one of whether "extraordinary powers of detention" are acceptable substitutes for the normal constitutional procedures. In relation to this, one needs to be conscious of the difference between what is “law and order” and what is “public order” that has been created by the Supreme Court. In Dr Ram Manohar Lohia v State of Bihar, the Court clarified that “public order” refers to a more grave disorder of the public, and is not synonymous with any violation of the law.[21]

[20] Shrutanjaya Bhardwaj, *Preventive Detention, Habeas Corpus and Delay at the Apex Court: An Empirical Study*, 13 NUJS L. Rev. 1 (2020).
[21] *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637.

Judicial Approach

Judicial understanding of the concept of liberty of the constitution is evolving in India, which is evident in the judicial interpretation of preventive detention. The Supreme Court's focus has shifted from the formal concept of legal authority to a more substantive focus on fairness, reasonableness and constitutional accountability.[22]

Gopalan Era

A.K. Gopalan v *State of Madras* was a case in which the early concept of constitutional preventive detention was upheld. The petitioner attacked the Preventive Detention Act, 1950, on the grounds that it infringes on the fundamental rights. The Supreme Court upheld the law, and took a narrow view of Article 21, saying that personal liberty could be curtailed by any procedure prescribed by an existing law. The decision was a reflection of a view held by the courts at an early stage that fundamental rights were seen in isolation and not as an interconnected group of guarantees. The judgment though upheld preventive detention as being constitutional, it had given a narrow reading to the concept of liberty which was subsequently challenged.[23]

The decision reflected an early judicial understanding where fundamental rights were viewed separately rather than as interconnected guarantees. Although the judgment accepted preventive detention as constitutionally permissible, its limited interpretation of liberty was subsequently reconsidered.

Emergency Period

The Emergency period was the most problematic in the history of preventive detention. In *ADM Jabalpur* v. *Shivkant Shukla*, the Supreme Court ruled that during the period of suspension of the constitutional remedies some fundamental rights could not be enforced. The judgment has been harshly criticized given the fact it has favored the executive power at a time when civil liberties were most fragile. Later constitutional developments have taken the view that the reasoning in ADM Jabalpur is incorrect. In *K.S. Puttaswamy* v. *Union of India*, the Supreme Court had specifically noted the significance of the freedom and dignity and that the actions of government during the Emergency period were an abnegation of the constitution.[24]

Constitutional Transformation

[22]Bhatia, *supra* note 11.

[23] *A.K. Gopalan v. State of Madras*, *supra* note 10.
[24] *Justice K.S. Puttaswamy v. Union of India*, *supra* note 10.

The constitutional approach adopted since the independence of India by the Maneka Gandhi has enhanced liberty protection a great deal. Principles of fairness, proportionality and reasonableness of State action in relation to fundamental rights have been increasingly stressed by the Supreme Court. Under the Court's reasoning in Puttaswamy, privacy and autonomy are integral parts of personal liberty and the interpretation of constitutional rights must be based on the prevailing democratic values of the day. This change has significant implications in terms of preventive detention. The constitutional issues do not merely concern the legislative competence of Parliament to enact preventive detention legislation but whether this legislation is in harmony with the substantive constitutional guarantees.[25]

Comparative Analysis

The comparative analysis is included here as it is not a solely Indian constitutional issue. The struggle to respond to the threat of terrorism, national security issues and disorders in the public sphere, while safeguarding individual rights, has been a common challenge for democratic States throughout the world. The United Kingdom and the United States are chosen because they are two countries with influential constitutional models relating to the issues of security power and individual liberty.[26]

United Kingdom

An interesting comparison is the U.K. in which the Indian legal framework has been influenced over the years by the British administration and constitution itself. Further, the UK has experienced serious national security issues, notably with regards to the threat of terrorism, and had to build more robust mechanisms for national security review, using human rights principles. The Human Rights Act, 1998 and Article 5 of the European Convention on Human Rights have enhanced judicial oversight of the detention powers. In the A v Secretary of State for the Home Department case, it was seen that the courts are prepared to scrutinise whether the national security measures are unjustifiably infringing upon an individual's liberty. The lessons that the UK model has for India are not that it must have the same laws, but that an independent review, an assessment of proportionality and the compatibility of security measures and human rights obligations are crucial.[27]

United States

The United States offers a comparative perspective since the notion of the rule of law and the notions of due process, habeas corpus, and judicial review are all strongly emphasized in the constitution. The

[25] *Maneka Gandhi v. Union of India*, *supra* note 7.
[26] Andrew Ashworth & Lucia Zedner, *Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions*, 2 Crim. L. & Phil. 21 (2008).
[27] *A v. Sec'y of State for the Home Dep't* [2004] UKHL 56, [2005] 2 A.C. 68 (HL).

United States has no preventive detention system as such as the NSA, but national security powers which arose following the September 11 attacks raised similar issues about detention powers and civil liberties. In Boumediene v Bush, US Supreme Court emphasises the need for judicial oversight of detention decisions, and rules that there are no constitutional habeas corpus protections that could be stripped away on the basis of national security issues. What is important of the American model is the fact that it underlies judicial oversight and the constitutional accountability of national security measures.[28]

Conclusion and Suggestions

Preventive detention in the National Security Act, 1980 is one of the most challenging constitutional issues to be solved as a balance between national security and personal liberty. The State has a legitimate responsibility to protect society from serious threats but in order to ensure constitutional democracy, the exercise of authority must be within the framework of legality, fairness and accountability. This study illustrates that it is not only a matter of permitting preventive detention but also how the law on such detention offers protection against a possible arbitrary deprivation of liberty. Although the NSA is constitutionally valid as an exceptional security measure, the fact that it is based on executive satisfaction, the scope of the statute and the lack of protections for the procedures raise ongoing concerns about abuse. From A.K. Gopalan to Maneka Gandhi and Puttaswamy, the development of Indian constitutional jurisprudence has shown that there is a need to go beyond formal legality to ensure liberty. Constitutional governance must be based on substantive fairness, proportionality and institutional accountability. Despite the best efforts of the security bodies, the presence of independent, review and transparency mechanisms, security measures can coexist with constitutional freedom, as seen from comparative experiences in the United Kingdom and the United States. The correct constitutional stance towards India is thus not one of wholesale rejection of preventive detention but of a reconfiguration of the system into a rights-based security system. National security should not be seen as being at odds with human rights. True security of a democratic State is only possible with limited and accountable exceptional powers in keeping with the morality of the Constitution and human dignity.

The preventive detention under the National Security Act, 1980 is an ongoing constitutional issue of balancing the national security with the individual liberty. Preventive detention is not totally prohibited by the Constitution, the article 22 acknowledges that it is an exceptional power which the State can exercise. But the recognition of the Constitution is not synonymous with unlimited executive power as all use of power in the State that encroaches on freedom is subject to constitutional restrictions in Article 14, 19 and

[28] *Boumediene v. Bush*, 553 U.S. 723 (2008).

21.[29] The first important to come from this study is that what is constitutionally justifiable for preventive detention is the compliance with the conditions of necessity and proportionality. While preventive detention is a deprivation of liberty without any criminal proceedings it must have more compelling reasons than the ordinary administrative action.[30] Detention cannot be justified on the basis of a security concern alone; the authority has to make an assessment of the need for detention and why alternatives are not going to be sufficiently effective at eliminating the risk. The second discovery is with regard to discretion of the national security act. The Act is highly discretionary in terms of the satisfaction of executive authorities. While in the national security field there may be circumstances that necessitate the need for some discretion on the part of personnel in order to obtain the intelligence information, there is a danger of arbitrary decision making when there is unrestricted discretion. The issue of the constitutional problem is not so much that the executive has discretion to act as it is that there are few enough institutional checks in place that are strong enough to check executive miscreants.[31] The third finding is related to Article 22 (procedural safeguards). While these safeguards are mandated by the Constitution, they are not as effective as they will be if they are being used in practice. A procedural safeguard is meaningless unless it provides the detainee with adequate information to enable him or her to effectively challenge the detention order. It has been the consistent position of the Supreme Court that the authorities responsible for making a decision on the preventive detention have to observe strict procedures as it is a serious interference of the personal liberty.[32] The fourth finding is about judicial review. The fourth finding is about judicious review. The concept of liberty in Indian constitutional interpretation has been evolving from a formal concept to a substantive concept with a focus on the notions of fairness, dignity and reasonableness. Even so, the jurisprudence of preventive detention is still beset with problems for two reasons: one, that the judicial review of the detention order is generally not seen until after the detention order has impacted the freedom of the individual; and two, that in many cases, the detention order remains in effect for periods of time without ever being implemented.[33] Constitutional protection, therefore, needs not only the judicial review but also judicial action in time and in an effective manner. The fifth finding is about dissent to democracy. Preventive detention should not be a tool to limit lawful political expression and peaceful public involvement. The protections afforded to speech and assembly in the Constitution of the United States must be balanced against the right to free expression and a difference of opinion. In a judgment that upholds the precedents set by the courts, the Supreme Court has acknowledged that not all breaches of law are considered an interference with the public order, but rather

[29] India Const. arts. 14, 19, 21.
[30] Kai Möller, *Proportionality: Challenging the Critics*, 10 Int'l J. Const. L. 709 (2012).
[31] Jinks, *supra* note 1.
[32] *Haradhan Saha v. State of West Bengal*, (1975) 3 SCC 198
[33] Bhardwaj, *supra* note 20..

the question must be answered in the light of the constitutional threshold defined in judicial precedents. The sixth finding is the result of comparative analysis. The experience of the United Kingdom and the United States shows that in such democratic States, security concerns have been addressed by strengthening judicial review of the law, the concept of proportionality and accountability of institutions to the rule of law. These models do not give a one-size-fits-all solution for India, but they do give insights into how to design oversight mechanisms in the constitution.