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# Contours of Preventive Detention and Personal Liberty in India

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## ABSTRACT

*A deprivation of personal liberty prior to criminal conviction in modern legal system characteristically occurs as a precautionary measure to ensure the criminal justice is not frustrated or obstructed by those who may become subject to the process of preventive detention. Constitution of India also guarantees preventive detention laws under the VII schedule and rights of preventive detention under Article 22. Preventive detention laws in other countries are used only in war but in India it is also used in peace time. But nowadays preventive detention laws are used according to the whims and fancies of executive authority. Recently also we could see how national security act was stringently used in Jammu and Kashmir. Now it's time to maintain constitutionalism within the country and the executive power needs to be controlled and judiciary in India should exercise its power in order to look that executive power is properly used. In the area of preventive detention the range of administrative control over an individual's personal liberty is wide so the doctrine of judicial review should be exercised to check the arbitrary power of executive authority. This article wishes to define the contours of preventive detention laws in this 21st century and to find effective measures to ensure personal liberty.*

## I. INTRODUCTION

*“Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism—not privileges to be sacrificed at a time of tension”<sup>2</sup>*

*-Kofi Annan*

Preventive detention is often called as administrative detention for the reason it is ordered by the administrative authorities prior to

criminal conviction as a precautionary measure to ensure criminal justice and public order. Magna Carta which is very influential till today is a masterpiece on the idea of the liberty of citizens. Art 21 of the Indian constitution is an organic provision on right to life, which is occupying paramount importance in the Indian legal system. The concept of right to life could be traced in natural law. The right to life is one of the pious rights and it is one of the

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<sup>2</sup> Kofi Annan, Secretary Gen. U.N., Remarks at a special meeting of the Security Council's Counter-Terrorism Committee with International, Regional, and Sub-Regional Organizations (Mar. 6, 2003).

Gods given right to the individual. The right to life has been asserted to be a divine right as it belongs to its holder and this could not be adjudicated by the judge, but could be only respected.

## II. WHAT IS PREVENTIVE DETENTION

Preventive detention means conviction of person without trial and conviction by court, merely on suspicion in the mind executive authority. Preventive detention is fundamentally and qualitatively different from imprisonment after trial and conviction in criminal cases. Preventive detention and prosecution for an offence are not synonymous. In prevention detention a person is denied without trial in subjective satisfaction of executive to prevent him for committing an undesirable act in future. It is preventive theory not punitive. It is not to punish an individual for any wrong done by him but curtailing his liberty, with a view to preventing him from committing certain injurious activities.<sup>3</sup> Preventive detention is only a war time measure in Britain, USA, Canada unlike in India it is used in peace time.

## III. HISTORICAL BACKGROUND

In India Constitution makers visualized the need for preventive detention. In spite of all the emphasis on individual liberty, it has been found necessary to resort to preventive detention during peace time because of unstable law and order situation in the country. The reason behind it is due to the composite feature of India and the way we got freedom. India has a long history of

preventive detention dates back from British rule. The laws authorizing preventive detentions are:

1. Bengal regulation –III of 1818
2. Defense of India act1939 – Rules 26
3. Preventive detention act 1950
4. Maintenance of internal security act 1971
5. COFEPOSA 1974
6. TADA 1985
7. POTA 2001
8. Unlawful activities (prevention) Act
9. National security act
10. Prevention of black marketing and Maintenance of supply of essential commodities act1955

## IV. LEGISLATIVE FRAMEWORK

### A. Constitutional provisions

A law on preventive detention can be enacted by parliament and state legislature through List I Entry 9 VII Schedule and List III Entry 3 VII Schedule respectively. Art 22 (4) to (7) lay down safeguards and provide for minimum procedure to be followed which must be observed in case of preventive detention. If it is not followed then such an action is held invalid and it violates fundamental rights of the detainee. The safeguards are

1. Communication of grounds to the detainee
2. Right to make representation

<sup>3</sup> Rajesh gulati v Government of NCLT Delhi (2002) 6 sc 142

3. Advisory Board
4. Maximum period of detention

#### B. International instruments

1. UN Human Rights Committee – General comment No.8 speak about right to liberty of person and security. “If so called preventive detention is used for reasons of public security it must not be arbitrary and must be based on grounds and procedure established by law, information of the reason must be given control of the detention by court must be available, as well as compensation in case of breach.
2. ICCPR 1966- Art 9
3. UDHR 1948- Art 9
4. United Nations Convention against torture and cruel, Inhuman and degrading treatment or punishment
5. United Nations Body of principles of the protection of all persons under any form of detention or imprisonment.
6. And many other regional instruments also speaks about preventive detention laws.

### V. ROAD FROM GOPALAN TO MANEKHA

In AK.Gopalan case preventive detention law was questioned on the expression personal

liberty. The court took a narrow view and applied strict interpretation and held the act is valid. In kharak singh case the word personal liberty was given liberal connotation and laid down that an unauthorized intrusion into a person’s home and disturbance caused to him thereby violated right to personal liberty enshrined in Art21. The case has been overruled and considered bad in law after the landmark R. C. Cooper Case<sup>4</sup> in which the court discarded the theory that *fundamental rights are water-tight compartments*.

In Manekha Gandhi case the court interpreted the word personal liberty under Art21 to its widest amplitude. In a case Secretary to government & others v. Nabila & Ors, the high court quashed the order of detention mainly on the ground that the detention was in remand in connection with the solitary ground case when there was no material before the detaining authority to show that either the detenu himself or his relatives are taking steps to file application for bail in solitary ground case.

### VI. ROLE OF INDIAN JUDICIARY

The law of preventive detention has been a very contentious measure and has given rise to catena of cases and it will not be an exaggeration to say that by now a distinct jurisprudence of preventive detention has been evolved in the country. The court always placed burden on the detaining authority to show that the order is passed in accordance with the procedure established by law<sup>5</sup>. Preventive detention encroaches upon personal liberty it is solemn duty of the courts to ensure that this power is exercised strictly in

<sup>4</sup> (1978) 1 SCC 248

<sup>5</sup> Icchu Devi v. UOI AIR 1980 SC 1983©1980) 4SCC

accordance with the requirements of constitution and law. The court emphasized from time to time that the power it is tolerated in a free society, as a necessary evil.<sup>6</sup>

1. No objective standard necessary:

Law of preventive detention is not invalid merely it has no objective standard because it depends on the subjective satisfaction of the executive authority. Court is not a proper forum to scrutinize subjective satisfaction of detaining authority<sup>7</sup>. The matter lies within the competence of advisory board<sup>8</sup>.

2. Circumstance vitiating subjective satisfaction:

Subjective satisfaction of detaining authority shall be called in question on grounds of malafides non application of mind. The supreme court held that there must be real likelihood of the person being able to indulge in such activities, the interferences of such likelihood being drawn from objective data<sup>9</sup>.

3. Colorable exercise of power:

A detention order may be quashed on the ground of colorable exercise of power if there is no rational material for the subjective satisfaction of detaining authority.<sup>10</sup>

4. Nonexistent or irrelevant grounds:

A detention order is bad if it is based on a non-existence ground<sup>11</sup>. The court quashed detention

order stating that the matter to be relevant to law and order and not to public order<sup>12</sup>.

5. Detaining authority to file affidavit:

Supreme Court Developed a norm that when a detainee moves a petition for habeas corpus challenging his detention, the counter affidavit must be filed by the authority on whose subjective satisfaction of the detention order was made. An affidavit from an officer who has at no time personally dealt with the matter and has no personal knowledge of detainee is improper<sup>13</sup>.

## VII. PREVENTIVE DETENTION IN JAMMU AND KASHMIR

During the abrogation of Article 370 around 2000 to 2500 people were under preventive detention in Jammu and Kashmir but now only 200 to 250 are under preventive detention. They were detained under preventive detention law public safety Act of J&k 1978. It has been used as a tool for political repression and spreading terror among civilians. In 2012, the UN Special Rapporteur on situation of human rights defender Margaret Sekaggaya asked for repeal of PSA. Justice Magrey of Jammu and Kashmir high court found Bhat's detention vitiated the settled position of law<sup>14</sup>. He said right to make representation should be given to detainees added grounds of detention must be stated including materials considered by the detaining authority for arriving the detention order. The judge relied

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<sup>6</sup> VC Mohan v. Union of India AIR 2002 SC

<sup>7</sup> Ak Gopalan v. state of madras

<sup>8</sup> Bhim sen v. state of Punjab AIR 1951 SC 481

<sup>9</sup> Asha Devi v. K shimraj Air 1979 SC 447

<sup>10</sup> Noor chand v. state of west Bengal AIR 1974 SC 2120

<sup>11</sup> Shibban Lal saxena v. state of UP AIR 1954 SC 179

<sup>12</sup> Niranjan Singh v. state of MP AIR 1972 SC 2215

<sup>13</sup> Niranjan singh v. state of MP AIR 1972 SC 2215

<sup>14</sup> Masood Ahmad Bhat v. State of J&K and ors. Case no. HCP 41/2019 ([WP Cri) No. 41/2019]

on Supreme Court judgment in Ibrahim Ahmad Batti v. State of Gujarat.<sup>15</sup> After the abrogation of Art 370 National security act was extended to J&K through state reorganization bill. Over 5000 people were arrested and detained but in the end of November only 609 were detained including stone pelters. The sorry state affairs is 144 minors were detained in Kashmir who were under age of 18 years.<sup>16</sup>

### VIII. CONCLUSION

“Preventive detention can only be tolerated in any democratic society in most extreme circumstances. It must be used with the utmost restraint only so long as it strictly necessary”

-Gardiner Committee Report

According to John Rawls judgments concerning what are morally good or fair must not depend on who is making the judgment his or her religion or race. It must be based on human well-being. These are the moorings of the very idea of India. To maintain constitutionalism within the country the executive power needs to be controlled. In the area of preventive detention, the range of administrative control over an individual's personal liberty is wide which is need to be controlled by judicial review to check the arbitrary power. It's correct time at the 70<sup>th</sup> year of adoption of Indian constitution to redefine the contours of preventive detention laws and inventing safeguard measures to protect personal liberty. Test of reasonableness had been given due weight age by judiciary and reiterated the rule of law firmly in several case. The law is not

static rather changing with the changing needs of the society. The law is growing with the growth of the society. This establishes a relationship between law and the society and shows that in India there is scope of both preservation and expansion of law. It's correct time at the 70<sup>th</sup> year of adoption of Indian constitution to redefine the contours of preventive detention laws and inventing safeguard measures to protect personal liberty.

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<sup>15</sup> The wire , J&k High court quashes Preventive Detention , Kindles hope for other detainees. 26 Sep 2019.

<sup>16</sup> India Today, 9 year ol among 144 minors detained in Kashmir since Article 370 abrogation: Reports, by Aneesh Mathur.