PREVENTIVE DETENTION AND HUMAN RIGHTS

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The detention of Mr. Gandhi, MP. Pilibhit (U.P.) has again proved that the preventive detention is a negation of the rule of law and the principles of fair trial. Through the Hon'ble Supreme Court of India has recently settled the issue after disposing of the petition filed by Mr. Gandhi. However, it needs to be examined in detail as to why the Executive authorities misuse law without proper application of mind at different times, places and circumstances.

It is also quite strange that there is no authoritative definition of the term preventive detention under the Indian Law. However, this impression and its original language was used by the law lords in England while explaining the nature of Detention under Regulation 14 (b) made under the Defence of the Realm Act, 1924 passed on the outbreak of Word War and the same repeated with emergency Regulation during World War. Hence, the term Preventive Detention is used world wide concerning detention of a person by executive order prevent him from endangering the security of the State, disturbing public order of essential services/ supplies adversely affecting specified object of public interest.

TABLE 1: PREVENTIVE DETENTION, THE STATE AND THE LAW

Country	Legal Basis for Preventive Detention	Who has power to detain	Administrative Review
Bangladesh	Constitution, Art 141-A, Special Powers Act 1974	Government	Automatic and binding
India	Constitution Sch 7; National Security Act 1980 conservation of Foreign Exchange & Prevention of Smuggling Act 1874; Terrorist & Disruptive Activities Prevention Act, 1967	Central & State Governments Limited delegation to police Civil servants & District Magistrates	Automatic but not for Periods of less than 2 months, not binding
Kenya	Constitution, S. 83; Preservation of Public Security Act.	Minister	Automatic and not binding.
Malaysia	Constitution, Art, 150; Internal Security Act; 1960; Emergency (Public Order & Prevention of Crime) Ordinance.	Minister and Police	At detainees' election; not binding

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Malawi	Preservation of Public Security Act, 1965.	Minister and Police	At detainees' election; not binding
Nageria	State Security (Detention of Persons) Decree 1984	Vice-President	Uncertain
Pakistan	Security of Pakistan Act, 1952, Maintenance of Public Order Ordinance 1960	Central Government & District Magistrates	Automatic and binding
Singapore	Internal Security Act, 1960	President, acting on advice from Govt; Police & Internal Security personnel	At detainees election; not binding
South Africa	International Security Act 1982; Public Safety Act, 1953	Minister for Law and Order & Police	At detainees election; not binding
Sri Lanks	Prevention of Terrorism (Temporary Provisions) Act, 1979; Public Security Ordinance under state of emergency.	Minister	At detainees' election; but not for members of prescribed organisation; not binding.
Swaziland	Detection Order, 1978	Prime Minister (subject to consent of the King)	At election of detainee or any family member, not binding.
Tazania	Preventive Detention Act, 1962; Deportation Ordinance, 1921; Expulsion of Undesirable Persons Ordinance 1930; Area Commissioners Act, 1962; Regions & Regional Commissioners Act, 1962	President	Automatic after three months, not binding
Trinidad & Tobago	Constitution, S. 6	Minister of National Security	At detainees' election then every six months; not binding.
United Kingdom	Prevention of Terrorism (Temporary Provision) Act, 1974; Northern Ireland Emergency Powers Act, 1991.	Secretary of State & Police	On request within one year of detention; thereafter every six months; not binding.
Zambia	Prevention of Public Security Act.	President	At detainees' election; not binding.
Zimbabwe	None at present	Minister of Home Affairs & Police.	Automatic; not binding

TABLE 2: DETA INEES' RIGHTS

Country	Judicial Review	Notification of grounds	Maximum length successive detention	Rights in admin. review process
Bangladesh	Objective text	Within 15 days	Indefinite with approval of Min/Yes.	Representation in writing only, no legal repn.
India	Quite vigorous subjective test	Within 15 days; relatives informed in writing	1 year; 2 Years in Punjab & Chandigarh/No	Oral and documentary evidence; examination of witnesses; detainee has right to cross-examine
Kenya	Weak & limited	Within 5 days	Indefinite	Six monthly review
Malaysia	Subjective rest imposed by statute	As soon as possible & allegations of fact	2 years; 60 days police detention/unlimited (extendable in period of two years even on original grounds)	No right to legal representation
Malawi	Very limited	No right to be informed	Indefinite (ministerial); police investigative detention subject to reasonableness test	No formal hearing no opportunity to make representation.
Nigeria	Subjective rwar	No right to be informed	6 weeks/unlimited	Procedure unclear
Pakistan	Objective test	Within 15 days unless Federal Govt. otherwise directs	8 to 12 months in any period of 24 months/in 3 months increments subject to review board approval	Right to legal representation
Singapore	Subjective rest imposed by statute	As soon as may be	2 years (President); 30 days (police must report to Minister after 14 days)/in increments of 2 years.	
South Africa	Quite Vigorous subjective test	Right to be adequately informed of reasons	Indefinite(Minis); 180 (police).	Legal advice in drafting written representation to review board; Min must give reasons to RB; RB can hear oral evidence including from detainee.

Sri Lanka	Quite vigorous despite constitutional limitations.	Right to be informed at AC	Indefinite under state of emergency (but this must be renewal monthly)	
Swaziland	Very weak	Pulished in Govt. Gazettee	60 days/renewable for unlimited	No formal review process.
Tanzania	Subjective test	Formal entitlement to release if not informed of ground witnin 15 days	Indefite	Procedure unclear
Trinidad & Tobago	Uncertain	Grounds must be cited in detention order	Indefinite	
United Kingdom	Uncertain	As soon as possible	Indefinite	Oral and written representations, legal costs in representations; no legal representation.
Zambia	Objective Test	Within 14 days	Indefinite	Right to legal to representation.
Zimbabwe	Objective test	Within 7 days; sufficient to make meaningful representation.	Indefinite (mins) 30 days (police)/no re-detention within 180 days of release unless fresh grounds	Right to legal representation usually doc evid. only but detainee can call witness and give evidence.

Hence, it is essential to have a glance at the tables given below indicating briefly the Preventive Detention, the State and the law, and also the rights of the Detenus in different countries of the World.

It is indicated at Serial No. 1 of table 1 above that the Preventive Detention has a Constitutional validity in our Country.

Article 22 (4) -(7) relates to the Preventive Detention. The first case with regard to Preventive Detention being *Gopalan's case*[1] The Article in class (4) states that no law providing for preventive Detention shall authorize the detention of a person longer than three months unless an Advisory Board reports reports that in its opinion sufficient cause for such detention exists. Further more, the right of communication of the ground at the earliest possible in provided in Clause (5). From *Tarapada De v. State of West Bengal.*[2] till a

1. AIR 1950 SC 27.
2. AIR 1951 SC 174.

decision in *P.U. Abdul Rahiman v. U.O.I.*[3] the court has held that non-supply of the grounds of the arrest was an infringement of the right conferred by Article 22(5). The accused is not only to be informed of the grounds of the arrest but these grounds must not be vague or irrelevant, must be in the language which the detinue understands so as to enable him to make a purposeful and effective representation and if the grounds are served in a language which he does not understand the purpose is not served. Article 22 (5) gives the detenu the right to make a representation for the personal liberty of a person is at stake. The emphasis has been laid on giving the detenu an opportunity to make a representation. It not only affords the chance to make a representation but the representation be considered and disposed of expenditiously as possible so that it does not lose both its purpose and meaning.

In a decision, *Kartar Singh v. State of Punjab*[4] of the apex court considered Preventive Detention and other aspects in relation to it, very widely. It emphasized that laws should give the person of ordinary intelligence, a reasonable opportunity to know what is prohibited so that he may act accordingly. Court laid down certain guidelines regarding confession also. It also stressed that designated Courts should dispose of case pending without any delay in consonance with "speeding trial" an essential parts of fundamental rights.

The Court in *Attorney General for India v. Amartlal Prejivandas*[5], did not agree with submission of petitioner's counsel, that Government had not chosen to specify the date from which amendments to substitution of Clause (4) and (7) of Article 22 come into force. It was of the view that it was not necessary to decide as the failure of the government to specify the date still after lapse of more than 14 years, in this case and applicability of *A.K. Roy's case*[6], decision was not in need to be considered, though the court had an opportunity to re-examine the decision in *A.K. Roy's case* and consider the question of applicability and enforcement of amendments left on Central Government to specify, which have been lying dead for past so many years.

The question regarding the release on bail has been considered in *Sanjay Dutt v. State*[7] case, where the Division Bench held that the provision to Section 167 (2) of code read with Section 20(4) (f) of TADA, creates an defeasible right in an accused person on account of the "default" by the investigating

3. AIR 1991 SC 336.
4. AIR 1994 3 SCC 569.
5 AIR1994 SCC 54.
6. AIR 1982 SC 710.
7. AIR 1994 5 SC 402.

agency in the completion of investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail. Another obligation cast on the court is to inform the accused of his right of being released on bail and enable him to make an appropriate course in that behalf.

If reasoning and logic underlying observation in *Hitendra Vashu Thakur*[8] are extended it could mean that every time magisterial order authorizes the detention of accused in custody beyond 15 days, he would be obliged to give notice to the accused and hear him. Such a course may neither be feasible nor warranted. The view taken probably calls for a reconsideration.

In *Sanjay Dutt v. State*[9] case, it was expressed that if accused applied for bail under the provision of expiry of period of 180 days or extended period as the case may be, he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provision of Cr. P.C. It is settled that petition seeking the writ of habeas corpus on the ground of absence of a valid order of detention of accused has to be dismissed. It is the nature and extent of the right of accused to be released on bail under section 20(4) (bb) of TADA Act read with Section 167 Cr. P.C. in such a situation. Thus the position in *Hitendra Vishnu Thakur's*[10] 9-A case is classified.

In view of the decision of Constitutional Bench in *Kartar Singh*[11] case, on meaning and scope of sub-section (8) of Section 20 of TADA Act the court expressed the opinion that it does not require any further elucidation.

It is submitted that the rights inherent in Article 22 that all arrested, detained or imprisoned shall be provided with opportunity to be represented or consult a lawyer in consonance with Human Rights as laid under International Instruments. As majority of the Indian masses are poor, illiterate and not aware of their rights, so all of them should be educated as to take care of themselves. Since wheels of the same cart, the courts should take care that the Article is given full effect so as to avoid any injustice and no opportunity or exploitation of these poor and uneducated persons is allowed to prevail. If the detained persons are dealt with cruelty, they should be entitled to such remedy, as on a release as justice requires.

8. AIR 1994 4 SCC 602.
9. AIR 1994 5 SCC 410.
10. AIR 1994 4 SCC 602.
11. AIR 1994 3 SCC 569.

Preventive Detention on the ground of public or State security is a flimsy and highly suspect justification for the deprivation of liberty. Abuse of power is seemingly widespread throughout the jurisdiction surveyed here. This does not mean that preventive detention can never be justified. But such more rigorous criteria than generally applied ought to be met if the practice is to be convincingly defended.

Preventive Detention is typically based upon alleged and vague prospective suspicion rather than, as for detentions in the criminal judicial system, accusations resting on a specific criminal offence retrospectively proved. The suspicions which result in the issuing of detention order originate in secret and intimately political decision making processes. Detainees are seemingly often suspected criminals and political dissidents, rather than those who pose a genuine threat to public order or national security. Few details of the grounds for detention are likely to be disclosed to the detainee. Nor is it intended that detentions should be reviewed by genuinely independent administrative or judicial agencies before whom a defense can be offered with a real hope of release from potentially indeterminate confinement. As stravros states, "there exists a point in time beyond which the administrative deprivation of liberty sheds the character of preventive measure and is transformed into a sanction imposed without due process".

The Principal task in this field for justice and others should be as follows. **First,** the complex relationship between political and legal systems should be carefully studied in order to ascertain why some countries appear more predisposed to instability or intolerance and hence to preventive detention, than others. **Secondly,** much stronger safeguards with respect to the decision to detain should be developed by all states. Constitutions should expressly limit preventive detention times of war, or states of public emergency which threaten the life off the nation. These should be declared in accordance with international norms and should be subjected to domestic legislative and judicial review. **Thirdly,** the lawyers should be allowed to be present before the Review Board, otherwise how can a layman fight his case before the Board without the help of the counsel. Hon'ble Apex Court has already held that no absolute immunity could be claimed by the administrative authorities as and when fundamental rights of citizens inclusive of freedom of movements and pursuit of normal life and liberty are involved. **Fourthly,** The necessary amendments should be made as per the recommendations of The National Commission for reviewing the working of the constitution for inclusion of all serving High Court Judges in the

Advisory Board as Chairman and members. At the same time, the detention should not exceed six months. **Fifthly,** High standards of proof are must for the preventive detention as the laws need to maintain a balance between the Human Rights and the security of the Nation for maintenance of public order etc. **Sixthly,** There should be a provision for adequate monetary compensation for the state though the same is not enough to compensate for detenu's mental torture, harassment and loss of reputation.

Within this framework, the circumstances in which detainees can legally be held should be defined as strictly as possible by legislation. All cases of preventive detention should automatically be referred to Administrative Review Boards where detainees should be entitled to legal representation at the expense of the State. Review penal decisions should be binding upon the detaining authorities. All detainees should also have speedy access to the Courts through habeas corpus, or its equivalent. In reviewing detentions, independents Courts should apply the objective tests, with the burden of proof resting firmly on the executive to justify its decision to detain.

Thus, it is the dignity of Human beings and the society which is being protected, it is the judiciary which came to rescue of individual against the excessive and abusive use of power by the State. It is for the judiciary to protect individual freedom and liberty against draconian laws of the State. Hence, no activity of the Sate is beyond judicial scrutiny. The judiciary has rightly been striking down arbitrary, irrational and unfair actions of the State.

Further, the Law Commission may be asked to reexamine the entire scope of preventive detention in accordance with contemporary needs, requirements and need for checks and balances. In the meantime, Hon'ble Supreme Court may also lay down elaborate guidelines to be followed by the state governments prior to issue of orders for preventive detention.

Above all, the State Human Rights Commissions should be constituted in all states and Union Territories as per the provision of National Human Rights Acts. Then only the National and State Human Rights Commissions can play a pivotal role in cases of abuse and misuse of powers relating to preventive detention.

At the same time, preventive detention should also be incorporated as a separate chapter in the Criminal Procedure Code through an appropriate amendment.

References:

- Jaswal Nishtha (Ed.), Role of S.C. with regard to life and Personal Liberty (Ashish Publishing House, New Delhi, 1990).
- Palkhivala, N.A., "Our Constitution, Defaced and Defiled" (The MacMillan Co. of India Ltd., New Delhi, 1974).
- Ramcharan, B.G. (Ed.), "Human Rights : 30 Years after Universal Declarations" (Martinus Nighoff, London, 1979).
- Ramachandran, V.G., Fundamental Rights and Constitutional Remedies-Vol.II (Eastern Book Co., Lucknow, 1979).
- Punjab University Law Review.
- Supreme Court Cases.
- Hindustan Times.
- The Tribune.
- Personal knowledge/experience.