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PREVENTIVE DETENTION AS A CONSTITUTIONAL TYRANNY

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ABSTRACT

In the regular criminal justice system, the law works sensibly to restrict arrest and custody. The processes under the normal courses of arrest or detention are executed in the manner preferred by the procedural laws. However, none of the above holds true when it comes to the preventive detention system. Further, there is no Constitutional mandate under Clause 5 of Article 22 to consider the representation made by the detenu before confirmation of detention order and in the absence of any statutory provision requiring consideration of representation prior to the confirmation of detention order, it can be considered after the confirmation of detention order.[1] Moreover, Article 22(6) also asserts that nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose. Moreover, the State is not under any obligation under Right to Information, 2005 to provide the grounds of detention to a detenu prior to his arrest and detention.[2] Preventive detention laws allow arrests if the executive officer is satisfied that a person is hazardous to society, where different laws deal with different hazards. It is all right that no grounds should be given up to five days, and in some cases even 15 days, after the arrest. Detainees shall not be brought before a judge at any point in time, nor shall there be a periodic review. Is it justifiable for India to allow one lakh person to be arrested and detained in a year without ever bringing them before a judge, refusing them a public trial, and not giving them any legal aid?[3]

1. INTRODUCTION

On June 8, 2018, Chandrashekhar Azad, a Dalit leader from Uttar Pradesh, completed one year in jail. Azad was not serving jail time after being convicted in a criminal case. Far from a conviction,

[1] K.M. Abdulla v. Union of India, AIR 1991 SC 74 ; D.M. Nagraja v. Government of Karnataka, AIR 2012 SC 295 (India).

[2] Subhash Popatlal Dave v. Union of India, AIR 2012 SC 3370 (India)

[3]Abhinav Sekr *Why it is Critical to review Preventive Detention Laws*, HINDUSTAN TIMES, (Jul. 01 , 2020, (10.04 A.M.), https://www.hindustantimes.com/analysis/why-it-is-critical-to-review-preventive-detention-laws/story-OuN05iXpk3OZS9nrkSStUN.html.

there had not even been a trial. Azad was, instead, in "preventive detention". His time in jail was — and continues to be — sanctioned by the National Security Act of 1980, which allows the State to imprison people for up to one year without bringing a charge against them. The NSA had been invoked by the Uttar Pradesh government in November when Azad had already been held in custody for a few months on charges of rioting and attempt to murder. Ironically, it was invoked again, immediately, after Azad was granted bail by the Allahabad High Court, which specifically observed that the charges against him appeared to be politically motivated[4]. In a free society like ours, it's often the case when it seems the law is quite jealous of the personal liberty of every individual and does not tolerate the detention of any person without legal sanction.[5] The Police is an instrument for the prevention and detection of crime.[6] Preventing the person from making his movements and from moving according to his will amount to arrest of such arrest.[7] The culture of Preventive Detention was introduced during colonial rule in the early 1800s. The Preventive Detention laws were brought into force to empower the rulers to arrest any person merely on suspicion that the said person is involved in the prejudicial activities. The Defence of Realm Act, 1914 allowed local governments to make rules detain indefinitely,[8] without representation, and to try by special tribunals persons "reasonably suspected" of being of hostile origin or acting in a manner prejudicial to the safety of the empire.[9] Moreover, the Defence of India Act 1915, also referred to as the Defence of India Regulations Act, was an emergency criminal law enacted by the Governor-General of India in 1915 followed by the Rowlatt Acts of 1919 which brought with them much hue and cry. The Act was passed with the intention of curtailing the nationalist and

[4] Gautam Bhatia, *Preventive detention must be used judiciously,* HINDUSTAN TIMES, (Jul. 03, 2020, 11.00 A.M) https://www.hindustantimes.com/analysis/preventive-detention-must-be-used-judiciously/story-P0kzB3DVDcMmtiq8Op4RTL.html.

[5] RV Kelkar Criminal Procedure 73 (6th Ed.2014).

[6] The Police Act, 1861 Preamble.

[7] Kaiser Otmar v. State of Tamil Nadu; 1981 LW (Cri) 158 (Mad).

[8] Halliday, Karpik & Feeley, 63 (2012).

[9] Terrence C. Halliday, Lucien Karpik (2012). Malcolm M. Feeley (ed.). *Fates of Political Liberalism in Post-British Colony: The Politics of the Legal Complex (google books)* 1 Cambridge University Press, 2012.

revolutionary activities during and in the aftermath of the First World War.[10] As a result, the state officials were empowered to detain any person engaged in the nationalist or revolutionary movement, also termed as 'illegal' in the context of Colonial Laws in British India. This is really a hangover of the colonial past, where it suited the colonial power to have a (lower) bureaucracy alienated from people but loyal to its masters – a truism emphasized by the National Police Commission.[11] Subsequently, after independence, India witnessed its own law over Preventive Detention piloted by Sardar Patel, to introduce such a Bill The first Preventive Detention Act was enacted by the Parliament on 26th February 1950. The Preventive Detention Act, 1950 was brought in force to provide for preventive detention in certain circumstances. Section 3 of the Act empowered the State and Centre Governments and the Officers under them to detain any person if there is a reasonable belief that there is no other option other than detention to prevent from acting in any manner prejudicial to the following mentioned conditions:

(i) The defence of India, the relations of India with foreign powers, or the security of India, or

(ii) The security of the State or the maintenance of public order, or

(iii) The maintenance of supplies and services essential to the community, or

(iv) To any person who is a foreigner with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India,

The government's over-reliance on preventive detention in ordinary criminal cases seems to misinterpret two basic aspects:

(1). Preventive detention is intended to deter potential crimes; and

(2) It is not intended to respond to common law and order infringements.

The first post-independence preventive detention act was passed in 1950 which was challenged fruitlessly by A.K Gopalan's case as it was considered legally legitimate by the Madras high court. This Act ended up expiring in 1969, after being extended seven times. Thereafter, further such

[10] B.G. Horniman, British Administration & The Amritsar Massacre, Delhi Mittal Publications (1984).

[11] Law Commission Report on Law Relating to Arrest 84 (2001).

actions as Maintenance of Internal Security Act 1971(MISA), Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 (COFEPOSA) and Terrorist and Disruptive Activities (Prevention) Act (TADA) were added. The TADA act was known as the most inhumane act, because also confessions rendered Under police torture, they were found admissible as testimony in court. There were reports that abuse of such laws was common. A new act, called Unlawful Activities (Prevention) Act, was passed after the series of attacks in Mumbai on 26 November 2008. Proponents in India and internationally have justified the practice as necessary to, for instance, prevent terrorist attacks or respond to existential national crises because the seriousness of the threat supposedly excuses the limitations on fundamental rights. While most proponents internationally do not conceive of the use of preventive detention other than as an extraordinary measure in exceptional circumstances, India regularly uses preventive detention to respond to ordinary criminal matters. Such use cannot be justified in a democratic, constitutional order such as exists in India. Article 22(3) provides that if the person who has been arrested or detained under preventive detention laws then the protection against arrest and detention provided under Article 22 (1) and22 (2) shall not be available to that person.

Ascertaining the object of Preventive Detention in *Ankul Chandra Pradhan Vs. Union of India*[12] The apex court observed that this piece of legislation is not to Punish but to intercept to prevent the Detenu from doing something prejudicial to the State. The satisfaction of the concerned authority is subjective satisfaction in such a manner. In several of the cases under investigation, The detainee was accused of a crime and, by obscuring the shortcomings of the Indian criminal justice system, was detained under the National Security Act, 1980. In order to gain a better understanding of the law, it is beneficial to know the nuances of the act and how some of them are vaguely labeled and defective and can lead to misapprehension. Is it justifiable for India to allow the arrest and detention of one lakh people in a year without ever producing them before a judge, denying them a public trial, and not allowing them any legal assistance?[13]

[12] AIR 1997 SC 2814.

[13] Abhinav Sekhri, *Why it is critical to review preventive detention laws*, (July 14, 2020, 8.59 A.M.), https://www.hindustantimes.com/analysis/why-it-is-critical-to-review-preventive-detention-laws/story-OuN05iXpk3OZS9nrkSStUN.html.

2. CONSTITUTIONAL ASPECT

The practice of preventive detention not only infringes the rights to dignity and freedoms but also curtails the constitutional rights of the detainue of the right to choose his representative. Constitutionalism can be easily found to be in perils through these practices. Article 21 articulates that no person should be deprived of his life and liberty except according to the procedure established by law. But the term 'except according to the procedure established by law' in Article 21 impliedly asserts that the person can be deprived of his life and liberty in accordance with the law. Article 22 specifically deals with such life and liberty in the light of Preventive Detention. Article 22(1) and Article 22(2) deals with the detention in the light of ordinary crimes but the remaining clauses (3), (4), and (5) categorically mention the parent provision of Preventive Detention. After the 44th Amendment, some rights have been enshrined in the remaining Clauses of Article 22 but still ceases to add more rights which are justified. The Right to Information Act 2005 gives the citizens the rights to access the information and in accordance with Section 2(j) of the said Act means the information accessible which are under the control of Public Authority. Hence, the State is not under any obligation to provide the grounds of detention to a detenu prior to his arrest and detention.[14] Further, there is no Constitutional mandate under Clause 5 of Article 22 to consider the representation made by the detenu before confirmation of detention order and in the absence of any statutory provision requiring consideration of representation prior to the confirmation of detention order, it can be considered after the confirmation of detention order.[15] Moreover, Article 22(6) also asserts that nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose. In the notable judgement in *Kharak Singh V. State of UP*[16], the court stated that personal liberty was not only limited to bodily restraint or enforcement. Kharak Singh was charged in the dacoity case but was released since there was no evidence available against him. However, the Police monitored his movements and activities even at night.The Apex

[14] Subhash Popatlal Dave v. Union of India, AIR 2012 SC 3370.

[15] K.M. Abdulla v. Union of India, AIR 1991 SC 74 ; D.M. Nagraja v. Government of Karnataka, AIR 2012 SC 295.

[16] AIR 1963 SC 1295.

Court in the said judgement has followed the dissenting opinion of Field J. in *Munn v. Illinois*[17] and interpreted the term ‘‘personal liberty’ is used in Article 21 as a compendious term to include within itself all the varieties of rights which go to make up the ‘personal liberties’ of man other than those dealt with in the several clauses of Article 19(1).

Hence, it is necessary to examine the position in respect of police officers. It follows that both the obligations to furnish particulars and that duty to consider whether the disclosure of facts involved therein is against public interest are vested in the detaining authority, not in any other.[18] It may be then implied that the not fully immune from the judiciary, but the language used in the provision could be used on the subjective satisfaction of the detaining authority. The Court will not normally interfere with the decision of the detaining authority whether the grounds given in the detaining order are sufficient or not.[19]

The present provision undoubtedly vandalizes the soul of democracy by infringing fundamentalism from the fundamental rights as the provision concerning the safeguard of those rights remains silent when it comes to addressing the preventive detention practices. Hence it can be concluded from the preceding sentences that “the fundamentalism of fundamental rights remains under acute distress in the course of such practices of arrest and detention. Such practices shall be kept under scrutiny on the account of such vandalism.

3. CRIMINAL ASPECT

It is also pertinent to mention that the Criminal Procedure Code is not only the enactment but one of the principal enactments and the principles underlying in this enactment is applied to various Statutes subject to modifications.

LAW ON PREVENTIVE DETENTION UNDER CRIMINAL PROCEDURE CODE

[17] (1877) 94 US 113, 142.

[18] Puran Lal Lakhan Lal v. Union of India, AIR 1958 SC 163.

[19] Saraswati Seshagiri v. State of Kerala, AIR 1982 SC 1425.

No arrest may be made merely on the basis of suspicion of complicity in an offence.[20] The submission to custody may be by express words or may be indicated by conduct.[21] If a person makes a statement to a police officer, accusing himself of having committed an offence, he would be considered to have submitted to the custody of a police officer.[22] If the accused proceeds towards the Police Station as directed by the Police Officer, he would be held to have submitted the custody to the Police Officer.[23] Indeed, while section 41(2) empowers only an officer in charge of a police station to make an arrest thereunder, section 151 empowers each and every police officer to do so. If so, such a person can be arrested under section 151 and resort to section 41(2) read with section 109 is unnecessary.[24] A police constable, who is hardly a matriculate (School higher secondary examination pass), whose training is almost nil, who is hardly aware of the constitutional, statutory and human rights of the accused, who is financially in a bad shape all the time and who is so badly treated by his superiors that he passes on that bad language and bad treatment to the people whom he comes across in course of his duties. In *Karam Singh v. Hardayal Singh*,[25] The Supreme Court asserted that, "Section 46(3) enjoins in clear terms that though the persons making an arrest can use all the necessary purpose, they have not given any right to cause the death of the person who is not accused of the imprisonment for life or death."

Section 110 takes in, inter alia, deals with the Security for the habitual offenders under Drugs and Cosmetics Act, 1940, Foreign Exchange Regulation Act, 1973 (now replaced by FEMA), Employees Provident Fund and Family Pension Fund Act, 1952, Prevention of Food Adulteration Act, 1954, Essential Commodities Act, 1955, the Untouchability (Offences) Act, 1955, the Customs Act, 1962 and any other law preventing the hoarding, adulterating or profiteering in food or drugs or of corruption. Here it is also not true that these offenders should not be arrested but the culture of biasness should be eliminated. Be that as it may, this kind of *carte blanche* power to

[20] 177th Law Commission Report on Law of Arrest 71 (2001).

[21] Paramhansa v. State, AIR 1964 Ori 144.

[22] Bharosa v. Emperor, (1941) 42 Cri LJ 390.

[23] Roshan Beevi v. State of Tamil Nadu, 1984 CriLJ 134 (FB) (Mad).

[24] 177th Law Commission Report on Law of Arrest 83 (2001).

[25] 1979 Cri LJ 1211, 1215 (P&H).

arrest "habitual offenders" of the specified kind at any time of his choosing, by an officer in charge of a police station – if the section is construed literally - is intrinsically capable of abuse and is liable to be characterized as discriminatory.[26] The Law Commission in its 174th report has categorically mentioned that:

> *"It is evident that the real purpose of section 41(2) is to clothe the police officer in charge of a police station to arrest a person, who is taking precautions to conceal his presence with a view to commit a cognizable offence, to prevent such person from committing a cognizable offence. Similarly, section 110 provides for an Executive Magistrate calling upon a habitual offender (of the kind mentioned in the said section) to execute a bond for his good behaviour for a period not exceeding three years. This is again a preventive measure aimed at habitual robbers, house-breakers, thieves and other types of habitual offenders specified in the section. It means that a habitual offender of the kind mentioned in section 110 can be arrested any time by an officer in charge of a police station since neither section 110 nor section 41(2) prescribe any other condition for such arrest. Even so, it is obvious that section 41(2) read with section 110 is again a preventive measure. It cannot be presumed that the law provides for picking up such a person at any time, at the pleasure of a Station House Officer, even if there is no apprehension that he is about to commit a crime."*

Moreover, Section 151(1) lays down the provision that "A police officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented." Section 151(2) subsequently mentions that no person arrested under Section 151(1) shall be detained in the custody for a for a period exceeding twenty- four hours from the time of his arrest unless his further detention is required or authorised under any other provisions of this Code or of any other law for the time being in force.[27] Again, Section 49

[26] 177th Law Commission Report on Law of Arrest 89 (2001).

[27] Shayam Dattatray Beturkar v. Executive Magistrate, Kalyan, 1999 Cri LJ 2676 (Bom).

provides that "the person arrested shall not be subjected to more restraint than is necessary to prevent his escape." The point to be noted is that in either case, the warrant ex facie sets out the reason for the arrest, namely, that the person to be arrested has committed or is suspected to have committed or is likely to commit some offence. [28] It is also pertinent to mention that the term 'police officer' in Chapter V of the Code also means the police constable. Hence, the Police Constable who hardly matriculates can enforce this power. Indeed, while section 41(2) empowers only an officer in charge of a police station to make an arrest thereunder, section 151 empowers each and every police officer to do so.[29] A police officer who arrested the person is an officer who is "not removable from his office save by or with the sanction of the government", he cannot be prosecuted for such actions except with the previous sanction of the concerned government. The said protection is provided by section 197 of the Criminal Procedure Code. The close nexus between the arrest ability and cognizanability is maintained for the reason as the Arrest under the provision of Criminal Procedure Code is not solely on the basis of cognizance of the offence but also includes the basis of the Police Officer's power to arrest.

Hence, the Law Commission in its 177th Report recommended that Section 41(2) should be deleted from the Code not affecting the power of the Magistrate.

MAINTENANCE OF INTERNAL SECURITY ACT 1975

In the famous *Habeas Corpus Case*,[30] The constitutional validity of the Section 16-A of MISA was challenged and contended that violated Article 226 of the Constitution as it prohibited the High Court to issue the writ of *Habeas Corpus*. The impugned Section mentions the special provision during the Proclamation of Emergency. However, the Court held the section as constitutionally valid. It is also notable to mention that Section 16-A of MISA is similar to Section 14 of the Preventive Detention Act, 1950 and was struck down in *A.K. Gopalan v. State of Madras.*[31] Unfortunately, the decision of the Supreme Court barred the courts to examine the *mala*

[28] State of Punjab v. Ajaib Singh (AIR 1953 SC page 10).

[29] 177th Law Commission Report on Law of Arrest 90 (2001).

[30] A.D.M. Jabalpur v. Shukla, AIR 1976 SC 1207.

[31] AIR 1950 SC 27.

fide intention of the order of detention or the *ultra vires* of the order. The decision of Supreme Court overrules impliedly the number of earlier decisions in which it had claimed that it could examine the validity of detention order on the ground either that the order was not passed on the subjective satisfaction of the detaining authority or the detention was made *mala fide* or the detention was made not for the purpose of the preventive detention laws.[32]

NATIONAL SECURITY ACT, 1980

In the midst of the ongoing situation in India due to the spread of the SARS-CoV-19 virus, there have been a few instances where medical practitioners have been attacked by an unruly mob. Extraordinary steps need to be taken to counter extraordinary situations, in which the Uttar Pradesh government and the Madhya Pradesh government subsequently invoked the 1980 draconian National Security Act. Back in late 2019, this act was used frequently to curb the voice of dissent, in protest against the controversial Citizenship Amendment Bill, with more than 5,538 preventive detentions alone in the state of Uttar Pradesh[33]. Section 3 of the NSA empowers the Centre and State Governments to detain any person if there is sufficient belief in the mind of a detaining officer about any prejudicial activity to be committed by the person. The term 'PREVENT' in this Act is a semblance of safeguarding the national security but it's apparently prejudiced and extrajudicial in terms of a democratic setup like ours. The Act apparently attracts extensive indulgence of only the executive and legislature more likely. The judiciary has been kept aloof from the act or only a nominal indulgence has been mentioned. As per the procedural law of the land, the judiciary plays the most vital role from the very beginning of the complaints until the condemnation of the accused. The judiciary ensures the essence of rule of law and perishes the rights of the accused even after proven guilty the right to live with dignity remains intact however talking about this Act it barely seems to incorporate any of the principal in fact its sounds way far against such principals. It blatantly violates the principle of presumption of innocence as according to the provisions, the actions taken against the arrestee are completely based on the discretion of

[32] Makhan v. State of Punjab, AIR 1964 SC 381.

[33] Kartikay Agarwal, Arjun Sharma, Tim Zubizarreta(Ed.) *National Security Act, 1980 – Iniquitous Act and Constitutional Tyranny or a Justified Piece of Legislation*, (July 13, 2020, 7:00 PM) https://www.jurist.org/commentary/2020/05/agarwal-sharma-national-security-act-1980/.

the executive. They skip judicial approval or assent to the acts done by the executive. The provisions bring the unquestionable power into the hands of the executives which in furtherance results in the abuse of due process of law in the long run. The recent amendments in NSA have limited the scope of the judiciary limiting the scope of judicial review in the matter of 'subjective decision' of the detaining authority. The amendment provides that the validity of the Preventive Detention order cannot be challenged on the ground that one of the several grounds of detention is vague, or non-existent, or unconnected or invalid.[34] Therefore, the need of utmost good faith and caution in the exercise of this power, therefore, cannot be overemphasized.[35] DR. Kafeel Khan was detained under the NSA by the Uttar Pradesh government after he gave an anti-CAA speech at Aligarh Muslim University and was also charged with section 153A and 295A of the IPC. Coming heavily upon this Markandey Katju, retired judge, Supreme Court of India and an eminent jurist says "As regards Dr. Khan's speech on December 12, first, I do not see how it attracts Sections 153A or 295A of the IPC. Second, even if it does, surely those provisions are sufficient to deal with the situation. The preventive detention order under the NSA is, therefore, clearly illegal, and should be struck down by the court,".[36] The provision of preventive detention under NSA is a convenient tool for the government and police because it allows them to escape the strictures of the Criminal Procedure Code and the courts of the land.

Further, as per **Section 62(5) of the Representation of People's Act,** a person confined in a prison or lawful custody of the Police except those under preventive detention under any law is not allowed to vote although except for convicts, they are eligible to contest the election. The provisions related to the right to vote in the Representation of People's Act be suitably amended to ensure this right for undertrial prisoners[37].

[34] J.N. Pandey, *Constitutional Law of India* 341 (2018 Edition, 2018).

[35] Bankatlal v. State of Rajasthan, AIR 1975 SC 522.

[36] Kartikay Agarwal and Arjun Sharma, *National Security Act, 1980 – Iniquitous Act and Constitutional Tyranny or a Justified Piece of Legislation* (Jul. 15, 2020, 7;00 PM), https://www.jurist.org/commentary/2020/05/agarwal-sharma-national-security-act-1980/

[37]National Workshop on Detention in Delhi, National Human Rights Commission (2008).

CONSERVATION OF FOREIGN EXCHANGE AND PREVENTION OF SMUGGLING ACTIVITIES ACT, 1974. (COFEPOSA)

An Act intended to provide for preventive detention in certain cases for the purposes of conservation and augmentation of foreign exchange and prevention of smuggling activities and for matters connected therewith. The act most likely deals with trade and commercial offenses. Section 3(1) of the ACT identifies the following grounds of arrest:-

1. smuggling goods, or
2. abetting the smuggling of goods, or
3. engaging in transporting or concealing or keeping smuggled goods, or
4. dealing in, smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or
5. harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,

COFEPOSA is not a punitive act. It does not empower the authority to punish a person without trial. It provides preventive detention of persons, before engaging in smuggling activities. A person can be detained under provisions of the Act, on the basis of suspicion that he will be engaged in smuggling activities but the detention must be followed both substantively and procedurally by detaining authorities.

UOI vs. Paul Manickam 2003 AIR SCW5423 it was held that in case of preventive detention, no defense is proved, nor any charge is formulated and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by legal evidence. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. But at the same time a person's greatest of human freedoms i.e. personal liberty is deprived, and, therefore, the laws of preventive detention are strictly construed and meticulous compliance with the procedural safeguard, however technical is mandatory.

4. NATIONAL POLICE COMMISSION REPORT

In the 3rd report of the National Police Commission, the function of the police has been manifested through the comment which says "The basic role of the police is to function as a law enforcement agency and render impartial service to the law, without any heed to wishes, indications or desires expressed by the government which either come in conflict with or do not conform to the provisions contained in the constitution or laws. This should be spelled out in the Police Act. The police should have a duly recognised service-oriented role in providing relief to people in distress situations. They should be trained and equipped to perform the service-oriented functions." The manner in which political power has been exercised according to the Commission has resulted in widespread violence, contributing to the deterioration of law. The rule and the deterioration of the reputation of the police as a qualified organisation. The Change Threat / Suspension is the most effective tool in the politicians' arsenal to break down police to his volition. In the majority of the case findings, the arrests are found to be unconstitutional and turn out to be a political vendetta rather than mere administration of the criminal justice system.

The commission has itself acknowledged in its third report the fact that "Presently the powers of the arrest available to the police give ample scope for harassment and humiliation of persons, prompted by *mala fide* considerations"[38].

5. RIGHTS OF UNDERTRIAL PRISONERS

The rules emerged from the judgements such as *Joginder Kumar v. State of Uttar Pradesh*[39] and *D.K. Basu v. State of West Bengal*, enacted in Section 50-A have made it obligatory on the part of a Police Officer not only to inform the friend or relative of the arrested person about his arrest, etc. But, the frequent cases of the custodial deaths have prompted the Supreme Court to review its decision in *Joginder Kumar*,[40] *Nilabati Behera v. State of Orissa*,[41] *State of Madhya Pradesh v.*

[38]Some Selected Recommendations of the National Police Commission.

[39] (1994) 4 SCC 260: 1994 SCC (Cri) 1172.

[40] Ibid.

[41] (1993) 2 SCC 746: 1993 SCC (Cri) 572.

Shyamsunder Trivedi,[42] and to issue some guidelines in the *D.K. Basu case*, to be followed in every arrest or detention. Hence, the arrests in the light of Preventive Detention must be in compliance with the following rules. Major eleven guidelines were issued in the said judgement failure to comply with which would be liable for the departmental action also rendered for Contempt of Court and the proceeding for the Contempt may be instituted in any High Court of the nation having territorial jurisdiction. The Law Commission in its 177th Report recommended that:

> *Accordingly, it is recommended that the aforesaid directions in D.K. Basu will be incorporated in Chapter V of the Code of Criminal Procedure, along with the consequences for not complying with such directions/provisions. It is obvious that by incorporating the said directions into the Code, the sanction now operating (contempt of Court) under and by virtue of the directions contained in the said decision, would not disappear. Evidently, the violation of the proposed provisions in sections 41A to 41D would constitute an offence within the meaning of section 166 IPC, which not being a provision relating to contempt of subordinate courts would not also attract proviso to section 10 of the Contempt of Courts Act, 1971. It would be a case of contempt under and by virtue of the directions aforesaid.*

"These requirements are in addition to the constitutional and statutory safeguard and do not detract from the various other directions given by the courts time to time regarding the rights and dignity of the arrestee."[43] The Gardiner Committee Report while Sir Orsward Mosley of Ireland was detained in 1971 under the Preventive Detention Act implemented by British Government reads:

> *"Preventive Detention can only be tolerated in any democratic society in the most extreme circumstances. It must be used with the utmost restraint and retained only so long as it is strictly necessary. Our Constitution, since its enactment, has had a peculiar feature the fundamental rights guaranteed under it allow preventive*

[42] (1995) 4 SCC 262: 1995 SCC (Cri) 715.

[43] D.K Basu vs State of West Bengal 1997 SCC 416; Ashok K Johri vs State of U.P 1997 SCC (Cri) 92.

> *detention without trial. Article 22 after providing that any person arrested must be produced before a court within 24 hours of arrest tenders this almost nugatory by permitting the state to preventively detain persons without any judicial scrutiny. The debates in the Constituent Assembly show that the need to provide for preventive detention was generally accepted*."

The reasonableness of the circumstances completely lies at the whims of the executives as there is a lack of clarity that under what conditions the circumstances are presumably reasonable to detain the suspect without any trace of even *mens rea.*

6. CONCLUSION

"Secret violence is confined to isolated and very small parts of India and to a microscopic body of the people. But the passing of the Bills designed to affect the whole of India and its people and arming the government with power out of all proportion to the situation sought to be dealt with is a greater danger."

While articulating these words for the press release on criticizing the Rowlatt Act of 1919, Gandhi ji had never imagined that these scars of such anti-human law would remain in independent India as a sacrosanct tool of the executives to unleash the tyrannical practices of preventive detention in the guise of national security and public safety. In the regular criminal justice system, the law works sensibly to restrict arrest and custody. Police need a legitimate reason for arrest, so without any investigative intent, pre-trial detention is not extended beyond 24 hours, and is not subject to periodic inspection. The legislation also includes rights for those detained. This includes a right to be informed as soon as possible of the reasons for the arrest, to be defended by a lawyer of one's choice. From this article, the only thing shall be emulsified that in India having these extraordinary, mischievous and 'unlawful' laws throughout needs a second thought before implementation. Many of the democratic countries refrain from the frequent practice of such extrajudicial practices as of course it's elusive to abide by doctrine of rule of law. The processes under the normal courses of arrest or detention are executed in the manner preferred by the procedural laws. However, None of the above holds true when it comes to the preventive detention system. Preventive detention laws allow arrests if the executive officer is satisfied that a person is hazardous to society, where

different laws deal with different hazards. It is all right that no grounds should be given up to five days, and in some cases even 15 days, after the arrest. Detainees shall not be brought before a judge at any point in time, nor shall there be a periodic review. While reviewing the practices of preventive detention the law commission emphatically observed "there are undoubtedly some such elements, but those are hardly kept off their activity for "fear of police".[44]

Further, the commission report observes that "the procedure contemplated by this article must be "right, just and 'fair" and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied.[45]

In *Secretary to Government & others V. Nabila & others*, 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 an application for bail in the solitary ground case. Held the impugned order of the High Court quashing the order of detention on the solitary ground case is erroneous and liable to be set aside. Detenu was taken into custody in Sept 2012 and the order of detention was passed in Dec 2012. The same was quashed by the High Court in April 2013. After a long time already expired and period of detention expired in April 2014 even if the impugned order passed by the High Court is set aside, the Detenu cannot and shall not be taken into custody for serving the remaining period of detention unless there still exist materials to the satisfaction of the detaining authority. In *Prakash Singh v. Union of India,*[46] The Supreme Court issued some guidelines as to police setup and directed the states and Centre to reorganise their police set up as per the guideline of this judgement. Although the States have yet to reorganise the Police set-up accordingly.[47] By using notions, like public order, PD laws become prone to abuse. For instance, the National Security Act is used to arrest journalists critical of public figures. No clear limits of scope also mean that rather than being used for "preventing" harm, PD laws are

[44] 177th Law Commission Report on Law of Arrest 97 (2001).

[45]Maneka Gandhi v. Union of India, (1978) I SCC 248, 284: AIR 1978 SC 597.

[46] (2006) 8 SCC 1; 3 SCC (Cri) 417.

[47] R.V Khelkar, K.N. Chandrasekhar Pillai ed. *Criminal Procedure* 20, (6th Ed., 2014).

instead used in tandem with the regular criminal law to keep persons in custody for longer, with fewer questions asked.

The PD regime's sanction for arrest and detention for up to three months, without periodic review and no judicial oversight, is against the basic principles of our republic that is supposed to "zealously" guard liberty. What makes this issue worse is that this rights-denying process finds support through Article 22(3) of the Constitution, which expressly chose not to extend the minimal safeguards of the criminal justice system to PD laws. Whatever might have been the reasons that led the Constituent Assembly to make this choice for a fledgling nation reeling from the aftermath of Partition, those justifications cannot go unchallenged 70 years later in the world's largest democracy. Especially, since Indian law's appreciation and of the right to life and personal liberty and the interpretation of the Constitution itself, have undergone tremendous transformation during this time[48]. It seems inquisitive to see the largest democracy of the planet thriving ladened with abusive practices of detention like the one discussed so far. It is a crucial moment to draw our attention to the PD regulations. Hence, the difference between "preventive" and "punitive" detention must be clearly understood to prevent this constitutional tyranny.

[48] Abhinav Sekhri, *Why it is critical to review preventive detention laws,* HINDUSTAN TIMES (July. 24, 2020, 10.01 A.M.).