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Modus Operandi of Neutralizing Preventive Detention in India

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ABSTRACT

India is the largest democracy in the world, but the law of preventive detention has brought upon plight to India's democracy. Woefully the law of preventive detention has its place in the Indian Constitution too. India's unresolved issues with its neighbouring countries have harmed it by the terrorist activities caused by terrorists, and the obligation to maintain public order has paved a path for the laws of preventive detention to prevail in India even after 75 years of Independence. The laws of preventive detention are a threat to human rights, which are mentioned in the form of fundamental rights in the Indian Constitution. The paper precisely focuses on the historical background, present condition, necessity and drawbacks of preventive detention laws in India and the solutions for it.

Keywords: *democracy, preventive detention, human rights, fundamental rights.*

I. HISTORICAL BACKGROUND

The Bengal State Prisoners Regulation, III of 1818 was the 1st preventive detention law enacted by the East India Company. Similar acts were enacted in precedencies of Madras and Bombay in 1819 & 1827, respectively. The British government enacted many preventive detention laws in India like The Anarchical and Revolutionary Crimes Act of 1919, popularly known as the Rowlatt Act and the Defence of India act 1939. After Independence, the Constitution of India too adopted the law of preventive detention.² Since Independence, the parliament has enacted many preventive detention laws, of which some got expired/repealed, and some are still in force.

II. DEVELOPMENTS AND PRESENT CONDITION

(A) The acts which got expired or repealed:

- 1) Preventive Detention Act, 1950. Expired in 1969.
- 2) Maintenance of Internal Security Act [MISA], 1971. Repealed in 1978.

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² INDIA CONST. art. 22, cl 3.

- 3) Terrorist and Disruptive Activities (Prevention) Act (TADA), 1985. Repealed in 1995.
- 4) Prevention of Terrorism Act (POTA), 2002. Repealed in 2004.

(B) The acts which are still in force:

- 1) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA), 1974.

It provides for detention:

- a) up to 3 months without obtaining the opinion of the Advisor Board.
- b) More than 3 months without obtaining the opinion of Advisory Board but not exceeding
6 months in certain cases.³
- c) On obtaining the opinion of the Advisory Board, up to a maximum period of 1 year & up to a maximum period of 2 years in certain cases and circumstances.⁴

- 2) National Security Act (NSA), 1980.

It provides for detention:

- a) up to 3 months without obtaining the opinion of the Advisory Board.
- b) More than 3 months without obtaining the opinion of Advisory Board but not exceeding
6 months in certain cases.⁵
- c) up to a maximum period of 12 months.⁶

- 3) Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act (PBMSECA), 1980.

a) up to a maximum period of 6 months after obtaining the opinion of the Advisory Board.⁷

- 4) Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act (PITNDPSA), 1988.

³ The Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974, No. 52, Acts of Parliament, 1974, § 9.

⁴ The Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974, No. 52, Acts of Parliament, 1974, § 10.

⁵ The National Security Act, 1980, No. 65, Acts of Parliament, 1980, § 14A.

⁶ The National Security Act, 1980, No. 65, Acts of Parliament, 1980, § 13.

⁷ The Prevention Of Blackmarketing And Maintenance Of Supplies Of Essential Commodities Act, 1980, No. 7, Acts of Parliament, 1980, § 13.

It provides for detention:

a) More than 3 months without obtaining the opinion of the Advisory Board but not exceeding 6 months in certain cases and circumstances.⁸

c) On obtaining the opinion of the Advisory Board, up to a maximum period of 1 year & up to a maximum period of 2 years in certain cases and circumstances.⁹

III. NEED FOR PREVENTIVE DETENTION LAWS AND THEIR DRAWBACKS

A bench led by Supreme Court judge F Nariman observed that Preventive detention is a necessary evil only to prevent public disorder.¹⁰ In the case of *Union of India v. Paul Manickam*, the Supreme Court stated that the purpose of the preventive detention isn't to punish any person but to obstruct him from doing something before he does it and deter him from doing so.¹¹ From the above judgement, it is clear that to maintain public order and obstruct a person from doing any wrong, the laws of Preventive detention are necessary.

The drawbacks of preventive detention laws and damages caused by them:

Mr Hussain, a member of the constituent assembly in the constituent assembly, stated, "I do fear that preventive detention goes counter to the fundamental rights. Preventive detention is nothing but a method of arbitrary detention without trial".¹² There is no doubt that the laws of preventive detention violate the fundamental rights provided by the Constitution.

There are some other major problems with the laws of preventive detention, the 1st one being insufficient safeguards provided in it. The right to consult a legal practitioner and the right of legal representation as soon as detention takes place is absent in it. The 2nd major problem is the condition of Indian prisons. The Supreme Court has pointed out the inhuman conditions prevailing in 1382 prisons in India.¹³

IV. THE MODUS OPERANDI OF NEUTRALIZING THE VIOLATIONS CAUSED BY PREVENTIVE DETENTION LAWS

The preventive detention laws should explicitly contain the following provisions in it:

⁸ The Prevention Of Illicit Traffic In Narcotic Drugs And Psychotropic Substances Act, 1988, No. 46, Acts of Parliament, 1988, § 10.

⁹ The Prevention Of Illicit Traffic In Narcotic Drugs And Psychotropic Substances Act, 1988, No. 46, Acts of Parliament, 1988, § 11.

¹⁰ *Union of India v. Paul Manickam*, (2003) 8 SCC 342 (India).

¹¹ Krishnadas Rajgopal, Preventive detention a necessary evil only to prevent public disorder: Supreme Court, *The Hindu*, (Aug. 2, 2021, 2021 22:00 IST), <https://www.thehindu.com/news/national/preventive-detention-a-necessary-evil-only-to-prevent-public-disorder-supreme-court/article35688565.ece>.

¹² Constituent Assembly Debates 114 (13 ed. 2014).

¹³ *Re Inhuman Conditions in 1382 Prisons vs State of Assam*, (2016) 3 S.C.C 700 (India).

- 1) Right to consult a legal practitioner and right to legal representation as soon as the detention takes place.
- 2) Right to compensation for the victim of unlawful detention as has been prescribed in the International Covenant on Civil and Political Rights [ICCPR].¹⁴
- 3) Creating separate prisons in accordance with Human rights for detainees under that law.
- 4) Every detainee should be given a separate cell which must be a posh dorm room.
- 5) The dorm room prison cells should have proper hygiene, ventilation, bed, Television, books, papers and stationery necessary for writing, etc. Required amenities.
- 6) The prison should have a ground where detainees can go anytime during the day.
- 7) Best quality medical and psychological help and assistance should be available 24/7.
- 8) The detainee should be given good quality diet.
- 9) There should be a yearly report on the condition of prisons and detainees, and the necessary improvements should be made from time to time.
- 10) If the detaining authority thinks it fit, the family members of the detainee should be allowed to visit him/her whenever the detainee or his/her family members wish during the daytime.

The maximum duration of detention, which is reduced to 2 months from 3 months by the 44th amendment act of 1978, should be immediately brought into force in addition to reducing the maximum period of detention with and without obtaining the opinion of the Advisory Board in the Preventive detention laws.

V. CONCLUSION

Fundamental Rights are an essential part of the Indian Constitution and the lives of Indians.

The law of preventive detention takes away the fundamental rights of the detainee. The European Court of Human Rights has long held that preventive detention, as contemplated in the Indian Constitution, is illegal under the European Convention on Human Rights regardless of the safeguards embodied in the law. The South Asia Human Rights Documentation Centre (SAHRDC), in its submission to the National Commission for the Review of the Constitution (NCRWC), proposed the removal of the provision of preventive detention from the Constitution. Considering the importance of maintaining public order, the laws of preventive detention are necessary, but at the same time, they should contain provisions that would ensure

¹⁴ International Covenant on Civil and Political Rights. art. 9, cl. 5.

that violations of fundamental rights caused by them are at the lowest possible form.
