**Block 4: Preventive Detention Laws**

**Unit 1: History and development of Preventive Detention Laws in India.**

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## 1.1 Introduction

In order to understand why a provision permitting detention without trial i.e preventive detention finds a place in Part III of the Constitution dealing with fundamental rights, we need only to see the backdrop around the time our Constitution was framed by the Constituent Assembly. Mindless communal violence around the time of partition, anti-national and subversive forces, war

with Pakistan over Kashmir, Razakar movement in Hyderabad and problems over integration of States into the Union weighed heavily on the minds of members of the Constituent Assembly. They felt that the Government needed the power of preventive detention under the prevailing circumstances. But the framers of the Constitution improved upon the existing law by subjecting the power of preventive detention to certain constitutional safeguards upon the violation of which the individual could have a right to approach the Supreme Court under Article 32 or the High Courts under Article 226. There have been a number of cases in which the Courts have nullified orders of preventive detention in proceedings for habeas corpus.

In A.K. Gopalan v. State of Madras [AIR 1950 SC 27], Patanjali Sastri, J explained the necessity of preventive detention in the following words:

> "This sinister-looking feature, so strangely out of place in a democratic Constitution, which invests personal liberty with the sacrosanctity of a fundamental right, and so incompatible with the promises of its Preamble, is doubtless designed to prevent the abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant republic."

The activities of organized criminal syndicates and terrorist groups constitute "serious threats aimed at destabilizing the security, integrity and economy of

India". Such activities should not be construed as ordinary crimes or routine issues of law and order nature".

Article 22 clauses (1) & (2) of the Constitution of India confer the following four rights upon a person who has been arrested:

(a) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest.

(b) The arrested person shall have the right to consult, and to be defended by, a legal practitioner of his choice.

(c) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and

(d) No such person shall be detained in custody beyond the said period without the authority of a magistrate."



Article 22(3) of the Constitution, however, provides for two exceptions. The above fundamental rights guaranteed to arrested persons do not apply

*(a)* to any person who for the time being is an enemy alien; or

*(b)* to any person who is arrested or detained under any law providing for preventive detention.

**Legislative power to enact Preventive Detention Act**

The legislative power to enact law of preventive detention is divided by the Constitution between the Union and the States. The Union has exclusive power [Entry 9 of List 1, 7th Schedule] only when such law is required for reasons connected with Defence, Foreign Affairs or the Security of India. A state has power, concurrently, with the Union, to provide for preventive detention for reasons connected with security of the State, maintenance of public order, or the maintenance of supplies and services essential to the community [Entry 3 of List III]. A State has therefore a say in mater of abolishing preventive detention on certain grounds because it is a responsibility of the State to maintain public order [Entry 1 of List II], production, supply and distribution of goods [Entry 27 of List II]. Both the Centre and the States are free to have their own preventive detention laws except that in the case of a conflict, it is the Central law that will prevail. From the above, one can assert that the Centre's ambit is larger than that of the States.

In addition, the Parliament has the power to prescribe, by law, the maximum period for which a person may be detained under a law of preventive detention.

Though Article 22(3) of the Constitution provides for preventive detention laws, Article 22(4)-(7) contain the following **safeguards** against abuse of this power**:**

- No law providing for preventive detention shall authorise the detention of a person for a longer period than three months. Detention beyond this 3 month period requires a clearance from an Advisory Board consisting

of persons who are, or have been, or are qualified to be appointed as Judges of a High Court. Before the expiration of the said period of three months, this Advisory Board must report that there is in its opinion sufficient cause for such detention.

- The authority making an order providing for preventive detention shall, as soon as may be, communicate to such person the grounds on which the order has been made, excepting facts which the detaining authority considers to be against the public interest to disclose.
- The authority shall also afford him the earliest opportunity of making a representation against the order.

By virtue of being placed under Chapter III of the Constitution, the above constitute fundamental rights against arbitrary detention. Any law which contravenes any of the above Constitutional safeguards in Article 22(4) to (7) can be declared void by the Courts. Likewise, detention orders which flout the above safeguards can be set aside.

Thus, “even in normal times the executive can arrest and detain a person for months together without even seeking the confirmation of the advisory board. The rights of the detainee are confined to making a representation to the very authority which has detained him. If, however, a proclamation of emergency is in force, the President can under art. 359 suspend the right of a citizen to move a Court for the enforcement of certain fundamental rights.” In that event, “even the safeguards conferred by art. 22(4) and (5) are, in effect, abolished as no

redress is available. Citizens are wholly at the mercy of the executive, and the courts have held that they are utterly powerless in a number of cases viz. Makhan Singh v State of Punja AIR 1964SC 381, Mohd. Yaqub v State of Jammu & Kashmir AIR 1968 SC 765 and ADM Jabalpur v S Shukla AIR 1976 SC 1207.

**Self-assessment questions** **spend 5 minutes**

1. What is the Legislative power of the Union and the States to enact preventive detention laws?

2. What are the Constitutional safeguards against abuse of the power of preventive detention by the Executive?

## 1.2 Objectives

After going through this unit, you should be in a position to

- Explain Legislative competence of the Union and the States to enact laws relating to preventive detention
- Outline Constitutional safeguards to prevent abuse of the power of preventive detention by the Executive
- Know the meaning of preventive detention and how it differs from the punitive detention.
- Features of the existing central laws providing for preventive detention
- Appreciate judicial decisions concerning preventive detention

## 1.3 Meaning of preventive detention

There is no authoritative definition of the term "preventive detention" in Indian law. Preventive detention means detention of a person without trial. It refers to the detention at the will of the executive. In the normal day-to-day life, we come across punitive detention which seeks to punish a person for what he or she has done after trial in a court of law for the offence committed by him or her. On the other hand, the objective of preventive detention is to prevent a person from doing something and the detention in this case takes place on the apprehension that he or she is going to do something prejudicial to the security of the State, public order, maintenance of supplies and services essential to the community, defence, foreign affairs or security of India.

According to Durga Das Basu, "preventive detention is resorted to in such circumstances that the evidence in possession of the authority, is not sufficient to make a charge or to secure the conviction of the detenu by legal proofs but

may still be sufficient to justify his detention on the suspicion that he [or she] would commit a wrongful act unless he [or she] is detained."

The word "preventive" is used to distinguish it from the word "punitive". To quote the words of Lord Finley in R v. Haliday [1917 AC 260, 269], "it is not punitive but precautionary measure." Preventive detention differs from the ordinary or punitive detention both in respect of its purpose and its justification. The object of preventive detention is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved nor any charge formulated. The justification of such detention is suspicion or reasonable probability of the impending commission of the prejudicial act and not criminal conviction which can only be warranted by legal evidence.



Self-assessment question spend 3 minutes

3. What is the meaning of preventive detention and how does it differ from the punitive detention?

## 1.4 History of Preventive Detention laws in India

Noted jurist M.C. Setelvad observed that "The builders of the Indian Constitution not only drew largely from the collection of British ideas and

institutions which was India's heritage from British rule, but they also took care to maintain continuity with the Governmental system which had grown up under the British. They believed not in severing their links with the past but rather than in treasuring all that had been useful and to which they had been accustomed. The structure which emerged was, therefore, not only basically British in its framework but took the form of an alteration and extension of what had previously existed." The laws relating to preventive detention also followed similar trend.

Laws authorising preventive detention existed in British colonial rule in India since 1818. Many members of the freedom movement spent years in jails without ever being tried and convicted. The power conferred on the Executive to arrest persons on suspicion can be traced to the early days of British Rule in India. The Bengal Regulation III of 1818 [the Bengal State Prisoners Regulation] and similar laws in Madras and Bombay Presidencies conferred powers to detain a person on suspicion.

There is no authoritative definition of the term "preventive detention" in Indian Law. This term had its origin in the language used by Law Lords in England while explaining the nature of detention under Regulation 14-B, Defence of Realm Act, 1914, passed on the outbreak of the First World War, and the same language was repeated in connection with emergency regulations made during the Second World War. During the First and Second World Wars, the British

Parliament empowered the government to pass orders of preventive detention and the courts upheld the power on the ground of necessity [Liversidge v. Anderson, 1942 AC 206]. However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely national success in war or escape from national plunder or enslavement. [R v. Haliday, 1917 AC 260, 269]. But no power of preventive detention has been exercised by the British Parliament during peace time. The Indian Constitution, however, recognizes preventive detention in normal times also.

At the outbreak of the Second World War, the British Parliament enacted the Emergency Powers (Defence) Act, 1939 which authorized making of regulations providing for preventive detention. Regulation 18B made under Section 2(2) of the said Act said:-

> "If the Secretary of State has reasonable cause to believe any person to have been or to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in preparation or instigation of such acts and that by reason thereof, it is necessary to exercise control over him, he may make an order directing that he be detained."

Rule 26 of the Rules framed under the Defence of India Act, 1939 authorised the Government to detain a person whenever it was "satisfied with respect to that particular person that such detention was necessary to prevent him from acting in any manner prejudicial to the defence and safety of the country and the like. "This was of course, a wartime measure modelled on similar legislations in England, during World War II, the validity of which had been upheld by the House of Lords. But even after the cessation of the War, preventive detention was continued in India as an instrument to suppress apprehended breach of public order, public safety, and the like by the Provincial Maintenance of Public Order Acts, under which there was a spate of litigation. The framers of our Constitution simply made it possible for such litigation to be continued under the Constitution, subject to certain safeguards laid down therein, because they realized that the circumstances which had necessitated such abnormal legislation in the past had not disappeared after the birth of India's Independence.

Accordingly, the Preventive Detention Act, 1950 was passed by the Indian Parliament which constituted the law of preventive detention in India. Sardar Vallabhbhai Patel, then Home Minister, moving the Bill which came to be enacted as the Preventive Detention Act, 1950, told Parliament that it was directed against persons `whose avowed object is to create disruption, dislocation, and tamper[ing] with communications, to suborn loyalty and make

it impossible for normal government based on law to function. It was a temporary Act, originally passed for one year only. Several times since then the term of the Act was extended until it expired at the end of 1969.

"The revival of anarchist forces obliged Parliament to enact a new Act, named the Maintenance of Internal Security Act [popularly known as MISA] in 1971, having provisions broadly similar to those of the Preventive Detention Act of 1950. In 1974, the Parliament passed the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 [commonly referred to as the COFEPOSA], as an economic adjunct of the MISA. While the MISA was, in general, aimed at subversive activities, the COFEPOSA is aimed at anti-social activities like smuggling, racketing in foreign exchange and the like. MISA was repealed in 1978, but COFEPOSA still remains."



Further power of preventive detention has been conferred on the Central and State Governments to safeguard defence and security of the country and to maintain public order and essential supplies and services by enacting the National Security Act, 1980, and the Prevention of Black marketing and Maintenance of Supplies of Essential Commodities Act, 1980.

"It may be mentioned that the number of detenus, during the Emergency of 1975-76, had soared up to 1,75,000. On the eve of coming to power, the Janata Party promised to abolish detention without trial. After coming to power, the Janata Government came to realise the reality of the problem. Eventually, in

April, 1978, the MISA was repealed by Parliament. But the Government refused to repeal the COFEPOSA because while the former related to political detention, the latter was aimed at social offences which required extra power to check when inflation, black marketing, smuggling and the like were rampant."

**The Constitution (44th Amendment) Act:**

The Janata Government sought to alleviate the rigours of the procedure for preventive detention, by effecting changes in Cls. (4) and (7), enacting the Constitution (44th Amendment) Act, 1978. Section 3 of the 44th Amendment limits the authority of the government to impose preventive detention in several respects. The maximum period of detention is reduced from three months to two months and Advisory Board appointments become subject to the recommendations of the Chief Justices of the High Courts**.** In addition, all Advisory Board members are required to be sitting or retired High Court judges and the ability of Parliament to permit the government to dispense with Advisory Board review of detention orders in particular cases is eliminated**.** Though this is not sufficient to eliminate potential for abuse of preventive detention, this section was nevertheless was aimed to reduce its rigour.

"The Amendment Act of 1978 empowered the Central Government to bring into force these provisions by issuing notifications. However, before any such notifications could be issued, the Janata government fell and Mrs. Gandhi returned to power in January, 1980. The Government has not issued any such

notification notwithstanding adverse comments by the Supreme Court on the inordinate delay. When the failure to give effect to the amendment was challenged in *A. K. Roy v Union of India,* the Supreme Court noted that there appeared to be no reason why the 44th Amendment could not have been enacted especially as 43 of the 44 sections had been brought into force with the exception of section 3**.** The Court stated that preventive detention and enacting this Amendment was a matter for the legislature not the judiciary, and thus did not mandate the section's entry into force.

As a result, the original Clauses relating to preventive detention in Art. 22 subsist till today and the relevant provisions of the amendment Act of 1978, solemnly passed by Parliament, remain a dead-letter."

**1.5 Preventive detention, challenges to criminal justice and human rights**

Criticising the delay in giving effect to Section 3 of the 44th Constitution (Amendment) Act, the South Asia Human Rights Documentation Centre said: "Although most of the 44th Amendment was brought into force with effect from 20 June 1979 or 1 August 1979, over 30 years later the preventive detention components were never given effect despite the fact that the entire Amendment was passed by both houses of Parliament and signed by the President...With the failure to bring into force section 3 of the 44th Amendment, preventive detention has continued to be abused through old and new Central and state legislation."

It further said: “Both Central and state governments have abused such legislation, with even the judiciary being unable to effectively limit such abuses as the detention of individuals without cause, the failure to follow even the minimal protections offered by Article 22 of the Constitution, the circumvention or ignoring of judicial orders of release, the re-issuing of new detention orders upon release, or the targeting of political opponents**.** The failure to enact the 44th Amendment is a stain on India’s human right record, especially as executive abuses of preventive detention have continued unabated despite the supposed public and political outcry after the Emergency.”

According to eminent jurist and former Attorney General for India, Shri Soli Sorabjee, “the frequent abuse of preventive detention provisions is the tendency to avoid a proper criminal trail and resort to preventive detention as a substitute for an ordinary criminal trial. Such convenient short cuts are impermissible. He said that even if preventive detention is a necessary evil, its effects and rigour can be mitigated. A detenue does not loose basic human rights and his right to be treated with dignity when he or she is in the custody. The courts are not supporters of criminals when illegal preventive detention orders are struck down. They are the protectors of individual liberty, which is a fundamental right of every person. He said that there should not be indefinite detention and the maximum period of detention should not exceed 6 months. Besides the grounds of detention must be very clear and they should have a rational nexus with the

purpose of the Act. He said the detaining authorities must be educated about the limits of their powers. A person should not be detained on farfetched apprehension because of a solitary act committed in the recent past. Preventive detention should be in rare cases only when there is a real danger to public order, security of State or supply of essential commodities. There should be a proper balance between the interest of society and personal liberty. Experience shows that the greatest danger of preventive detention is its use against political dissidents or opponents. He said the real safeguard against abuse of preventive detention lies in a strong Advisory Board and an independent judiciary like ours."

### 1.6 Overview of central legislations relating to preventive detention

The safeguards provided in the Constitution were made more elaborate and exhaustive in the Acts which were enacted by the Parliament or by some of the Legislatures of the States. Presently, the following Central legislations which are in force provide for preventive detention:

1. The National Security Act, 1980 [please see unit 2 for further details]
2. Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 [COFFPOSA]
3. Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980, and

4. Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988

In addition, there are other State laws which provide for preventive detention viz. The Jammu and Kashmir Public Safety Act (1978) (PSA) (amended in 1987 and 1990), the Assam Preventive Detention Act, 1980 (APDA), and the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders and Slum-Grabbers Act, 1982, to mention but a few.

### 1.5.1 Conservation of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974 (COFEPOSA)

The Preamble to COFEPOSA recognizes that violation of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy and thereby a serious adverse effect on the security of the State. Noting the fact that in certain areas which are highly vulnerable to smuggling, smuggling activities of a considerable magnitude are clandestinely organised and carried on, the Preamble stresses the need for COFEPOSA for the effective prevention of such activities and violations to provide for detention of persons concerned in any manner therewith. Section 3 of COFEPOSA empowers the Central Government or the State Government or a specially empowered officer of the Central Government not below the rank of Joint Secretary or a specially empowered officer of the State Government not

below the rank of Secretary, if satisfied, with respect to any person that with a view to preventing him from acting and in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from -

(a) smuggling or abetting the smuggling of goods, or,

(b) engaging in transporting or concealing or keeping smuggled goods or dealing in smuggled goods or harbouring persons engaged in smuggling goods, make an order directing that such person be detained.

Section 8 of COFEPOSA mandates that the State Government and the Central Government shall constitute an Advisory Board in compliance with the mandate of sub-clause (4) of Article 22 of the Constitution. The appropriate Government shall make a reference to the Advisory Board within 5 weeks from the date of detention of a person and the Advisory Board is required to submit its report within 11 weeks from the date of detention. If in the opinion of the Advisory Board, there is no sufficient cause for detention of the person concerned, the appropriate Government shall revoke the order of detention. However, if the Advisory Board holds that there is sufficient cause for detention, the appropriate Government may confirm the detention order. The normal period of detention is one year unless the case is covered by Section 9(2) where the detention order can extend to a period of two years. Section 11 of COFEPOSA lays down that where an order of detention has been passed by an officer of the State

Government, the State Government and Central Government both will have power to revoke the same. Similarly where the order has been passed by an officer of central Government, or the State Government, the Central Government will have the power to revoke the same.

### 1.5.2 The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988

The President promulgated the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Ordinance, 1988 on 4th July, 1988. To replace this ordinance, the Narcotic Drugs and Psychotropic Substances Bill, 1988 was introduced in the Parliament. According to its Statement of Objects and Reasons, "although a number of legislative, administrative and other preventive measures, including the deterrent penal provisions in the Narcotic Drugs and Psychotropic Substances Act, 1985 have been taken by the Government, the transit traffic in illicit drugs had not been completely eliminated. It was, therefore, felt that a preventive detention law should be enacted with a view to effectively immobilising the traffickers. The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 provides for preventive detention in relation to smuggling of drugs and psychotropic substances, but it cannot be invoked to deal with persons engaged in illicit traffic of drugs and psychotropic substances within the country. It was, therefore, felt that a separate

legislation should be enacted for preventive detention of persons engaged in any kind of illicit traffic in narcotic drugs and psychotropic substances."

This Act defines "illicit traffic" in relation to narcotic drugs and psychotropic substances, as –

"(i) cultivating any coca plant or gathering any portion of coca plant;

(ii) cultivating the opium poppy or any cannabis plant;

(iii) engaging in the production, manufacture, possession, sale, purchase, transportation, warehousing, concealment, use or consumption, import inter-State, export inter-State, import into India, export from India or transhipment, or narcotic drugs or psychotropic substances;

(iv) dealing in any activities in narcotic drugs or psychotropic substances other than those provided in sub- clauses (i) to (iii); or

v) handling or letting any premises for the carrying on of any of the activities referred to in sub-clauses (i) to (iv), other than those permitted under the Narcotic Drugs and Psychotropic Substances Act, 1985, (61 of 1985.), or any rule or order made, or any condition of any licence, term or authorisation issued, thereunder and includes—

(1) financing, directly or indirectly, any of the aforementioned activities;

(2) abetting or conspiring in the furtherance of or in support of doing any of the aforementioned activities; and

(3) harbouring persons engaged in any of the aforementioned activities;

Section 3 of this Act stipulates that the Central Government or a State Government, or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may if satisfied, with respect to any person (including a foreigner) that, with a view to preventing him from engaging in illicit in narcotic drugs and psychotropic substances, it is necessary so to do, make an order directing that such person be detained.

### 1.5.3 **The Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980**

In order to deal with malpractices like blackmarketing, hoarding, profiteering, and to arrest unjustified rise in prices of essential commodities, the Prevention of Black marketing and Maintenance of Supplies of Essential Commodities Ordinance, 1979 was promulgated on 5th October, 1979. To replace this Ordinance by an Act of Parliament, the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Bill was introduced in the Parliament and was passed by both the Houses of Parliament and received the assent of the President on 12th February 1980. It was amended in 1981 and later in 1982. . According to the Statement of Objects and Reasons, “Although the Essential Commodities Act, 1955 made comprehensive provisions for the regulation of production, supply, distribution, prices and trade and commerce n

commodities declared essential under the Act and although the penal provisions in the Act were made more stringent in accordance with the recommendations of the Law Commission in their Forty-Seventh Report, it was found not adequate to deal with the situation" and therefore underlined the need to provide for preventive detention of persons likely to indulge in such malpractices. Recognising preventive detention as a necessary evil, the legislation also provided for various safeguards to avoid scope for possible abuse or powers under it.

According to Section 3 of this Act, the Central Government or a State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person that **with a view to preventing him from acting in any manner prejudicial to the maintenance of supplied of commodities essential to the community** it is necessary so to do, make an order directing that such person be detained.

The expression "**acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community**" has been defined as follows:-

"(a) committing or instigating any person to commit any offence punishable

under the Essential Commodities Act,1955 (10 of 1955), or under any other law for the time being in force relating to the control of the production, supply or distribution of , or trade and commerce in, any commodity essential to the community : or

(b) dealing in any commodity:-

(i) which is an essential commodity as defined in the Essential Commodities Act,1955 (10 of 1955), or

(ii) with respect to which provisions have been made in any such other law as is referred to in Cl.(a). with a view to making gain in any manner which may directly or indirectly defeat or tend to defeat the provisions of that Act or other law aforesaid."

In accordance with Constitutional safeguards in Article 22(4)-(7), section 8 of this Act stipulates that when any person has been detained, the authority making the order of detention has to communicate to him in writing the grounds on which the order has been made within five days and in exceptional cases within ten days. The detained person shall be given an opportunity of making representation against the order of detention to the appropriate Government. The Act made provisions to ensure the composition of Advisory Boards [section 9-11 of the Act]. A person is not detained for a period longer than two months without the approval of an Advisory Board. The maximum period of detention in pursuance of any detention order which has been approved by the Advisory Board is six months from the date of detention [Section 13 of the Act]

## 1.6 Relevant judicial decisions concerning preventive detention

Apart from the constitutional and statutory safeguards, the Supreme Court of India by a series of decisions has provided some additional safeguards:

(i) Sub-clause (5) of Article 22 requires that the authority making a detention order shall communicate to such persons the grounds on which the order has been made. It has been held in a series of decisions that grounds in Article 22(5) do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences. The grounds must be self-sufficient and self-explanatory. The grounds should comprise of all the constituent facts and materials and not merely the inferential conclusion. Therefore, copy of documents on which grounds of detention are based have to be supplied to the detenue otherwise the order of detention is liable to be struck down.

Shalini Sony (1981 SC 431); Ichhu Devi vs. U.O.I. (11980 SC 1983); Smt. Khatoom vs. UOI (1981 SC 1077)

(ii) The grounds and the material in support of the ground should be communicated in a language with which the detenue is conversant. Where the detenue is not conversant with English, the communication of grounds in English language has been held to be bad.

(iii) Even if the detenue is aware of a document, he has to be supplied a copy of the same as he cannot rely upon his memory while in jail in order to make an effective representation.

Mehrunissa vs. State of Maharashtra (1981 SC 1861)

(iv) The representation made by the detenue should be considered with utmost expediency by the detaining authority namely the State Govt. or the Central Govt. as the case may be. Where the order has been passed by the officer empowered under sub-section (3) of Section 3 of the National Security Act and a representation is made to him, he is under an obligation to consider the same. The delay in consideration of representation renders the continued detention invalid. In some later decisions, Supreme Court has ruled that there can be no fixed time imperative for consideration of the representation but there should be no casualness or lethargy.



(v) If vital and relevant material or vital facts essential to the formation of the subjective satisfaction are kept away from the consideration of the detaining authority, the satisfaction of the detaining authority gets vitiated and the order of detention is bad.

Asha Devi vs. Shivraj (1979 SC 447); 1979 SC 447; 1983 SC 541

(vi) Consideration of extraneous material by detaining authority without communicating the same to the detenue vitiates the detention order.

[1975 (2) SCC 586].

(vii) Delay in actually arresting the detenue after an order of detention is passed has also been held to be fatal as unreasonable delay in detention would throw considerable doubt on the genuineness of the subjective satisfaction of detaining authority.

Sheikh Nizammudin vs. State of W.B. (1974 SC 2353) (Two and half months); Suresh Mehto vs. D.M. Bardman (1975 SC 278)

(viii). The period prescribed under NSA & COFEPOSA for making a reference to the Advisory Board which is three weeks under NSA and five weeks under COFEPOSA has been held to be absolutely mandatory and even a delay of one day has been held to be fatal.

(ix). To affect public order, it must affect the community or the public at large. One has to imagine three concentric circles, the largest representing "law and order", the next representing "public order" and the smallest representing "security of State". An act may affect law and order but not public order. Public order is synonymous with public safety and tranquillity: it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State.

Dr. Ram Manohar Lohia vs. State of Bihar & Ors (1966 1 SCR 709)

(x). A detenue has no right to appear through a legal practitioner in proceedings before the Advisory Board, the detaining authority or the Government. This bar would also apply to officers of the Government in the concerned department. If the detaining authority or the Government takes the aid of legal practitioner or an advisor before the Advisory Board, the detenue must be allowed the facility of appearing before the Board through a legal practitioner. A detenue can be aided or assisted by a friend who in truth and substance is not a legal practitioner.

A.K. Roy vs. U.O.I. (1982) 1 SCC 271

(xi). An order of detention can be challenged at pre-execution stage but on very limited grounds and they are:-

(i) that the impugned order is not passed under the Act under which it is purported to have been passed.

(ii) that it is sought to be executed against a wrong person,

(iii) that it is passed for a wrong purpose,

(iv) that it is passed on vague, extraneous and irrelevant grounds, or

(v) that the authority which passed it had no authority to do so.

Additional Secretary to Govt. of India vs. Kalka Subhash Kadia (1992 SCC (Crl.) 301; N.K. Bapana vs. U.O.I. [1992 (3) SCC 512]; State of Tamil Nadu vs. P.K. Samsuddin ; Subhash Mujimal Gandhi vs. L. Himingliyana

(xii). Solitary grounds sufficient if reasonable inference can be drawn from detenue's past conduct about likelihood of his repeating the prejudicial activity in future.

Ismail Sheikh vs. D.M [1975 SC 168] – Telegraph wire in bullock cart;

Madhav Ram vs. State of W.B. [1974 Crl. L.J. 1335] – Electric traction wire;

Md. Sultan vs. Joint Secretary to Govt. of India [1990 SC 2222]; Abdul Sattar vs. U.O.I. [1991 SC 2261]

The competence of Parliament to enact COFEPOSA was upheld by the Supreme Court which gave an excessively wide definition of the phrase `security of a State' contained in entry 3, List III of the Seventh Schedule to the Constitution observing:

> "In the modern world, the security of a state is ensured not so much by physical might but by economic strength – at any rate, by economic strength as much as by armed might. It is, therefore, idle to contend that COFEPOSA is unrelated to the security of a State."

[Attorney-General of India v Amratlal Prajivandas AIR 1994 SC 2179]

A Constitution Bench of the Supreme Court upheld the Constitutional validity of Preventive Detention in the case of Haradhan Saha vs. State of West Bengal – AIR 1974 (S. C.) 2154, in which it was held that Article 22 does not have to meet the requirements of Articles 14, 19 or 21. It was further held that the

power of preventive detention is qualitatively different from punitive detention, the former being a precautionary power exercised in reasonable anticipation.

In A.K.Roy v. Union of India [AIR 1982 SC 710], it was argued that the National Security Act, 1980 and the preventive detention in general was violative of the just and fair procedure as has emerged through the relationship of Articles 14,19 and 21. The Supreme Court rejected it on the ground that though the preventive detention laws have to satisfy the requirements of Articles 14,19 and 21, they cannot be unconstitutionlised per se so long as Article 22 and the legislative entries expressly sanction them.

In Shibban Lal Saksena v. State of U.P. [AIR 1954 SC 179], it was held that if the Advisory Board reports that the detention is not justified, the government is duty-bound to revoke the detention order. In Puranlal Lakhanpad v. Union of India [AIR 1958 SC 163] and A.K.Roy v. Union of India [AIR 1982 SC 710], it was held that if the Advisory Board reports that the detention is justified, then only the detaining authorities determine the period of detention. It is no business of the Advisory Board to express any opinion as to how much longer than three months the detenu should be kept in detention. The matter before the Advisory Board is the subject of detention of the person concerned and not for how long he should be detained.

## 1.12 Summary

The Union has exclusive power [Entry 9 of List 1, 7th Schedule] to enact a law providing for preventive detention for reasons connected with Defence, Foreign Affairs or the Security of India. A state has power, concurrently, with the Union, to provide for preventive detention for reasons connected with security of the State, maintenance of public order, or the maintenance of supplies and services essential to the community [Entry 3 of List III]. A State has therefore a say in mater of abolishing preventive detention on some grounds because it is a responsibility of the State to maintain public order [Entry 1 of List II], production, supply and distribution of goods [Entry 27 of List II].

Though Article 22(3) of the Constitution provides for preventive detention laws, Article 22(4)-(7) contain the following **safeguards** against abuse of this power**:**

- No law providing for preventive detention shall authorise the detention of a person for a longer period than three months. Detention beyond this 3 month period requires a clearance from an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as Judges of a High Court. Before the expiration of the said period of three months, this Advisory Board must report that there is in its opinion sufficient cause for such detention.
- The authority making an order providing for preventive detention shall, as soon as may be, communicate to such person the grounds on which

the order has been made, excepting facts which the detaining authority considers to be against the public interest to disclose.

- The authority shall also afford him the earliest opportunity of making a representation against the order.

By virtue of being under Chapter III of the Constitution, the above constitute fundamental rights against arbitrary detention.

Preventive detention means detention of a person without trial. It refers to the detention at the will of the executive. It is not punitive but precautionary measure. It differs from the ordinary or punitive detention both in respect of its purpose and its justification. The object of preventive detention is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved nor any charge formulated. The justification of such detention is suspicion or reasonable probability of the impending commission of the prejudicial act and not criminal conviction which can only be warranted by legal evidence.

## 1.8 Terminal questions

1. What are the Constitutional safeguards to prevent abuse by the executive of its power of preventive detention? How do central legislations relating to preventive detention seek to fulfil these Constitutional safeguards?

## 1.9 Answers and Hints

1. The Union has exclusive power [Entry 9 of List 1, 7th Schedule] to enact a law providing for preventive detention for reasons connected with Defence, Foreign Affairs or the Security of India. A state has power, concurrently, with the Union, to provide for preventive detention for reasons connected with security of the State, maintenance of public order, or the maintenance of supplies and services essential to the community [Entry 3 of List III]. A State has therefore a say in mater of abolishing preventive detention on some grounds because it is a responsibility of the State to maintain public order [Entry 1 of List II], production, supply and distribution of goods [Entry 27 of List II].

2. Though Article 22(3) of the Constitution provides for preventive detention laws, Article 22(4)-(7) contain the following **safeguards** against abuse of this power**:**

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- The authority shall also afford him the earliest opportunity of making a representation against the order.

By virtue of being under Chapter III of the Constitution, the above constitute fundamental rights against arbitrary detention.

3. Preventive detention means detention of a person without trial. It refers to the detention at the will of the executive. It is not punitive but precautionary measure. It differs from the ordinary or punitive detention both in respect of its purpose and its justification. The object of preventive detention is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved nor any charge formulated. The justification of such detention is suspicion or reasonable probability of the impending commission of the prejudicial act and not criminal conviction which can only be warranted by legal evidence.

## 1.10 References and Suggested Readings

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