AN ANALYSIS OF RELEVENCY OF PREVENTIVE DETENTION LAWS IN A MODERN DEMOCRATIC STATE

DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF LL.M. (HUMAN RIGHTS) DEGREE.

(2020-2021)

SUBMITTED BY:

NIHARIKA SINGH

(LL.M/944/2020)

LL.M. (HUMAN RIGHTS)

UNDER THE SUPERVISION AND GUIDANCE OF

PROF. APARNA CHANDRA

(ASSOCIATE PROFESSOR OF LAW, NLSIU)

Certificate

This is to certify that this dissertation titled "AN ANALYSIS OF RELEVENCY OF PREVENTIVE DETENTION LAWS IN A MODERN DEMOCRATIC SOCEITY" submitted by Ms. Niharika Singh (ID No. 944) in partial fulfilment of the requirements of LL.M. Degree for the academic session 2020-21 at National Law School of India University, Bengaluru, is a bonafide research work carried out by her under my guidance and supervision.

PROF. APARNA CHANDRA

ASSOCIATE PROFESSOR OF LAW,

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY,

BENGALURU

Date:

Place:

Declaration

I, the undersigned, solemnly declare that this dissertation titled as "AN ANALYSIS OF RELEVENCY OF PREVENTIVE DETENTION LAWS IN A MODERN DEMOCRATIC SOCIETY" submitted to National Law School of India University, Bengaluru for LL.M. Degree (2020-21), is an original and bonafide research work carried out by me under the supervision of my guide. In case the contributions of others are involved, every effort has been made to give due credit to them through reference to the literature. The information contained in this work is true to the best of my knowledge. This dissertation or any part thereof has not been submitted for the award of the degree, diploma, certificate or fellowship not has it been sent for any publication purpose.

NIHARIKA SINGH

LLM/944/2020

Human Rights Law

Date: 1st September, 2021

Place: NEW DELHI

ACKNOWLEDGEMENTS

On the completion of this dissertation, I would like to place on record my earnest gratitude towards my worthy supervisor, Dr. Aparna Chandra, Associate Professor of Law, National Law School of India University, Bengaluru, for giving me an opportunity to carry out this research work. Without her supervision and guidance, this work would not have taken its present shape. I am immensely grateful to the library staff at National Law School of India University, Bengaluru for their unrelenting assistance in making available the relevant books and e- resources for the conduct of this research. I would also like to thank the IT Support team for their promptness in resolving issues relating to e-database access from home during this pandemic. I would take this opportunity to thank my family and friends who constantly motivated me in their distinctive ways and supported me during this global crisis.

TABLE OF CONTENTS

TABLE OF AUTHORTIES

STATUES

INDIAN STATUTES

1. Maintenance of Internal Security Act, 1971 (Act NO.26 of 1971)
2. Preventive Detention Act, 1950 (Act No. 4 of 1950)
3. The Constitution of India
4. The Defence of India Act, 1971 (Act No. 42 of 1971)
5. The Defense of India Act, 1962
6. The Jammu and Kashmir Public Safety (Amendment) Act,2018, s 8(1)(a)(i)
7. The Jammu and Kashmir Public Safety Act, 1978 (Act No. VI of 1978)
8. The National Security Act, 1980 (Act No. 65 of 1980)

FOREIGN STATUTES

1. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)
2. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

CASES

1. A.K. Gopalan v. union of India (1950) SCC 88
2. A.K. Roy v. Union of India, AIR 1982 SC 710
3. Banka Sneha Sheela v. State of Telangana and others 2021 SCC OnLine Sc 530
4. Haradhan Saha v. The State of West Bengal (1975) 3SCC 198
5. Khaja Bilal Ahmed v. State of Telangana 2019 SCC OnLine SC 1657
6. Khudiram Das v. State of West Bengal and others (1975) 2SCC 81
7. Pebam Ningol Mikoi Devi v. State of Manipur (2010) 9SCC 618
8. Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740
9. Sunil Fulchand Shah v. Union of India (2000) 3SCC 409

I INTRODUCTON

Balancing the security of the state with the liberty of an individual is “The eternal problem of government[s] [all] over the world”, noted H.V. Kamath, an assembly member, while preventive detention was still being argued in the assembly post-independence of India. The risks because of imbalance on either side are immense. While India chose to befriend Preventive Detention Laws, other equally torn countries like Japan did not. It becomes imperative then to analyze whether this law is even relevant with respect to a modern democratic state and is achieving what it seeks to achieve. Any side effects that it is bringing in the state need to be highlighted. Through this paper the author hopes to create a clear picture of the basis and branches of preventive detention. The paper examines if the preventive detention laws are fitting with respect to the grounds of a democracy and whether the arguments that supported the laws in India are valid still. It also discusses the practicality of these laws and where they are heading India towards.

1.1 STATEMENT OF PROBLEM

Preventive detention laws were introduced in the Constitution of India to combat terrorist activities. The majority of the founding fathers of the Constitution feared the ongoing violence, communal riots and terrorism due partition could not be stopped with criminal procedure. Therefore, they felt the need for a swift system under which fear could be instilled in people who goes against the ambits of democracy. However, over the period of time these laws are used as political tools of suppression rather than for security of nation. The stringent structure of these draconian laws directly conflict with the right to free speech and personal liberty. The status of these laws as it currently stands raises the question of relevancy at present. Using these laws for political agendas have further aggravated the problem of suppression of free speech and voices of dissent. This raises serious doubts on the efficiency and relevancy of preventive detention laws in combating terrorist activities.

1.2 IMPORTANCE OF STUDY

At present none of the democratic countries in the world use preventive detention laws during peacetime. Such draconian laws are repugnant to modern democratic Constitutions. Therefore, it becomes imperative to understand the philosophy behind existence of such laws in India even during peacetime. Such an assessment is necessary to identify the importance of preventive detention in the modern era.

1.3 AIMS AND OBJECTIVES

The aim of the research is to study the past legislations and the present day legislations containing the preventive detention laws. Through an analysis of social, political and legal issues concerned with preventive detention, it seeks to study the relevancy of draconian laws in modern democratic state. The objectives of this research are:

1) To identify the relevancy of preventive detention laws (NSA, PSA) in modern democratic state.
2) To assess if these laws are able fulfill the goals with which they were first brought into existence or are simply tool of suppression.
3) To identify the lacunas in the present legislative framework of preventive detention laws
4) To suggest reforms to address the aforesaid quandary, so that these laws are used to fulfill the objectives for which they were legislated at first place i.e. to guarantee state security

1.4 HYPOTHESIS

In the modern era the essence of these laws have changed drastically. These laws are moving far behind in achieving their objectives of curbing terrorism. They are now a tool in disguise to curb the voices of dissent of general public. Such draconian tools are converting a democracy to tyranny. These laws have failed to achieve its twin objectives of providing national security and Constitutional freedom.

1.5 RESEARCH QUESTIONS

On the basis of hypothesis, the researcher attempts to answer the following research questions within the ambit of present study

1) Are preventive detention laws relevant in modern democratic state?
2) Are Preventive Detention Laws in violation of social contract theory between the citizen and state?
3) Does excess authority transform these laws in a tool for tyranny?

1.6 RESEARCH METHODOLGY

The methodology adopted for this legal research is doctrinal. This research involves analysis of preventive detention laws through the lens of social, political and legal issues. The research has analysed various preventive detention laws and through analytical research has tried to find out its significance in the modern democracy. The data is collected from various secondary sources.

1.7 MODE OF CITATION

The researcher has adopted the OSCOLA (4^{th} ed.) format of citation. The mode of citation is uniform throughout the paper.

1.8 SCOPE AND LIMITATIONS OF STUDY

The study is limited to assessment of only two Acts which presently deal with Preventive Detention in India. The two acts are National Security Act, 1980 and The Jammu and Kashmir Public Security Act, 1978. The paper seeks to analyse and locate the relevancy of draconian laws in a modern democratic society. To study the relevancy of these laws various legislations have been studied from colonial era to post independence stage. A dataset of various judgements of Indian courts have been collected to track the evolving jurisprudence of Preventive Detention laws in India.

1.9 REVIEW OF LITERATURE

The book *Managing Fear* written by Bernadette McSherry investigates the rising use of risk assessment in relation to preventive detention and monitoring programmes for offenders with a high risk of reoffending, those with serious mental illness, and suspected terrorists. It highlights various legislations in common law countries which have expanded the scope of such laws in civil arena. Through the lens of criminology and social psychology it seeks to analyse how and why such schemes represent a shift toward restricting liberty before damage occurs rather than after a crime has happened. Case examples are presented to illustrate some of the aspects of how governments have sought to control the fear of future damage.

In the book *Preventive Detention and the democratic state*, Hallie ludsin has discussed the evolution of preventive detention from an emergency response to a routine law enforcement instrument in a democratic society. Historically, democracies utilized preventative detention only in exceptional circumstances where the criminal justice system was rendered ineffective. This book demonstrates that major democracies have begun to use incarceration as a form of insurance against dangerous persons. In the process, they've stepped onto a precarious ledge that permits them to utilize preventative detention to avoid the criminal justice system. Based on these nations' actual experiences, the book compares preventative detention in India, England, and the United States, highlighting its potentially disastrous repercussions for the rule of law, due process rights, and democratic ideals. The author beautifully highlights the modern day problem of balancing of security of state against the rights of individuals.

1.9.1 RESEARCH GAP

While there exist various safeguards provided by the constitution and that developed by the judiciary over period of time. Still there exists a lacuna in the current legislations, which increases the chances of misuse of such laws against the peaceful working of democracy. The concept of Preventive Detention was inculcated into the Constitution of India to tackle the violence taking place due to partition. However, over the period of time these lows have lost their relevancy in a modern democratic stage. The world has evolved and the idea of freedom and security has also changed

in the past 75 years since India attained Independence. Therefore, it is essential to check the relevancy of these laws on the anvil of principles of a modern democratic State.

1.9.2 CONTRIBUTION OF STUDY

This study seeks to fill the lacuna identified in the research gap. It aims to suggest reforms and alternative solutions to combat terrorism and violence without jeopardizing the human rights of an individual. Through this paper, the researcher highlights the fact that how these laws are moving towards tool of suppression and an instrument of majoritarian government against minority. The paper also suggests the the vision with which these laws were drafted is left far behind, the need is to find alternative solutions to curb the problem of terrorism in a modern democratic state.

1.10 CHAPTER SCHEME

In chapter II, the researcher discusses the jurisprudential basis of preventive detention laws from sociological perspective. The chapter briefly discusses the risk theory and highlights the factors that can lead to arbitrary usage of preventive detention on the basis of risk theory.

Chapter III, seeks to analyse the principles of a democratic state. It briefly discuses the theory of social contract.

Then Chapter IV briefly discuss the sources of preventive detention laws

Chapter V discuses the evolving jurisprudence by judiciary

Then Chapter VI, traces history of preventive detention laws in India. Firstly, it describes the origin of preventive detention laws with the advent of British. It then discusses the constituent assembly debates regarding preventive detention after India attained freedom from Colonizers. The chapter also discusses various legations in post-independence stage and analyses their impact in curbing the terrorism. It then discusses the current legislations mainly PSA, and NSA. Wherein, various lacunas in the legislations have been highlighted which makes it easier to misuse the draconian legislations against the minority or voices of dissent.

CHAPTER VI, discusses about the theory of social contract. It assess whether prevalence of preventive detention laws in the society can lead to breach of contract between the citizen and the state.

In chapter VII, difference is drawn between democracy and tyranny. Through various examples the chapter seeks to answer the fact whether these draconian laws are used as tool for tyranny or are legitimately successful in curbing terrorism and violence. It also discusses the impact of such laws on human rights of an individual.

Chapter VIII, tries to locate the relevancy of these laws in modern democratic state. Through various reports, cases and examples it suggests that such laws are repressive in nature and there can be an alternate solution to curb the terrorism. A balance has to be struck between the liberty and security of the state.

Chapter IX briefly recommends the reforms that can be brought in such laws to strike a balance between fundamental right to freedom and liberty and security of the state.

Chapter X concludes the paper by commenting upon diminishing relevancy of the preventive detention laws in modern democratic state.

I JURISPRUDENTIAL ESSENCE OF PREVENTIVE DETENTION LAWS

Preventive Detention laws are anticipatory in nature. A layman would perceive detention laws to be part of criminal justice system. However, the basis of criminal justice and preventive detention laws are in contrast with each other. In the criminal justice system, the crimes are investigated and the accused gets a chance at fair trial. The punishment is given only when the guilt of the offender is proved through fair procedure of law. In contrast to this under preventive detention laws the arrest and detention is made on the prediction of future harm which has not yet happened. The philosophical reasoning behind punishing a person under preventive detention laws is on the anticipation of dangerousness. To understand these reasoning we need to look at the jurisprudential essence of detention laws which can be explained through risk theory. Premises of risk theory and preventive detention laws are similar in nature.

Relevant to the field of sociology and criminology are the theories of risk, which form the basis for preventive detention laws. Deborah Lupton has identified three approaches to

preventive detention laws i.e. 'cultural', 'governmentality', 'risk society'. These are three ways to define what is perceived as 'risk'[1].

According to the cultural approach, people in a community have common beliefs and ideology. Communities having common cultural beliefs and principles perceives risk in a similar fashion. Consequently, whatever threatens the belief system of the community is perceived as risk. Under this theory certain marginalized groups can end up being seen as a threat to the community. For example, Hindus in Pakistan are massively persecuted primarily because they are seen as a threat to the culture and ideologies of Muslims in the country. Forced conversions, rapes and marriages of Hindu women are recurrent occurrences. Not just Hindus but Christians and other minority religions are also found to be persecuted in the country. Certain reports suggest that over one thousand girls are annually abducted and forcefully converted to Islam[2]. Situations such as these, show one way of perceiving risk as is defined by the cultural approach. As is clear, according to the cultural approach the idea of risk can differ with differing backgrounds, customs and traditions. However, such cultural approach to risk may not be justified. What may be culturally appropriate may not be universally accepted. For example, detaining Uighurs Muslims by Chinese government in campus under the pretext of re-educating them so as to prevent terrorist activities in the region reveals how the subjectivity of cultural risk can be employed to justify un-ethical and illegal detention by the government[3]. It showcases how government can jeopardize the human rights of communities who have different cultural ideologies. Therefore, such a cultural approach to risk might lead to arbitrariness. Basing preventive detention laws on the premises of cultural theory can proved to be fatal and can also lead police brutality.

Michael Foucault introduced the concept of governmentality[4]. The word describes the study of government and its mentality. The premises of governmentality approach to risk is drawn from Foucault's idea of government. According to him the society entails self-governing capacities. Due to this the government has evolved over time and has moved from basic command theory to engaging more complex mechanisms to govern the self-governing entities. The governmentality approach aims to mold the conduct of things which they seek to

[1]Bernadette McSherry, Managing Fear, (Routledge, 2014) 15

[2]Udeerna Tippabhatia, '5 things to know about Hindus in Pakistan' (Hindu American Foundation, 13 October 2020) <https://www.hinduamerican.org/blog/5-things-to-know-about-hindus-in-pakistan> accessed 31 August 2021

[3] BBC, 'Who are the Uyghurs and Why is China being Accused of Genocide?' <https://www.bbc.com/news/world-asia-china-22278037> accessed 1 September 2021

[4] McSherry (n 1) 16.

govern[5]. In this approach risk is perceived as tool of governance. Risk is a statistical and probabilistic approach in which a large number of occurrences are classified into a distribution, which is then used to make probabilistic predictions[6]. Using the technology, the government then identifies recurring characteristics that poses threat to the smooth functioning of government and society. For example, under Public Safety Act, many people in Kashmir are detained if they are involved in any kind of protest. The common ground for evaluation of risk under this act is participation in protest[7]. There must be history of terrorists trying to bring unrest via protests and hence a general idea of finding high risk personalities through this medium is preferred by government agencies. The lacuna in this theory that it revolves around the power of government. Government can also perceive risk as voice of dissent. It might want to suppress everything which may come in their way of attaining power. For example, after the coup in Myanmar the military regime detained around 3800 civilians. The detention was solely based on the grounds of voices of dissent against the illegal formation of coup or elected government[8]. This can turn a democracy into tyranny. Therefore, this theory also does not completely justify the use preventive detention laws against the perceived risks by government.

Ulrich Beck explained the transition from industrial society to the society concerned with problems of scientific and technological advancements by coining the term 'risk society'[9]. He characterized risks in a society as a global phenomenon which is unpredictable in nature. He was of the opinion that fear determines the perception towards life. It becomes essential to guard the society against the threats that imbibes fear. Consequently, security is supplanting the 'freedom and equality from the highest position on the scale of values'. Resulting in implementation of stringent laws ultimately leading to 'totalitarianism of defence against threats'. His idea of risk society is not concerned with obtaining good rather it revolves around prevention of the worst.

---

[5] Pat O' Malley, 'Governmentality and Risk' (2009) Sydney Law School Research Paper 09/98, 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478289> accessed 25 August 2021

[6] ibid 5

[7] Naseer Ganai, 'Arrests Under PSA Amount to 'Thought Crime', Say Kashmir Lawyer As 100s Remain Under Detention' Outlook (3 October 2019) <https://www.outlookindia.com/website/story/india-news-arrests-under-psa-amount-to-thought-crime-say-kashmir-lawyers-as-100s-remain-under-detention/339932> accessed 31 August 2021

[8] Bhupinder Singh, 'Over 750 dead, Thousands Detained: 100 Days of Myanmar's Military Coup' (2021) < https://www.indiatimes.com/news/world/myanmar-military-coup-100-days-photo-gallery-540231.html> accessed 1 September 2021

[9] McSherry (n 1) 17.

These three sociological approaches to risk lays down the basis of society's approach towards preventive detention laws. It highlights the government's philosophy behind adoption of detention laws. Apart from the risk theory, traces of philosophical reason behind preventive detention laws can also be found in the theory of Incapacitation. This theory of punishment follows utilitarian perspective to reduce the crime in society by imprisoning the accused to prevent any future crimes from happening in society. Following the utilitarian perspective by reducing crime it aims to enhance the overall happiness quotient of the society. Originated in Britain between 18th and 19th century, the theory seeks to incapacitate offenders to prisons to prevent future crimes. Preventive Detention laws follows the same analogy of incapacitating a person to reduce the chances future risks. Although incapacitation theory of punishment becomes operational after the crime has been committed and preventive detention laws are pre-crime operations. However, both the theories work on similar underlying principle, prevention of future risks.

Additionally, in the post-modern era the governments have been justifying the use of detention laws basing their reasoning on the premises of 'precautionary principle'. Although the precautionary principle has its origin in the environment law. Still, analogy can be drawn between the precautionary principle and the detention laws. The precautionary principle mandates the early use of forces to prevent any future catastrophe, which might be irreversible in nature. Accordingly, unpredictable and uncertain future harms can be avoided if action is taken before the disaster. The principle rejects the idea of evidence based approach to public policy. Drawing on the analogy of precautionary principle, preventive detention laws can be best summarized in the words of former Prime Minister of Australia John Howard as "it's better to be safe than sorry."[10]

Thus primary reflection of philosophy behind preventive detention laws can be seen in risk theories. These define what constitutes as dangerousness, thus highlighting the importance of trying to curb that danger for a just, fair and prosperous society. The 'risk of future harm' arises either from the lens of 'cultural' theory, 'governmentality' theory or 'risk society' theory. These form the basis of justification of preventive detention laws. Other justifications can also be drawn from the overlap with the ideology of incapacitation which also tries to reduce future harm in the society that a guilty proven person could bring. And lastly, detention laws are reasoned with the 'precautionary principle'. Both showcasing the similar ideology of 'prevention is better than cure'. How so ever different these might seem, but their

[10] McSherry (n 1) 22

goal is same – to curb a large perceived risk to the society before it takes shape and causes irreversible harm. It is an important objective for any society to function properly.

However, these theories nowhere address the problem of attaining balance between security of state and the constitutional freedoms of society. It is of utmost importance to define the 'risk' and 'dangerousness' globally. These words are so wide that they can be interpreted in any manner by one who is in power and use the preventive detention laws to their own advantage.

II DEMOCRATIC STATE

To determine the relevancy of preventive detention laws in post-Independence era, first it becomes essential to define a modern democratic state. Social Contract theory and democracy are closely linked to each other. The present day democracy is result of the social contract between the citizen and the government. John Locke's social contract theory inspired the constitutional democracy. His idea led to development of modern day liberal democracy. Therefore, it becomes essential to understand the basis of democracy i.e. the theory of social contract. Because without the contract between the state and the individual man would have been living in a state of fear and pain.

2.1 THEORY OF SOCIAL CONTRACT

The theory of Social Contract originated to overcome the hardships faced by man. It was thought that man before the social contract theory lived in state of nature. There was no government or law to regulate the will of man. So to overcome this state of tyranny and hardships, man entered in two agreements. First was 'Pactum Unionis', according to it people entered into agreement for protection of life and property. Consequently, people grew mutual respect for each other and lived in peace and harmony. Second agreement was 'Pactum Subjectionis'. Individuals collectively surrendered their rights and freedom to one sovereign authority. Which in return took pledge to provide protection of life and property and liberty subject to certain limitations. Therefore, due to two agreements the authority of sovereign and state came into existence[11].

[11] Manzoor Laskar, 'Summary of Social Contract Theory By Hobbes, Locke and Rousseau' (2014) 1 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410525> accessed 31 August 2021

Thomas Hobbes is one of the prominent jurist known for the evolution of theory of social contract. His ideas of social contract were first published in this book ‘Leviathan’ in the year 1651. According to him before the theory of social contract came into existence man lived in fear and selfishness. With no central authority to govern and the lack of laws, state of nature man was poor, nasty, solitary[12]. He opined that man has a natural desire of protection and order. It is due this feeling of self- preservation and protection, man entered into the contract with the sovereign and the state. He willingly surrenders his rights and freedoms to one central authority, in return of assurance of security and order. Due to this social contract between the man and the central authority emerged the concept of ruler or monarch. This then meant that word of the sovereign was absolute and there was nobody above it. However, Hobbes also placed a moral obligation on the sovereign. Accordingly, the sovereign was bound by principles of natural law. For the sake of the subjects' peace, life, and prosperity, Hobbes urges them to relinquish all of their rights and deposit all of their liberties in the sovereign. In this sense, natural law became a moral guidance or direction to the sovereign for the preservation of the subjects' inherent rights.

Alternatively, Jean Jacques had a different approach with regards to theory of social contract. His interpretations of the theory were published in a book called “The Social Contract” and “Emile”. For him social contract was hypothetical construction of reason. When man was in state of nature before the emergence of social contract, there was equality and he was happy. With passage of time the population increased however, the resources were limited. Therefore, people had to change their way of living. Division of labor was introduced and man started living in small clusters rather than bigger. New means of living and leisure were introduced. Due to this man started comparisons amongst themselves. Most significant development according to Rousseau was the creation of private property, which led to emergence of greed and selfishness. Therefore, to regulate the selfish nature of man, people surrendered their rights to the community as whole. Rousseau termed it as ‘General Will’. According to Rousseau, contemporary civilisation has lost the fundamental "freedom, happiness, equality, and liberty" that existed in primitive communities prior to the social contract. The Social Contract established a new type of social organization to secure and guarantee rights, freedoms, freedom, and equality. The essence of Rousseau's notion of General Will is that State and Law are the result of the people's General Will. It creates the state and the laws, and if the government and laws do not accord to the 'public will,' they are

[12] ibid.

repealed. In exchange for giving up his inherent rights, the person gains civic liberties such as freedom of expression, equality, and assembly, among others. His natural law approach is limited to individual freedom and liberty. He founded his social contract theory on the idea that "man is born free, but he is chained everywhere."[13]

Thus Hobbes and Rousseau conceived the social contract as an agreement between citizens to establish an ordered society based on the right to mutual protection and security. This agreement validates national governments' jurisdiction over some elements of citizens' life. This social structure enables individuals to achieve happiness, which is only attainable in collaboration with others rather than alone. The social contract is fulfilled when a government is able to offer both wealth and security to its citizens. If these two conditions aren't satisfied, unfortunately, it can lead to serious repercussions.

2.2 ESSENTIAL FEATURES OF MODERN DEMORACTIC STATE

Democracy can best be defined as an institution which is ‘for the people, of the people and by the people’. Modern democratic society follows the principles of natural justice. The core principles of Natural Justice in any proceeding are fair hearing, adequate notice and no bias. These principles are indispensable in justice delivery system. According to Justice Krishna Iyer “Natural justice is a pervasive fact of secular law where a spiritual touch enlivens legislation, legislation and adjudication to make fairness a creed of life. It has many colour and shades, many forms and shapes”[14]. Although, a procedural requirement, but it provides a significant protection against any judicial or administrative order or action that might have a negative impact on an individual's fundamental rights. In times of need man has always gaped at god and his divine principles which are free from human perpetration. These principles ensure and symbolizes fairness, reasonableness, equity and equality[15].

Further, in any democratic society freedom of speech and expression plays a vital role in ensuring good governance and rule of law in society. It is the most essential tool which an individual can use to keep the arbitrary power of government in check. Democracy came into existence only because of the will of the people. If this will is supressed by curbing free

[13] ibid. 6
[14] Principle of Natural Justice and Its Legal Implecations <https://www.cusb.ac.in/images/cusb-files/2020/el/law/PRINCIPLE%20OF%20NATURAL%20JUSTICE_6th%20Sem.pdf> accessed 31 August 2021
[15] ibid.

speech and rule of law then that may lead to culmination of democracy. Therefore, it is quintessential for any modern democratic society to leave space for individuals to develop ideas. Democracy is in the hands of the people, and the right to free speech is critical to the efficient functioning of the state. If the state fails to operate effectively and becomes side tracked from its responsibilities, it is the responsibility of the people to remind them. Freedom of expression is a tool that has been given to us in order for us to live with dignity rather than just exist[16].

Even though India is a Democratic state still it is not truly liberal in nature. The constitution of India was designed keeping in mind the principles of Natural justice. For instance, Article 14 of the Constitution provides for equality before law. Similarly, Article 19 guarantees fundamental right to free speech and express. Yet there are certain tools whose presence threaten the very basis of democracy. On one hand Preventive Detention laws were inculcated into Constitution to safeguard the very basis of democracy. But on the flip side, these laws are capable of yielding immense power to government that they can act as antithesis to the principles of modern democratic state. The major snag that these laws carry is its arbitrary usage. The preventive Detention Laws carry with them the ultimatum of turning a democratic state into a tyranny.

III SOURCES OF PREVENTIVE DETENTION

3.1 INTERNATIONAL LAW

Under global justice system, preventive detention laws are mainly governed by International Human Rights Law (IHRL) and International Humanitarian Law (IHL). However, both differ in their application. While IHRL governs all preventive detention laws, IHL is only applicable in cases of armed conflict. Additionally, the Universal Declaration of Human Rights[17], International Covenant on Civil and Political Rights[18] acts as primary sources. Some other sources such as Human Rights Committee comments though not binding in nature, persuade the law on preventive detention.

[16] Nirbhay Phusate, 'Freedom of Expression- Democracy' <http://www.legalservicesindia.com/article/2307/Freedom-of-expression---Democracy.html> accessed 31 August 2021

[17] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

[18] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

The significant limitation imposed by the international laws on application of preventive detention is the use of arbitrary detention. Both IHL and IHRL treats prohibition of arbitrary detention as customary international law. Additionally, Article 9 of both UDHR and ICCPR absolutely prohibits use of arbitrary detention. The premises of prohibition on arbitrary detention is majorly based on right to liberty. Article 9 of ICCPR elucidates that right to liberty can only be limited "on such grounds and in accordance with such procedure established by law", not otherwise. Therefore, in light of principles and rules laid down under international law, it becomes essential for sates to ensure legality and non-arbitrariness while detaining under preventive detention laws.

To ensure legality of detention, states must specify the grounds of making arrest and ensure abidance to rule of law. The legality principle also demands state to enlist the behavior that might lead to detention[19]. Furthermore, the human rights committee holds the view, that states should guarantee procedural and substantive rights to accused to abide by principles of ICCPR[20].

The states are also allowed under Article 4 of the ICCPR to adopt principle of derogation. That is, it allows states to derogate from rights of liberty in cases of imminent threat or emergency. Although some states interpret emergency in a broad manner, however according to article 4 it has to be interpreted in a limited fashion. Derogation under Article 4 would only be justified if nature of emergency is such that it threatens the 'life of nation'[21]. Even though ICCPR allows derogation, the UN Human Rights committee 'treats prohibition on arbitrary detention as preemptory norm that is not subject to derogation'[22]. Therefore, it becomes all the more essential for states to apply preventive detention laws in proportion.

3.2 IN INDIA

The Constitution of India under Entry 9 list 1 of the seventh schedule confers power to parliament to draft law regarding preventive detention. The grounds for drafting preventive detention laws in India is to safeguard country and to maintain foreign affairs. Additionally, Entry 3 of list III grants concurrent power to the parliament and the state

[19] Hallie Ludsin, *Preventive Detention and the Democratic State* (Cambridge University Press 2016) 64
[20] ibid.
[21] ICCPR (n 10) art 4
[22] Ludsin (n 11) 66

legislature to make laws with respect to preventive detention. The power to legislate can be invoked by the parliament or state legislature for matters relating to ' preventive detention for reasons connected with the security of a state, the maintenance of public order, or the maintenance of supplies and services essential to the community.'[23] Additionally, Article 22(3) paves way for preventive detention laws[24]. Article 22(3) overrides article (1) and (2). It legalizes detention without trial in two cases. First, during situation of war a person can be arrested if he is an enemy alien. Second, arrest is valid if made under preventive detention laws enacted by the state or the parliament.

Further Article 22(4)[25] stipulates maximum period of detention to be three months. However, it can be extended in case the advisory board thinks that there is sufficient cause to detain a person. Article 22(5)[26] makes it necessary for the authorities to make detainee aware about the grounds of arrest and also afford the opportunity of legal representation. But Article 22(6) makes the provisions in Article 22(5) redundant if authorities are of the opinion that disclosing the information might hamper the public interest. Further Article 22(7) empowers parliament to prescribe 'circumstances or class or classes of cases in which a person maybe detained for a period longer than three months'[27].

IV EVOLVING JURISPRUDENCE BY JUDICIARY

Judiciary of India with its independent status and power of judicial review has developed the judicial jurisprudence of preventive detention laws since independence. It has used its interpretative tools to evolve the understanding of legislative provisions. With its power of judicial review, the Indian judiciary acts as guardian of both the Constitution and the citizens. With the passing of PDA Act in the year 1950, AK Gopalan filed writ petition in Supreme Court of India challenging the validity of the Act[28]. The arguments in this case proceeded on hypothetical scenarios, because PDA Act prevented AK Gopalan to disclose the papers of his detention. The majority of the judges on the bench ruled in favour of the validity of the Act. It was held that law in preventive detention should only be judged through the provisions of

[23] The Constitution of India, sch. 7 list III entry 3
[24] The Constitution of India, art. 22
[25] The Constitution of India
[26] ibid
[27] ibid
[28] A.K. Gopalan v. union of India (1950) SCC 88

Article 22. The law does not have to satisfy the requirements laid down in Article14, 19 and 21. Although, AK Gopalan was a bad law, it still pointed out the despotic rules laid down by such laws, which did not allow AK Gopalan to defend himself in the court.

Almost after 25 years, Supreme court reversed the bad law laid down in AK Gopalan case. The court in the case of Haradhan Saha[29] held that preventive detention laws are not limited to scrutiny of Article 22 but also have to stand the test of Article14,19 and 21. The court also observed that the idea is not debar the executive authorities from passing the detention order under preventive detention laws. But the executive should exercise their authority to detain under preventive detention laws only after exhausting the remedies available under criminal law of India. Then in the case of Khudiram Das V State of West Bengal[30], constitutional validity of MISA was is question. The supreme court was of the opinion that all the preventive detention is justified according to article 22 of the constitution. However, it would only be legitimate if it satisfies the condition laid down in Article 14,19 and 21.

In case of Sunil Fulchand Shah v Union of India[31], the court recognised that personal liberty is the foundation of democracy. It is the most significant of all the other freedoms given under constitution of India. Only when a person has liberty, he can enjoy the other rights. To protect the realm of personal liberty, the founding fathers of the constitution provided the safeguards from arrest and detention under Article 22 of the Constitution of India. Whenever detention is ordered under Article 22, it has to stand the scrutiny of Article 21. Therefore, the restrictions imposed on a person under prevention detention laws has to minimal[32].

Time and again apex court has acted as pillar to safeguards the rights of pool. In the case of Khajja Bilal Ahmed v State of Telangana[33], the court held that state and irrelevant incidents cannot form the basis of preventive detention. In yet another case the supreme court held that if one of the grounds are non-existent, misconceived or irrelevant in a detention order under the National Securities Act, it will be invalid[34]. Further in the case of A.K Roy v Union of India[35] Court examined the validity of National Security Law, 1980. The court established the fact that "it is excellent to have a giant's strength but it is tyrannical to use it as a giant and therefore, the Constitution has chalked out various checks and balances to ensure a

[29] Haradhan Saha v. The State of West Bengal (1975) 3SCC 198
[30] Khudiram Das v. State of West Bengal and others (1975) 2SCC 81
[31] Sunil Fulchand Shah v. Union of India (2000) 3SCC 409
[32] ibid.
[33] Khaja Bilal Ahmed v. State of Telangana 2019 SCC OnLine SC 1657
[34] Pebam Ningol Mikoi Devi v. State of Manipur (2010) 9SCC 618
[35] A.K. Roy v. Union of India, AIR 1982 SC 710

reasonable exercise of power"[36]. Further the court held that person liberty of an individual can be restricted under NSA. However, the extent of restriction should be limited. Also the provisions should be established following reasoned and fair procedure keeping in mind the principles of natural justice[37].

In recent case of Banka Sneha Sheela v the state of Telangana[38], apex court court relied on the case of Ram Manohar Lohia v State of Bihar[39], to distinguish between mere law and order disturbance and a public order disturbance. It was observed that disturbance 'law and order' situation is of less gravity as compared to disturbance of 'public order'. The court also opined that "Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however, Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous and historic struggles. It follows, therefore, that if the ordinary law of the land (the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal."[40] The court held the view that "Preventive detention must fall within the four corners of Article 21 read with Article 22 and the statute in question. For public order to be disturbed, there must in turn be public disorder."[41]

V THE HISTORY OF PREVENTIVE DETENTION LAWS IN INDIA

5.1 COLONIAL ERA

India had its first encounter with the preventive detention laws during colonial rule with the East India Company Act of 1784. Using this, the British could detain anyone considered a threat to their interests in India. [42]

[36] Ananya Bajpai, 'Constitutional Law: AK Roy Case' (Lex Life India, 27 July 2020) <https://lexlife.in/2020/07/27/constitutional-law-ak-roy-case/> accessed 31 August 2021
[37] ibid.
[38] Banka Sneha Sheela v. State of Telangana and others 2021 SCC OnLine Sc 530
[39] Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740
[40] Banka Sneha Sheela (n 27) [26]
[41] ibid [15], [20]
[42] Ludsin (n 11) 86

Another precursor of the preventive detention laws was the 1818's Bengal Regulation Act. This also gave the power to detain individuals without "sufficient ground"[43] for "judicial proceeding"[44]. Following years of British rule saw various variations of detention laws such as the 1919 Rowlatt Act, 1920 Government by Ordinances, 1935 Government of India and 1942-Armed Forces (Special Powers) Ordinance. While some were to handle tense situations around world war I and II, others were to subjugate India against movements such as the Quit India movement lead by M. K. Gandhi.[45] British implemented almost 17 such legislations during their rule.[46] They detained many top independence movement leaders such as Mahatma Gandhi, Jawaharlal Nehru, and Sardar Patel.

During the colonial era, preventive detention was used as a tool to crush the Indian uprisings for independence and to establish formidable control over millions of Indians by a few thousand British. It was used to extract maximum use out of Indian population and resources for coloniser's benefits and to suppress anything that would get in their way. This makes for an intriguing question then, that how a dictatorial tool like preventive detention can still exist in a country that has faced severe horrors of the same laws in the past.

5.2 TOWARDS INDEPENDENCE

There were regular protests against the preventive detention laws, but in spite of them, the two most influential leaders of the time, namely India's first prime minister Nehru and deputy prime minister Sardar Patel supported the laws. They supported the protection of the preventive detention laws constitutionally at the cost of deprivation of the right to liberty. It meant making India a risk-averse society whose constitution would be built on liberal democracies but altered in a risk-averse manner. The constituent assembly could not foresee a safe future for India without the draconian powers of preventive detention. There were serious threats at the time of independence ranging from cross border conflicts to internal lack of order. The support from the top leaders, who themselves had been a victim of the same laws, added to the trust that the government would use the tools in an effective and trustable manner. That innocent people will have nothing to fear. This laid the foundation of

[43] Bhamati Sivapalan and Vidyun Sabhaney, 'In Illustration: A Brief History Of India's National Security Laws' The Wire (27 July 2019) < https://thewire.in/law/in-illustrations-a-brief-history-of-indias-national-security-laws> accessed 31 August 2021
[44] ibid.
[45] ibid.
[46] Ludsin (n 11) 87

our constitutional recognition of preventive detention laws and India not being a completely liberal democracy.

5.3 INCLUSION OF PREVENTIVE DETENTION LAWS IN THE CONSTITUTION

India established a constituent assembly post-independence in 1946 with the purpose of drafting the first set of legislatures of the country as well as the constitution, and one of the main points of discussion and debate was the inclusion of preventive detention laws.

As expected, some were in favour of having the full expanse of the rights to liberty, whereas some thought that the arbitrary force of preventive detention was a necessary compromise for securing India from the larger threats to its unity and democracy. The threats at the time were seen mainly because of the post-partition instability, rising black marketeers, thugs, and refugees, and rising communist resistance in Telangana post-1948.[47]

Most assembly personnel were comfortable with the idea of preventive detention during emergencies. The tougher question was whether it should be allowed during peacetime. Those who believed the laws to be justified were of the view that disruptive elements of the society were hard to prosecute via normal procedures since they would intentionally tamper the evidence and threaten any witnesses.[48] They believed that such elements would disrupt the rights of the larger society hence found it justified to restrict their freedom.[49] Moreover, their belief that government would not use these powers abusively was strengthened by the support of leaders who themselves had suffered because of preventive detention under colonial rule.[50]

Members, who were critical of this idea, perceived the government as being no different from the colonial masters if the detention powers were to be allowed during peacetime. They saw it as a severe violation of democratic principles. They believed that this could open doors

[47] Ludsin (n 11) 88
[48] ibid. 89
[49] G.Durgabai, Constituent Assembly of India Debates (Proceedings) Volume IX (16 September 1949) <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C16091949.html> accessed 31 August 2021
[50] Ludsin (n 11) 89

towards tyranny that could lead to rebellion among the people.[51] They also believed this could be used as an easier route to incarceration instead of taking the lengthier route of prosecution.[52] And some doubted the trust being placed in the current leaders of the nation when they wouldn't be there forever. A constituent assembly member, H.V. Kamath, argued exactly this.[53] He imagined the possibility that if someone who was completely in opposition to the ideals of democracy were to come into power, he would use the same laws to repress the country and the liberty of its people. Some members also brought up the Japanese constitution, which had acted as a reference for certain provisions in the Indian constitution, as an example that did not allow preventive detention even in the post-world war II instability.[54] They further noted that India's situation was much better than Japan.[55]

In the end, advocates of the preventive detention laws stood out. The Indian constitution allowed both the state and central governments the authority to ordain preventive detention in peacetime. Perhaps the best explanation for this was given by the assembly member B.M. Gupte. He noted that even though the sympathy goes out to the high principles of democracy that they themselves had upheld and propagated during the struggle for independence, the wariness of the most influential leaders, who have mass representation in the country is a matter of much significance. These leaders warned everyone of severe dangers to the liberty of India looming wide. And thus, in situations such as these, noted B.M. Gupte, one cannot take chances.[56]

VI POST INDEPENDENCE ERA

6.1 PAST LEGISLATIONS

Thereby began the series of important legislations first of which came in just 30 days of India's constitution getting into action. This was the Preventive Detention Act (PDA) 1950[57]. The intention behind it was to keep roughly 500 detainees in detention because many of them

[51] ibid.
[52] ibid.
[53] ibid.
[54] ibid.
[55] Dr. Bakshi Tekchand, Constituent Assembly of India Debates (Proceedings) Volume IX (15 September 1949) < https://indiankanoon.org/doc/213750/> accessed 31 August 2021
[56] Ludsin (n 11) 91
[57] Preventive Detention Act, 1950 (Act No. 4 of 1950)

were riotous communists. Another reason was to fight certain antinational communist factions.[58] And like always, the law was to curb the spread of anti-social elements like smugglers, "gundas" and black marketeers as well.[59] The act gathered the support of majority of the members even though they were aware of the repressive nature of it. The safeguards built under PDA followed the minimum requirement set by Article 22 of the Indian Constitution. The government believed them to be sufficient to prevent any innocent people from getting captured. The parliamentarians believed innocent people had nothing to fear from PDA and only those that were challenging the sovereignty of the state needed to get what they deserved. The parliamentarians believed those who challenged the sovereignty of the state did not deserve to exercise their right to liberty because they were challenging it in the first place.[60]

Even though initially PDA had garnered major support, over the years the opposition had started to build up. At first came the arguments that PDA was being used to majorly detain smugglers and black marketeers and 'gundas' only to avoid the tougher route of prosecution.[61] They observed that act's safeguards were not sufficient to protect the civil liberties of a detainee. They also found it extremely draconian. Over time the opposition started with intense points of arguments. They claimed that PDA was being used to detain only small-time criminals and not the bigger ones because they were supporting the majority party in their election campaigns. They claimed that government was misusing PDA to crush genuine social protests and the opposition as well. There were also reports of policemen and magistrates using it to settle their personal vendettas. PDA was also seen as a counterproductive law. By incarcerating people of conflicting philosophies, it would end up increasing their support. It would glorify these 'new martyrs', which was exactly the opposite of the intended effect.[62]

PDA was supposed to be reviewed and renewed regularly and generally the opposition did not agree with the cost benefit analysis of the PDA. Slowly the focus of PDA also shifted from communists and anti-national elements to anti-social elements. Repeatedly it also shifted its focus on to the possibility of cross border conflict with China or Pakistan when the tensions rose. It was finally allowed to expire in 1969, only for political reasons. Congress

[58] Preventive Detention Bill, supra note 60 at 875.
[59] Ludsin (n 11) 96
[60] Ludsin (n 11) 97
[61] ibid.
[62] ibid.

had lost in the elections and had to form coalition with CPI and CPM who demanded for the PDA to be removed.[63]

In between came the Defense of India Act 1962[64]. Due to a Chinese invasion in India, the government declared an emergency and introduced this act which allowed the detention of anyone who could be under the influence of China or could harm the country in any manner or was an anti-social element. It removed the detainees right for a judicial review which was a safeguard of the PDA and it did not face much opposition given the situation in the country. The emergency was ended in 1968[65].

Around 1971 came the Maintenance of Internal Security Act[66] (MISA). Congress under the leadership of Indira Gandhi implemented the act in peacetimes. It was justified as a remedial measure against the rising Naxalite movement. The communists from the Communist party of India and the Maoist Communist Centre were using the uprisings to create a mass movement against the government. Majority of the parliamentarians believed it to be justified to have preventive detention in place to control these uprisings. Furthermore, tensions were rising between Pakistan and Bangladesh (then East Pakistan). It seemed important to thwart any potential Pakistani spies from entering into Indian borders or India getting dragged in a fight that it did not start[67].

The opposition argued strongly against MISA. The unrest in the country was geographic in nature mainly concentrated around the Naxalite regions or borders with Bangladesh. So, they found MISA completely unnecessary for the rest of the country. They also indicated that this was more of a political move rather than a security related amendment. They feared that the ruling party wanted to establish more control over the country and suppress the opposition using these measures. Yet supreme court validated the requirement of preventive detention given the sensitive situation in the country.

In the same year the war between India and Pakistan led to implementation of Defence of India Act[68]. This watered down the safeguards of MISA even further particularly the right to review the detention by an advisory board. In the first half of 1970s, India faced an economic crisis which led to a powerful opposition led by Jayaprakash Narayan. The aim of his movement was anti-corruption and protection of democracy. The movement gained

[63] ibid. 105
[64] The Defense of India Act, 1962
[65] Ludsin (n 11) 105-106
[66] Maintenance of Internal Security Act, 1971 (Act NO.26 of 1971)
[67] Ludsin (n 11)
[68] The Defence of India Act, 1971 (Act No. 42 of 1971)

significant traction after Indira Gandhi was found guilty of electoral malpractice. Consequently, in 1975, Indira Gandhi declared "Emergency" in the country. She justified it by suggesting that a minority wanted to topple the government without following the due procedure of elections, since they were calling for the police and the armed forces to rebel. The government thought of this as a threat to India's democracy. This was followed by removal of safeguards from MISA, most importantly the right for judicial review of the detention order. Opposition vehemently argued against MISA every time it was renewed. They accused the government to using it for instilling fear in the countrymen. They also pointed out that government used MISA against not just the opposition but its own party members as part of an internal fight. Finally, MISA and Defence of India Acts were repealed after congress lost the elections in 1977[69].

The above past legislations are suggestive of the fact, rather than using the detention laws to curb the terrorism, they were used to promote the political agenda. Consequently, such repressive and draconian laws were doing more harm to country than protecting it. It appears that mainly these laws were used to suppress the voices of dissent in the name of protection of the country.

6.2 CURRENT LEGISLATIONS

6.2.1 THE JAMMU AND KASHMIR PUBLIC SAFETY ACT

The Jammu and Kashmir Public Safety Act[70] (PSA) was sculpted under the government of then Chief Minister Sheikh Abdullah in the year 1978. The 1978 Act was the reflection of the Public Security Act, 1946[71], promulgated in colonial era to hold up revolutionaries on the grounds of "public order"[72]. In the post-colonial era the Act was succeeded by Preventive Detention Act, 1954[73]. This Act was to automatically terminate at the end of five years. However, prior to the expiry of the Act, it was amended and replaced by Preventive

[69] Ludsin (n 11)106-120
[70] The Jammu and Kashmir Public Safety Act, 1978 (Act No. VI of 1978)
[71] Mohmad Abid Bhat, 'Preventive Detention in Counter-insurgencies: The Case of Kashmir' Insight Turkey (2019) 55 <https://www.researchgate.net/publication/337870818_Preventive_Detention_in_Counterinsurgencies_The_Case_of_Kashmir> accessed 1 September 2021
[72] ibid.
[73] Mohmad Aabid Bhat, 'Politics of Preventive Detention: A Case Study of Jammu and Kashmir Public Safety Act, 1978' (2020) 15(1) IJCJS <http://www.ijcjs.com/pdfs/Bhat15Issue1IJCJS.pdf> accessed 1 September 2021

Detention Amendment Act, 1958[74]. The 1958 was further amended twice in the year 1964 and 1967. Subsequently, Sheikh Abdullah introduced the Jammu and Kashmir Safety Ordinance Act (SOA) in the year 1977[75], culminating into Jammu and Kashmir Public Safety Act, 1978[76].

The Act was devised to protect the forest cover from the timber smugglers. However, with the boiling tensions between India and Pakistan, the state of Affairs of Jammu and Kashmir were disrupted. The government then had to use the wide powers under Section 8 of the Act, to discourage the militant activities taking place in Jammu and Kashmir over the period of time.

Section 8(1)(a)(i) of the Act authorizes the the government to detain any individual "with a view to preventing him from acting in any manner prejudicial to the security of the state or the maintenance of the public order."[77]Although section 13(1)[78] of the Act makes it mandatory that detainee must be made aware about the grounds of his arrest and also allow for legal representation. However, the safeguard is limited by Section 13(2)[79]. It empowers the authority to not "to disclose the facts which it considers to be against the public interest"[80]. This means that a detainee may not be allowed to represent himself or have a lawyer if the detaining authority considers it to be a threat to larger public interest. Consequently, any alternative interpretation of the situation can be turned against the accused, leaving too much power in the hands of the detaining authority unchecked. Thus, making the Act more susceptible to be abused by the authorities. Further, Section 10-A of the Act makes the grounds of detention severable in nature. Meaning, if an individual is detained on two or more grounds and either of the ground is "vague", "non-existent" or "not relevant"[81]. Then the relevant ground can be severed from the non-relevant one, thereby making the order of detention as valid in nature. The Act paves way for rectification of error carried out by authorities. Thereby, making the Act more prone to be misused by the government. Also, Section 22[82] of the Act gives clear pass to the authorities from any legal

[74] ibid. 162
[75] ibid.
[76] PSA, 1978 (n 81)
[77] The Jammu and Kashmir Public Safety (Amendment) Act,2018, s 8(1)(a)(i)
[78] PSA, s 13(1)
[79] PSA, s 13(2)
[80] ibid.
[81] PSA, s 10-A
[82] PSA, s 22

action against them for carrying out the detention in accordance with the Act. It assumes that the authority will always act in good faith.

In addition, Under Section 19(1), the government can choose to cancel or modify any detention at any point of time. However, subsection (2) to Section 19 adds a slight variation to the power of revocation. It states that there is no impediment to establishing a new order of detention against a person based on the identical circumstances as an earlier order of detention when the order is cancelled owing to illegality due to a 'technical defect'[83].That is to say, Section 19(2) permits authorities to arrest and detain a person again based on the same circumstances, even after the incarceration has been revoked. This results in a vicious cycle and a significant gap in the Public Safety Act. Furthermore, it creates opportunities for harassment against the same individual who is arrested again.

6.2.2 NATIONAL SECURITY ACT, 1980

The National Security Act[84] (NSA) has its roots in the Bengal Regulation III Act passed in the year 1818. The main objective behind the Bengal Regulation III Act was to arrest individuals who posed threat to colonial masters. In the post-independence Indira Gandhi after again coming into power in 1980 introduced the National Security Act. The Act was famously known by catchphrase "no vakil, no appeal, no daleel"[85].

Primarily, Section 3 of NSA empowers the central and the state government to detain any person "with a view to preventing him from acting in any manner prejudicial to the security of the state"[86] or Public order. Similar to PSA, Section 8 of the Act makes it obligatory for the authorities to make detainee aware about the grounds of his arrest within maximum period of 15 days[87]. However, section 8(2) grants discretionary powers to authority to not to disclose grounds of arrest in view of "public interest"[88]. Such expansive discretionary powers in the hands of authorities can jeopardize the rights of the detainee.

Section 9(1) of the Act makes provision for the constitution of an advisory board to review the detention, comprising of 3 members "who are or have been, or are qualified as, judges of

[83] PSA, s 19(2)
[84] The National Security Act, 1980 (Act No. 65 of 1980)
[85] Kartikay Aggarwal and Arjun Sharma, 'National Security Act, 1980 – Iniquitous Act and Constitutional Tyranny or a Justified Piece of Legislation' Jurist (1 May 2020) <https://www.jurist.org/commentary/2020/05/agarwal-sharma-national-security-act-1980/> accessed 31 August 2021
[86] NSA 1980, s 3
[87] NSA 1980, s 8
[88] NSA 1980, s 8(2)

a High Court"[89]. But the major setback of the provision is that the appointment of board members has to be done by the government. It's similar to an executive review of the executive's decision, except that the executive may also choose members who are ready to work hand in hand with the government, giving it unparalleled ability to act on its will[90]. A further hitch to the rights of accused emerges under Section 11(4) of the Act. According to the Section the proceedings carried out by advisory board has to be 'confidential'[91]. It also states that "Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board"[92]. Consequently, leading to violation of principles of natural justice of fair and unbiased hearing.

Further, Section 13 provides intemperate powers to the government to 'revoke or modify the detention order'[93]. Similar to PSA, this Act also contemplates principle of good faith in favour of the detaining authorities, excusing them from any legal liability for actions taken under the Act[94]. Also, Section 14(2)[95] expressly indicates that a new order can be issued regardless of whether the preceding order has been revoked or has expired. If the government seeks the same, it may result in a longer detention. Even if an individual is imprisoned for clearly illegitimate reasons, he will not be freed as long as government officials are able to include one of the grounds for imprisonment in the detention order. This highlights a noteworthy crevice within the National Security Act and further increases chances of badgering against the person who is captured again.

VII REPRESSION OF THE MASSES

There are significant lacunas in the current form of preventive detention laws. Widely expansive and unchecked powers under the preventive detention laws allow the government to book almost anyone under ambiguous charges. Furthermore, the government gets a clean chit even if an individual is wrongly incarcerated. With such weaknesses in place there have

[89] NSA 1980, s 9(1)
[90] Aggarwal and Sharma (n 96)
[91] NSA 1980, s 11(4)
[92] ibid.
[93] NSA 1980, s 13
[94] NSA 1980, s 16
[95] NSA 1980, s 14(2)

been many instances in the past as well as the present where government has used this tool to repress dissent, minority voices and opposition parties.

Back in 1977, the Shah commission had released a detailed report on the sheer abuses of power that were done under the garb of MISA during the emergency period that was declared by Indira Gandhi to curb the rise of communist opposition. The report had pointed that almost 35000 people were detained under MISA and a third of that number were members of political parties. The report mentioned that on the night when emergency was declared by Indira Gandhi, 67 members of opposition party members were detained in New Delhi alone.[96]

The carnage of the democratic fabric did not stop with these horrors of the past. They continue till date. For instance, in a report[97] submitted by Amnesty International it was stated that PSA violates the India's International Human Rights Obligation. It further elucidates the fact that the PSA is used to arbitrarily detain political activists and supporters instead of using ordinary criminal justice system. Individuals are detained without sufficient evidence of trial or conviction, majorly to keep them "out of Circulation"[98]. This is a clear and severe violation of the right to life and liberty. How can justice happen in cases such as these where the accused is sans legal aid in other words absolutely powerless. Consequently, one of the foremost protectors of human rights, Amnesty international, was recently forced to leave India due to government intervention with forceful closing of their bank account. As claimed by Amnesty they had to halt their operations in India due to act of reprisal. These few examples are indicative of the fact that use of limitless and arbitrary use of power can bring cause huge repercussions in future.

7.1 THE PATH TO TYRANNY

In absolute terms, tyranny is a form of governance which has no sense of constitution or laws or welfare or justice in the society. It is a form of repression meant to subjugate the masses and fulfill the 'whims', 'fancies' or desires of those that are governing above everything else. Such rulers are called tyrants. Mainly, they protect their position by brute force or violence

[96] Ludsin (n 11) 117

[97] Amnesty International India, 'Tyranny of a 'Lawless Law': Detention without charges or trial under The J&K Public Safety Act' available at <https://amnesty.org.in/wp-content/uploads/2019/06/PSA-Report_15-FINAL-LOW-Version-2.pdf> accessed 31 August 2021

[98] ibid.

and not wider opinion.[99] Tyranny, however, may not be limited to a single ruler. Varying type of governments like autocracy, oligarchy or democracy can be accused of tyranny.

India is a parliamentary form of democracy where the party that wins maximum seats in the general elections forms the government. Thus, the government that is formed has superior control over the Parliament's legislative plans. Significant control of the parliament can allow the majoritarian government to pass certain legislations that are, on the face of it, for the larger good but also leave a big space for misuse. By passing such legislations, government has behaved like a demagogue, very similar to what Plato had theorized regarding tyranny. He noted that a tyrant is a demagogue who appears to be justful on the outset but only ends up playing with the emotions of the masses. He appeases to their prejudices and comes to power.[100] Similarly, under the garb of security threats that cannot be managed with normal prosecution, the government of India has played with the insecurities of the citizens. They have used these laws to create a political stronghold rather than for the security of the country. For instance, according to a 2018 report by National Herald, NSA was used against Muslims and Dalits in Muzzafarnagar district of west UP with such high frequency that even a minor brawl between children of different communities led to the detention of the members of the minority community. The preventive detention laws were passed under the hope that they would be used judiciously and sparingly. However, these laws are rampantly used, even for cases that should have been the part of the normal path to prosecution. Not just this but these laws have been used to crush dissent of minority voices as well as against opposition political parties. Dr. Kafeel Khan was detained under the NSA for participating in protests against the CAA. He was kept in jail for three days even though he had a bail order. After that he was served a detention order under NSA. His detention was quashed after 7 months by the Allahabad high court. During this time his family had to request to the supreme court to get his case expedited in the high court. These are acts of mass repression and create fear in the society. Such fear is extremely dangerous for a democracy. It is a severe violation of the fundamental right of speech and expression and is nothing short of tyranny. The evidence of the tyrannical usage of preventive detention in India is immense and keeps on building every day. The cost to our country rises with every false incarceration and the fabric of our

[99] Antonis Coumoundouros, 'Plato's View of Tyranny' (2006) 71 <https://dsc.duq.edu/cgi/viewcontent.cgi?article=1448&context=etd> accessed 1 September 2021

[100] Sean Illing, 'The People's Tyrant: What Plato can Teach us about Donald Trump' Vox (2016) < https://www.vox.com/policy-and-politics/2016/11/7/13512960/donald-trump-plato-democracy-tyranny-fascism-2016-elections> accessed 31 August 2021

democracy weakens. Acts such as these can lead to mass revolts in the country leading to another war for independence.

RELEVANCY

The tussle faced by the democracies today is to balance security of state with individual liberty. Nations like India restored to draconian laws, as they feared that the criminal trial procedure would be insufficient in dealing with the terrorist activities. The ideology of introducing the concept of preventive detention during the colonial times was to suppress the voices of dissent and consolidate the power of British. Through such draconian laws the colonizers did not aim to protect the Indian citizens, but the main agenda was to weaken the strength of public to revolt. The British detained various freedom fighters such as Mahatma Gandhi, Jawaharlal Nehru under various preventive detention legislations. The idea was to instill fear in public and suppress the local voices who seek freedom from them.

When India gained independence from the colonial rulers, the constituent assembly members showcased dilemma over inclusion of preventive detention laws in the constitution of India. Some members were in favour of the inclusion of detention laws in the constitution of India. Because they could foresee a scenario where granting unfettered liberty to individuals could result in it being abused to achieve unjust ends[101]. While those in opposition perceived such laws as violation of democratic principles. They drew similarity between the proposed preventive detention laws and those that were prevalent during colonial times. Kamath while voicing out his views in the assembly said that "Has anybody considered how some other persons, possibly totally opposed to our ideals, to our conceptions of democracy, coming into power, might use this very constitution against us, and suppress our rights and liberties? This constitution which we are framing here may act as a Boomerang, may recoil upon us and it would be then too late for us to rue the day when we made such provisions in the constitution."[102]

With the expansion of scope of fundamental right to liberty and freedom, preventive detention laws need to stand the scrutiny of time. The relevancy of draconian laws comes into question as detention under these laws are in direct conflict with the ideas of freedom and

[101] Ludsin (n 11) 89
[102] ibid. 90

liberty today. In India the state rather than using it as tool for combatting terrorism, seems to be using it as a tool of suppression and scuttling the voices of dissent.

Prima facie the prevalent preventive detention laws seem to be against the very idea of natural justice. The lacunas present in the draconian laws lead to failure of justice. These laws deny a fair hearing to the detainee. Also, due to such unfair practices the right to reputation of innocent individual often gets jeopardized. Misuse of these laws by the government is a violation of the principle "equality before law". Both NSA and PSA manifest various loopholes which permits the authorities to misuse the law. It leads to arbitrary arrests which is in violation of Article 9 of ICCPR. A 2019 Human Rights Review report criticizes the arbitrary arrests done by government under PSA. It highlights the ambiguous number of detentions recorded by the government. In another report by J&K Coalition of Civil Society and Association of Parents of Disappeared Persons found that over 662 persons were detained under PSA for raising their voices against abrogation of Article 370. Even a leader like Omar Abdullah was detained under PSA. Out of the many reasons of his detention one was that he had encouraged the citizens to exercise their right to vote even though the militants had boycotted the polls. Such reasoning is nothing but ridiculous.

The above examples portray as to how these laws are used more as a tool of suppression rather than for the security of the country. The capricious usage of these laws are anti thesis to the principles of modern democratic state. Consequently, the preventive detention laws are slipping down the slope of relevancy in the current era.

RECOMMENDATIONS

The lacunas present in current legislative structure of the preventive detention laws points towards a dire need of change and filling the gaps of these legislations. Through reforms and amendments, the need is to balance the Right to security of the state against the constitutional freedom. With the following suggestions the idea is to reform the laws along the lines of natural justice and further decrease its arbitrary usage.

- The principle of good faith provided both under the PSA and NSA in favour of detaining authorities should be removed. This would reduce the chances of arbitrary arrest and detention and would lead to increase in government accountability.

- Guidelines should be framed which elucidates the moral code of conduct and standard operation procedure in accordance with principles of natural justice[103].
- People who have been wrongly detained and arrested should be compensated with sufficient amount to curb the loss that they might have faced. Medical assistance should also be provided to the victim and his family as being in jail would have negative impact on his mental health. Being termed as terrorist carries huge societal burden and stigma with it[104].
- There is need to distinguish between 'preventive detention' and 'punitive detention' "Preventive detention should not be reported as a substitute for the normal procedure established by law. There is a need to sensitize the authorities concerned that it should be resorted to as an exception in rare cases."[105]
- Advisory guidelines laid down by the court and under International law should be strictly adhered by the state and central government while detaining a person under preventive detention laws[106].
- Preventive Detention laws should be exercised only during the times of emergency and war and the government should be abstained from using it during peace time.
- The definition of terrorist activities and terrorist should be defined clearly and not in vague manner. It should be given restrictive interpretation.

CONCLUSION

The above discussed arguments highlight various legislative lacuna's present in current structure of preventive detention laws. First and foremost, the situations that commanded the inculcation of Preventive Detention in India have changed drastically over the years. The trust that was advocated by the most influential leaders of the independence era has been broken multiple times over and the mountainous evidence keeps on building everyday regarding misuse of the laws. The laws go against the principles of natural justice and is in violation of theory of Social Contract. The icing on the cake is the fact that the detainee's

[103] Bhat (n 71) 169
[104] Mehal Jain, 'UAPA & Sedition- Sufficient Amount of Compensation has to be given to all people who have been wrongly Arrested and Detained: Justice Madan Lokur' Live Law (2021) < https://www.livelaw.in/top-stories/uapa-sedition-sufficient-amount-of-compensation-wrongly-arrested-and-detained-madan-lokur-178086> accessed 1 September 2021
[105] National Human Rights Commission of India, 'Recommendation of NHRC on Detention' (2008) < https://nhrc.nic.in/press-release/recommendations-nhrc-detention> accessed 31 August 2021
[106] ibid.

right to information regarding his charges can be easily revoked and the detainee is kept sans legal aid. The detainee's family must shuttle between courts on their own dime and time to prove innocence while the authorities that manipulate are going normally about their lives. Such a despotic provision is naturally supportive of a military like order rather than being human centric. The laws have been practiced by placing ludicrous charges on people especially those of political importance. Genuine activists that should have complete freedom of peaceful protests are wrapped around in a laid back system, left to suffer the treachery of jails and mental harassment. By giving authorities impunity it has promoted ridiculous investigations and framing of charges, vengeful settling of personal vendettas and a constriction of the political space. The democracy that our founding fathers had envisioned is dying a slow death. Even a well-educated citizen cannot express his views peacefully because the clutches of vague scopes in preventive detention could befall anybody and that too in broad daylight with complete media attention. A foremost and most applauded organisation for the upholding of human rights like Amnesty was forced to exit without a blink. Even then Chief Minister of J&K was detained with irrelevant charges. There is a silver lining between a tyranny and a democracy and it appears that the country might just be right on the edge. The power does reside with the government to topple it right over, if not now then anytime in the future.

BIBILIOGRAPHY

BOOKS

1. Ludsin Hallie, Preventive Detention and the Democratic State (Cambridge University Press 2016)
2. McSherry Bernadette, Bernadette

REPORTS

1. Amnesty International India, Tyranny of a 'Lawless Law': Detention without charges or trial under The J&K Public Safety Act, https://amnesty.org.in/wp-content/uploads/2019/06/PSA-Report_15-FINAL-LOW-Version-2.pdf

RESEARCH ARTICLES/BLOG POSTS

1. Bajpai Ananya, Constitutional Law: AK Roy Case, (Lex Life India, 27 July 2020), https://lexlife.in/2020/07/27/constitutional-law-ak-roy-case
2. BBC, Who are the Uyghurs and Why is China being Accused of Genocide?' https://www.bbc.com/news/world-asia-china-22278037
3. Bhat Abid, Politics of Preventive Detention: A Case Study of Jammu and Kashmir Public Safety Act, 1978' (2020) 15(1) IJCJS, http://www.ijcjs.com/pdfs/Bhat15Issue1IJCJS.pdf

4. Bhat Abid, Preventive Detention in Counter-insurgencies: The Case of Kashmir' Insight Turkey (2019), https://www.researchgate.net/publication/337870818_Preventive_Detention_in_Counterinsurgencies_The_Case_of_Kashmir
5. Coumoundouros Antonis, Plato's View of Tyranny, (2006) https://dsc.duq.edu/cgi/viewcontent.cgi?article=1448&context=etd
6. Durgabai, Constituent Assembly of India Debates (Proceedings) Volume IX (16 September 1949), http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C16091949.html
7. Ganai Naseer, Arrests Under PSA Amount to 'Thought Crime', Say Kashmir Lawyer As 100s Remain Under Detention, Outlook (3 October 2019), https://www.outlookindia.com/website/story/india-news-arrests-under-psa-amount-to-thought-crime-say-kashmir-lawyers-as-100s-remain-under-detention/339932
8. Illing Sean, The People's Tyrant: What Plato can Teach us about Donald Trump' Vox (2016), https://www.vox.com/policy-and-politics/2016/11/7/13512960/donald-trump-plato-democracy-tyranny-fascism-2016-elections
9. Jain Mehal, 'UAPA & Sedition- Sufficient Amount of Compensation has to be given to all people who have been wrongly Arrested and Detained: Justice Madan Lokur' Live Law (2021), https://www.livelaw.in/top-stories/uapa-sedition-sufficient-amount-of-compensation-wrongly-arrested-and-detained-madan-lokur-178086
10. Laskar Manzoor, Summary of Social Contract Theory By Hobbes, Locke and Rousseau, 2014, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410525
11. National Human Rights Commission of India, Recommendation of NHRC on Detention' (2008), https://nhrc.nic.in/press-release/recommendations-nhrc-detention
12. O' Malley Pat, Governmentality and Risk, (2009) Sydney Law School Research Paper 09/98, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478289
13. Phusate Nirbhay, Freedom of Expression- Democracy, http://www.legalservicesindia.com/article/2307/Freedom-of-expression---Democracy.html
14. Principle of Natural Justice and Its Legal Implications, https://www.cusb.ac.in/images/cusb-files/2020/el/law/PRINCIPLE%20OF%20NATURAL%20JUSTICE_6th%20Sem.pdf

15. Sabhney Vidyun and Sivapalan Bhamati, In Illustration: A Brief History Of India's National Security Laws' The Wire (27 July 2019),https://thewire.in/law/in-illustrations-a-brief-history-of-indias-national-security-laws
16. Sharma Arjun and Aggarwal Kartikey, National Security Act, 1980 – Iniquitous Act and Constitutional Tyranny or a Justified Piece of Legislation Jurist, (1 May 2020) https://www.jurist.org/commentary/2020/05/agarwal-sharma-national-security-act-1980
17. Tekchand Bakshi, Constituent Assembly of India Debates (Proceedings) Volume IX (15 September 1949), https://indiankanoon.org/doc/213750
18. Tippabhatia Udeerna, 5 things to know about Hindus in Pakistan' (Hindu American Foundation, 13 October 2020, https://www.hinduamerican.org/blog/5-things-to-know-about-hindus-in-pakistan
19. Singh Bhupinder , 'Over 750 dead, Thousands Detained: 100 Days of Myanmar's Military Coup' (2021) https://www.indiatimes.com/news/world/myanmar-military-coup-100-days-photo-gallery-540231.html