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India's preventive detention laws

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Context: The Supreme Court's recently observed that preventive detention laws are a colonial legacy and confer arbitrary powers on the state. It is one more iteration of the perennial threat to personal liberty that such laws pose.

A Brief about recent SC verdict

Two separate cases in the Supreme Court recently highlighted the abuse of India's web of preventive detention laws that confer the executive with extraordinary powers.

In one case, SC ticked off the UP government for inappropriately invoking the National Security Act in a case with political undertones.

In another case (Pramod Singla vs UoI), the bench pointed out that India's preventive detention laws are a colonial legacy with a potential to be misused.

About Preventive Detention law

Preventive Detention can be understood as imprisonment of a person without trial, an act that is supposedly justified for non-punitive ends and is often described as a preventive measure rather than a punitive one.

The essence of the Law on Preventive Detention is entirely different from the arrest and incarceration under regular criminal prison, which is relevant in both a crisis and a calm scenario.

Constitutional Provision

Article 22 second part ensures protection for an individual who has been arrested or detained under a preventive detention law. The protection has been ensured to both citizens as well as aliens and includes the following:

Extent of detention: The detention of a person cannot exceed three months unless the advisory board reports sufficient cause for extended detention. Judges of a high court are part of this Board.

Provide reason for detention: The grounds of detention should be communicated to the detente. Although, the facts considered to be against the public interest should not be revealed.

Opportunity to make representation: The detente should be afforded an opportunity to make representation against the detention order.

Article 22 also authorises the Parliament to prescribe

The circumstances and the classes of cases in which a person can be detained for more than three months under a preventive detention law without obtaining the opinion of an advisory board

The maximum period for which a person can be detained in any class of cases under a preventive detention law; and

Kamaraj IAS Academy

Plot A P.127, AF block, 6 th street, 11th Main Rd, Shanthi Colony, Anna Nagar, Chennai, Tamil Nadu 600040

Phone: **044 4353 9988 / 98403 94477 / Whatsapp : 09710729833**

The procedure is to be followed by an advisory board in an inquiry

Regulations for Preventive Detention in India

India is one of the few nations in the world with a Constitution that provides for preventative detention in times of peace without the protections that are considered necessary in other countries to protect fundamental human rights.

The European Court of Human Rights, for example, has long concluded that preventative detention, as defined by the Indian Constitution, is unconstitutional under the European Convention on Human Rights, regardless of the protections enshrined in the statute.

Preventive detention may be used indefinitely under Article 22 of the Indian Constitution, whether in times of peace, non-emergency situations, or otherwise.

Detainees are denied the right to legal counsel, cross-examination, timely or periodic review, access to the courts, or compensation for wrongful arrest or imprisonment under the Constitution, which enables them to be held without accusation or trial for up to three months.

Historical use of Preventive Detention

The first Preventive Detention Act was passed on 26 February 1950, with a purpose to prevent anti-national elements from carrying out acts that are hostile to Nation's security and defence. The said act was supposed to end after the remaining 2 years in practice.

In 1971 Maintenance of Internal Security Act, MISA was instituted to establish internal security in India. It was regarded as a controversial act as it was being used continuously to harass and detain people who put challenges to the governance of Congress including certain opposition parties, reporters, and social workers.

Another Act named Foreign Exchange and Prevention of Smuggling Activities Act, COFEPOSA, entered in 1974, which provided for preventive detention to maintain and improve foreign exchange and to deter illegal trade.

This act was like a backup for MISA, 1971 and despite the repealing of MISA in 1977, COFESA persisted. The detention period for smugglers initially was for one year via another ordinance on 13 July 1984, this was increased to two years.

In the year 1985 Terrorist and Disruptive Activities (Prevention) Act, TADA was brought in the regard of Khalistan's separatist movement. Originally the act was only for two years but it was revised and reintroduced in the year 1987.

Till 1993 the length of this act had been extended every two years. From the end of its time frame in 1995 until POTA's enactment, there was no law centre level to combat terrorism in India.

Prevention of Terrorism Act, POTA, 2002, was presented as an act similar to TADA in April 2001. POTO (Prevention of Terrorism Ordinance, 2001) was formulated as an authoritative order in the background of terrorist attacks in the USA in 2001.

Unlawful Activities (Prevention) Act, UAPA, was first passed in 1967 to assert all such groups unlawful who are seen as separatist followers. Under this act, several organizations were considered null and void in the 1990s, in the context of the destruction of the Babri Mosque and the rise of separatist movements in Kashmir.

The 2012 UAPA amendment incorporated creation and distribution of high-quality counterfeit currencies, and supporting organizations considered unconstitutional under the scope of 'terrorism operation' as instances of those activities that present a danger to the country's economic stability.

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The latest amendment in the act was done in 2019 which grants the NIA the authority to put even individuals, besides organizations, as 'terrorists' on the ground of suspicion that they have links to act of terrorism.

Conclusion

Liberty of a citizen is a most important right won by our forefathers after long, historical and arduous struggles. We must confine the power of preventive detention to very narrow limits, otherwise the great right to liberty won by our Founding Fathers, who were also freedom fighters, after long, arduous and historical struggles, will become nugatory