

PREVENTIVE DETENTION VIS-A-VIS PERSONAL LIBERTY AND HUMAN RIGHTS

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“When the spirit of liberty, which now animates our hearts and gives success to our arms, is extinct, our numbers will accelerate our ruin and render us easier victims to tyranny.”

- Samuel Adams²

Personal liberty has been always held as the most *sacra sanctum* right in the history of humankind. The struggle for freedom or abolition of slavery or abolition of any kind of oppression has been the main objective of the majority of the human race throughout the globe which has witnessed conflicts and faced wars. All one needs is personal liberty. Life without personal liberty makes no sense or makes life like animal existence. Perhaps, that is the reason why most of the legal systems including India have placed right to life and personal liberty together. Such an important right has been in question or is undervalued in few legal systems taking away or curtailing personal liberty vis a vis right to life itself. Indian legal system too has come into conflicts when it comes to deal with preventive detention and personal liberty. These are not only the conflicts between Art. 21 and Art. 22 of the Indian Constitution, but also the conflicting contrary to the values or principles of human rights.

Personal liberty under international law

The provisions of personal liberty under international law are not new, although they are not produced in the documentary form, the struggle for personal liberty has originated with the origin of the civilization itself. It was after witnessing two world wars, that the international community came ahead with the Charter of the United Nations and later on the General Assembly of the UN adopted the Universal Declaration of Human Rights (UDHR), 1948. Article 3 of the UDHR states, “Everyone has the right to life, liberty and security of person.” This has been given a wider recognition by the member States with the adoption of International Covenant on Civil and Political Rights under Art.4. There are various international conventions and treaties that have been adopted by the international community especially to establish peace and harmony; peace and harmony are the two factors which are very much necessary for enforcing the right to liberty and right to life.

Personal liberty as the principle of human rights

Taking a fair look at the various principles or values of human rights, one can realize that the principles of human rights have undergone change for ages as the human species go on developing. However, two of its principles never underwent any change, namely, a) Universal order governing all men and b) Inalienable rights of the individual. These are nothing but the right to equality and the doctrine of basic structure or fundamental rights. Among the very many rights envisaged as fundamental rights the prime most rights which include almost all other rights are the right to life and personal liberty. Both these rights have evolved from the values of human rights philosophy. These rights have never undergone change in the past; they are well placed in most of the legal systems today and perhaps, they will continue to be the basic rights in future too.

Preventive detention under Indian legal system

India is one of the few countries in the world whose Constitutions allow preventive detention even during peacetime. Specifically, under Article 22 of the Constitution of India, preventive detention may be implemented *ad infinitum* whether in peacetime, non-emergency situations or otherwise. The Constitution expressly allows an individual to be detained, without charge or trial, for up to three

months and denies detainees the rights to legal representation, cross-examination, timely or periodic review, access to the courts or compensation for unlawful arrest or detention. In short, preventive detention as enshrined under Article 22 strikes a devastating blow to personal liberties as enshrined under Article 21. These two provisions have been under question in front of the Judiciary in various cases. *A.D.M. Jabalpur v. Shiv Kant Shukla*³ is one of the blows that the Indian Supreme Court gave to the Indian legal system. However, the decision in the case of Shiv Kant Shukhla did not last as it was overruled and held be bad in the eyes of law.

The Indian Parliament has enacted various laws to implement Art. 22: The Preventive Detention Act, 1950; The Maintenance of Internal Security Act 1971 (MISA); The National Security Act, 1980; Terrorist and Disruptive Activities Prevention Act (TADA); Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) and there are few state Acts which are enacted by the State legislatures. The implementation of these laws has caused more damage than protection to the society. They have added more burden on the courts as most of the detentions are challenged and those who have resources get out of it and the poor languish in the jail for longer period for doing no offence.

The contribution of Indian Judiciary is very valuable as for as preventive detention is concerned. Public Interest Litigations (PIL) in India have made a lot of difference in the legal system and while the interpretation of Art.22 has been narrowed down, the interpretation of Art. 21 has been enlarged and expanded. "Due Process" which was inserted by Maneka Gandhi's case has taken our legal system to its highest heights. There are cases concerning bonded labour, under trial prisoners including women in 'protective' custody, for instance, *Bandhua Mukti Morcha v. Union of India*,⁴ *Hussainara Khatoon v. Home Secretary, State of Bihar*⁵, etc., where the Indian Supreme Court has upheld the right of personal liberty over preventive detention. There have been reports of people spending long years in jail, which could have been averted if prisons were not as inaccessible as they are. *Rudul Shah*⁶, the man who spent fourteen years in jail because he had been considered unfit to stand trial, and continued to remain untried despite having been declared fit, is one well known instance. Recent instances from Bihar⁷ and West Bengal⁸ reveal that the neglect that occasions such illegal incarceration continues. The incapacity of a person to follow up on his trial and to procure orders in time has been known to keep him in prison long after he was due to have been released.⁹ The inability to furnish bail or sureties was reportedly one such reason for the large under trial population. All such cases have been taken compassionately by the Indian Judiciary and directions have been issued against the arbitrary and high-handedness of the administrative authorities.

Conflicting factors

Many legal systems in the world have not included preventive detention under their laws as it does infringe the right to life and personal liberty. Preventive detention is nothing but a limitation to the right to free movement. The purpose of this provision is to say, 'prevention is better than cure', which has not been proven effective in India. Prevention is better than cure, but cure without ailment also is not reasonable, that is to say, that the protection itself has become an ailment and defect in the system.

On the one hand the State wants to prevent the unwanted incidents to happen because security is very important to any civilized society or State. On the other hand, right to life and personal liberty is held to be the *sacra sanctum* of all rights. Following both these rights strictly brings down the

legal system with the criticism that these are nothing but conflicting provisions. In other words, the interpretations given by the Indian Judiciary is not enough to solve the age old conflict. There is still place for fresh and new interpretation of the provisions under Art.21 and Art.22 of the Indian Constitution.

Conclusion and suggestions

The philosophy of Human Rights envisages a society which is just and moral without which the basic needs of the welfare society cannot be attained. Thus, it is very essential that the values of Human Rights be incorporated in one way or the other in the legal system so as to attain the end goal of prosperous and happy society. When personal liberty and right to life themselves are under question, and when preventive detention itself is not preventive but a calamity to an individual, why should one need to give any importance to such provisions? Detention is needed to curtail and punish the offenders but under preventive detention the possibilities of ordinary and innocent people getting detained is more. Thus, doing away with such provisions from the Indian legal system is the felt need of the welfare State like India.

The question remains as to what to do to prevent the possible crimes and organized crimes like terrorism, communal violence, religious conflicts, etc. The answer is simple and effective, that is, to enhance our security services like intelligence agencies which must be equipped with modern technologies.

The best possible thing is to do away with the provisions of preventive detention or any kind of arbitrary arrest. Secondly, if at all we decide to continue with the existing system, periodical reviews must be made on the detention cases and if not found genuine must be released within three weeks. Thirdly, if wrongly detained for any reason, adequate compensation must be granted to the aggrieved party. Fourthly, the period of detention must be prescribed by law, that is to say that Art. 22(7) (b) needs to be amended. Fifthly, all that is needed is the political willingness to witness and transform India into a Welfare State to its real sense which is peaceful and just.

(Endnotes)

- 1 Assistant Professor, DES's SNFLC, Pune
- 2 Bob Kelly, "Quotes Worth Repeating", Better Yourself Books, St. Pauls, Bandra, p. 259.
- 3 (1976) 2 SCC 521.
- 4 (1984) 3 SCC 161.
- 5 (1980) 1 SCC 81.
- 6 *Rudul Sah v. State of Bihar* (1983) 4 SCC 141.
- 7 *Serajuddin Ansari v. Home Secretary, State of Bihar* (1999) 1 Bihar LJR 670.
- 8 *R.D.Upadhyay v. State of A.P.* (1999) 7 SCALE 618.
- 9 *Ayodhya Rajbhar v. State of West Bengal* (1995) 2 Cal HCN 82.