PERSONAL LIBERTY AND PREVENTIVE DETENTION IN INDIA, UNITED STATES AND UNITED KINGDOM

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Abstract: - *The area of preventive detention is very much administrative-ridden. The law of preventive detention has been so designed to leave a very discretion with administrative authorities to order preventive detention of a person, and leave only a narrow margin for judicial review. However, the courts have been conscious of the fact that preventive detention affects one of the most cherished rights of a human being, namely, the freedom of his person and have, therefore, gradually evolved a few principles to control administrative discretion in the area in order to safeguard the individual's freedom from undue exercise of power.*

The Courts have achieved by construing the relevant provisions of Article 22 liberally, by insisting that the provisions of the specific law under which an order of preventive detention is made should be observed scrupulously, and by applying vigorously and creatively some of the principles of administrative law controlling administrative discretion. The law of preventive detention has been a very contentious measure and has given rise to a catena of cases and it will not be an exaggeration to say that by now a distinct jurisprudence of preventive detention has been evolved in the country.

1.1 Introduction

Centuries before the use of *habeas corpus* in England, there were procedures (remarkably analogous to *habeas corpus)* in Spain. Thus the justices of Aragon were authorized to issue a writ of manifestation ordering a goaler or other custodian to bring a prisoner before them. The Justices acted on the petition of the detenu and if the detention was illegal, a detenu was set free or remanded for trial. This procedure dates back to the 13th century. While the law of the Spanish Colonies in America was based on the law of Castile, the law of the North American Colonies was the law of English settlers. The common law of *habeas corpus* is still recognized in the U.S.A. and though the constitutional guarantees of *habeas corpus* are embodied in the federal and state constitutions, they are to be interpreted in the light of common law.

1.2 Background

Historians of English constitutional law are familiar with *Darnel's case* (1627) which was followed by the various Habeas Corpus Acts. Indian law followed to a great extent the English concept of personal liberty but the Constituent Assembly of India decided to embody the law of personal liberty (as well as of preventive detention) in the Constitution. The problem of its constitutional presentation brought American law into the picture and the Assembly introduced at first the 'due process of law' clause in the relevant draft article. The Assembly later changed its mind, mainly influenced by the communal upheaval caused by the partition of India in 1947. It substituted for the due process of law clause (which should have given extensive powers to the Judges) the "procedure established by law" clause which was borrowed from the Japanese Constitution. There was considerable opposition in the Assembly against this re-formation of

Article 21[1] brought forward in favour of the change deserve our attention.

Sir Alladi Krishnaswami Aiyer one of the defender of the change, had this to say : " I might mention that the main reason why 'due process' has been omitted was that if that expression remained there, it will prevent the State from having any detention law, any deportation laws and even any laws relating to labour regulation. Labour is essentially a problem relating to persons and I might mention that in the U.S. Supreme Court, in the days when the conservative regime dominated U.S.A. politics, enactments restricting the hours of labour constituted a violation of the 'due process of law'.

One American would be employed for five hours, ten hours or twenty hours and make a slave of himself and yet it was held to be interfering with due process of law if there was a restriction of the hours of labour until the U.S. Supreme Court put a different construction in a later decision. After a consideration of all these points, with due regard to the whole history of the expression 'due process; in the U.S. Supreme Court, this House deliberately came to the conclusion to drop that expression 'due process' from our articles instead of leaving it to the Supreme Court Judges to mould the Constitution or to read up all the decisions of the Supreme Court and adopt such decisions as appealed to them according to their conservative or radical instincts as the case may be."

Preventive detention is frequently used in support of deportation orders issued by the Government of Ceylonn. They affect seriously the rights of the Indian Community in Ceylon. Under Section 31 of the Immigrants and Emigrants Act the Minister of Defence and External affairs may make deportation orders when he deems it to be conducive to the public interest. It happened frequently that deportees who were detained brought *habeas corpus* petitions. The courts took the view that what seemed to the Minister to be conducive to the public interest was not a justifiable issue. Thus the *habeas corpus* petitions failed[2].

Dr. Ambedkar, the Chairman of the Drafting Committee, remarked in the Constituent Assembly that it seems uncertain whether people and parties will behave in a constitutional manner in the matter of getting hold of power or whether they would resort to unconstitutional methods for carrying out their purposes. "If all of us" he added, "followed purely constitutional methods to achieve our objective, I think the situation would have been different, and probably the necessity of having preventive detention might not there at all."

The interconnection between preventive detention and political stability was also a theme recurring in the Parliamentary Debates on the renewal of the Preventive Detention Act. The Home Minister introducing the Bill extending the life of the Act by three years explained that the Central Government treated the Act mainly as an effective measure of psychological importance in the fight against subversive activities. In 1957 it was stressed in Parliament that the Act called for further prolongation to meet situations such as the sabotage activities in Kashmir, communal riots in Ramanathapuram and actions like the burning of the Constitution by the Dravida Kazhaga in the South. But the Madras Government did not take advantage of preventive detention and the same attitude was taken by the Communist Government in Kerla.

[1] See Constituent Assembly Debates VII, 852, 999-1001 and IX 1496, 1543, 1547, 1551, 1556 etc. Present Art 21. Was draft Art. 15.

[2] See *Sudeli Audy Asseri v. vonden Dreessers,* 1952 N.L.R, 66; *fabu Nadar v. Grey.*

In 1960, the Home Minister remarked in Parliament that the Communist Government in Kerla (in not using the Act) had to pay a 'tremendous price'. If it had taken action under the Act, the consequences for them would not have been "disastrous". The Home Minister also referred to the language disturbances in Assam and stated that if the Assam Government had applied the Act, "loss and devastation would have been avoided."

1.4 Gopalan's Case and Preventive Detention

Indian Judges often stressed the analogy between two *classic* cases on preventive detention i.e., *Gopalan's case*[3] (India) and *Liversidge v. Anderson*[4] (U.K.) Before commenting on the elements of this analogy, the British Law of Preventive detention deserves our attention

Preventive detention in the U.K. is purely an emergency institution. It appeared in the First and Second World Wars in the form of Defence Regulations 14B and 18B. Regulations 18B states that "if the Secretary of State has *reasonable* cause to believe any person to be of hostile origin or association or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm…….". Detention may be applied to such a person. Regulation 18B was later amended to permit detention of persons because of their membership in subversive organizations. The question of membership in political organizations also arose in Indian preventive detention cases *e.g.,* in *Sita Ram Kishore v. State of Bihar*[5] or in *Gulam Quadir v. State of Jammu & Kashmir*[6]. But it never assumed the same dimesnsions as in American or English Law. As generally known, the American Historical Security Act, 1950, introduced detention particularly in relation to Communist organizations.[7]

Preventive detention came under judicial review (in England) in a number of cases such as the *King v. Secretary of State, ex parte Less,*[8]*Liversidge v. Anderson,* [9]*, Rex. V. Home Secretary, ex parte Budd,*[10] *Greene v. Secretary of State*[11]*, Greene Knight v. Borough of Guildford* (unreported case) etc.[12]

What is characteristic in the above cases? First of all, the reasonableness of grounds of detention was not allowed to be a justifiable issue. No objective test was applied in these cases but the subjective satisfaction of the Government (detaining authority) was decisive. However, the courts went into the procedural safeguards provided by the law.[13] An oral detention order or one essentially faulty in form would be struck down.

Regulation 18B provided also for Advisory Committees to which detenus could submit objections. The work of these Committees was heavily criticized, merely because of undue delay in the hearing of cases.

Comparing the position in English and in Indian Law, the following remarks would be relevant. In both systems of law of preventive detention the courts cannot go into the sufficiency of the grounds of detention. It has been made clear in *Gopalan's* that the *subjective* satisfaction of the detaining authority would be accepted by the

[3] A.I.R. 1950 S.C. 27.
[4] (1942) A.C. 206
[5] A.I.R. 1956 Pat. 1.
[6] A.I.R. 1955 J. & K. 35.

[7] Detention would be applied to them if there is *reasonable* ground to believe certain persons will engage in acts of espionage or sabotage.
[8] 1942 A.C. 206
[9] *Ibid*
[10] (1941) 2 All E.R. 749 K.B.
[11] (1942) A.C. 284
[12] See Emergency Detention in Wartime : The British Experience by C.P. Cotter
[13] For instance, procedural issues were considered in *Rex. V. Brixton Prison, Exp Pitt-Rivers,* (1942, I All E.R. 207).

judges. But the judges in both countries made it clear that the formula adopted in the law of preventive detention is an exception to the rule.

2. Judicial Review of Preventive Detention

Thus Patanjali Sastri, J., *State of Madras v. V.G. Row*[14] stated that "the formula of subjective satisfaction of the government…cannot receive judicial approval as a general pattern of reasonable restrictions on Fundamental Rights". The same idea was expressed in 1951 by the Judicial Committee of the Privy Council which held that the meaning of "reasonable cause" as laid down in the *Liversidge* case should not be considered as laying down a general rule for the consideration of such a phrase.[15] However, there is difference between the law laid down in *Gopalan's* case and in the *Liversidge* case that according to the first, preventive detention is applicable even in non-emergency time, while according to the second, it is confined to periods of emergency.[16] Indian Judges have given extensive relief to detenus by applying the procedural safeguards provided in Article 22 of the Constitution in preventive detention cases. Among all the available cases the decision in *Puranlal Lakhanpal v. Union of India,*[17] deserves special attention. The appellant in that case challenged the validity of S.11[18] of the Preventive Detention Act, 1950, on the ground of its inconsistency with sub-clause (a) of cl. (4) of Article 22.

Article 22 (4) of the Constitution of India reads as follows:

"No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless (a) an Advisory Board…has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for *such detention".*[19]

[14] (1952) S.C.J. 253

[15] *Nakkuda Ali v. Jayaratne* (1951) A.C. 66.
Sir Carleton Allen *(Law and Orders,* 1950 pp. 243, 251) emphasizes that the effect of *Liversidge v. Anderson* is not confined to war-time detentions. "It gives to executive discretion an almost unlimited charter for all time…". "This extreme expedient….might reappear even in time of peace under the Emergency Powers Act, 1920". [Sir Carleton Allen appears to have changed his opinion in the second edition of his book. See *Law and Orders* (1996) at p. 293. The relevant passage is as below (slightly adapted).
"…'if the minister has reasonable cause to believe' was interpreted by the majority in *Liversidge v. Anderson* to mean, 'if the Minister *in his own mind* has reasonable cause', i.e., that he is the sole judge of his own 'subjective' reasonableness. This case has never had many champions among the legal profession and , as against Lord Atkin's shattering dissent, it has generally been regarded as the House of Lords' contribution to the war effort'. In *Nakkuda Ali v. Jayaratne* the Judicial Committee, *per* Lord Radcliffe , had this to say of it-
'It would be a very unfortunate thing if the decision in *Liversidge's Case* came to be regarded as laying down any general rule as to the construction of such phrases when they appear n statutory enactments. After all, words such as these are commonly found when a legislature or law-making authority confers power on a minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power'. In other words, the psychological subtlety of *Liversidge v. Anderson* is to be limited to the special case of Regulation 18B. The decisions of the Privy Council are not binding on English courts, but it seems probable that this interpretation will be generally accepted; and in peace-time at least, the draftsman who wishes to make his statute 'judge-proof' will adopt some other form than 'reasonable cause". "The discussion of Reg. 18B cases which formed part fo the text in the 1950 edition has been relegated to App. I in the 1956 Edition. Ed. J. I. L. I.J

[16] If an emergency were constitutionally proclaimed in India the right to move the Courts by *habeas corpus* petitions in defence of personal liberty might be temporarily suspended according to Art. 359 of the Constitution. This would seem to be the same position as in Article I Section IX (2) of the U.S. Constitution.

[17] (1958) S.C.J. 510

[18] Section 11 Preventive Detention Act, 1950, (1) In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate government may confirm the detention order and continue the detention of a person concerned for such period as it thinks fit. (2) In any case where the Advisory Board has reported that there is in its opinion no sufficient cause for detention…, the appropriate government shall revoke the detention order…"

[19] Art. 22 (7) states that if detenu are to be detained beyond the period of 3 months without review by an

The appellant's contention was that "such detention" refers not merely to the original order of preventive detention, but to detention for a period longer than 3 months. The respondent argued that "such detention" referred to preventive detention simplifier. The Court (Sarkar, J., dissenting) pronounced itself in favour of the respondent's contention. It referred, inter alia, to *Gopalan's* case in which Kania, J., had interpreted "such detention" as referring to detention for a period longer than 3 months.[20] The Court also referred to *Dattatraya v. State of Bombay*[21] in which Mukherjea, J. adopted the same views as Patanjali Sastri, J., in *Gopalan's case.*

The decision in *Puranlal's* case is also important for the interpretation of Article 22 (5) of the Constitution. It reads as follows:

"The authority making the order of preventive detention shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order". These two separate but interconnected rights of the detenu had been already considered by the Supreme Court in *Vaidya's Case*[22]. One of the crucial questions is whether the Court can go into the sufficiency of grounds of detention as necessary for the purpose of making a representation.

Patanjali Sastri and Das JJ., took the view that this would be a deviation from the essential principles adopted by the Supreme Court in *Gopalan's* case. However, the sufficiency of grounds of detention as ventilated in *Gopalan's* case had a completely different meaning. It meant control of the satisfaction of the detaining authority into which the courts are not authorized to inquire, while the sufficiency of grounds of detention for the sole purpose of making a representation is obviously a different matter and can be scrutinized by judicial authority.[23]

The Courts (relying on the procedural safeguards of Art... 22) gave also relief to detenu in other respects. Thus it was held that the Government (confirming the order of detention) could not modify the grounds of detention on which the appropriate Magistrate bases his satisfaction. This would amount to the substitution of its own satisfaction for that of the Magistrate, a proposition which is not acceptable.[24]

Detention orders based on vague grounds were also questioned by the Courts.[25] If a detention order was made on several grounds and some of the reasons of passing he order were found to be non-existent or irrelevant, the order was considered bad. In *Dwarka Das Bhatia v. The*

Advisory Board, the Parliament should in such a serious case prescribe the special circumstances under which, and the class or classes of cases in which this can be done. The dissenting Judges in *Gopalan's* said that the Preventive Detention Act should have specified the more serious circumstances and cases in which detenu suffer confinement for more than 3 months without intervention of the Advisory Board. However, these constitutional safeguards as to Advisory Boards (as well as to the maximum period of detention) can be reduced to nil whenever the executive and legislature care to do so. Through Advisory Boards now function in all types of cases, Parliament could easily do away with them, simply by applying Article 22(7)(a) as interpreted in the decisions in *Gopalan's* case. The maximum period of detention has to be through the extension of detention orders on the basis of succeeding Preventive Detention Acts. See *S. Krishnan v. State of Madras,* (1951) S.C.J. 453. Bose, J., gave a dissenting judgement in this case.

[20] Patanjali Sastri, j., had adopted a different view

[21] (1952) S.C.J. 235.

[22] (1951) S.C.J. 208. See also *Ram Krishan v. State of Delhi* A.I.R. (1953) S.c. 318; *Ujagar Singh v. State of Punjab* A.I.R. (1952) S.C. 350.

[23] See also *Prem Nath v. Union of India,* A.I.R, 1957 Punjab 235. however, the supply of grounds to the detenu is limited by Art. 22 (6) already. The disclosure of facts considered to be against the public interest cannot be required.

[24] *See Umaraomal v. Rajsthan,* A.I.R. (1955) Raj. 6

[25] See *Ghulam Quadir v. State of J & K.* A.I.R. (1956) Patna 1; *Moolsingh v. State of Rajsthan,* A.I.R. 1958 Rajsthan 158.

State of Jammu & Kashmir,[26] the court said that upholding such a bad order would mean to substitute the objective standards of the court for the subjective satisfaction of the detaining authority which would be contrary to the law laid down in *Gopalan's case.*

In *Dharam Singh v. The State of Punjab,*[27] the contention was that the Board submitted its report too late. The court held the detention illegal. The court also struck down detention orders if the detaining authority acted mala fide or if the grounds were irrelevant. Irrelevancy (as distinguished from sufficiency) of grounds is a justifiable issue.

3. Conclusion

In democracy it is not enough to ensure the fundamental rights like right to life and liberty but it is the duty of the state to provide such environment to exercise those right freely and without any fear or pressure. Then only we can say that the state is behaving in accordance with the philosophy of the constitution.

[26] (1957) S.C.J. 133.
[27] A.I.R. 1958 S.C. 152