HARMONISING THE CONFLICT BETWEEN NATIONAL SECURITY ACT, 1980 AND PERSONAL LIBERTY: AN ANALYSIS WITH SPECIAL REFERENCE TO THE VERDICT IN A. K. ROY VERSUS UNION OF INDIA

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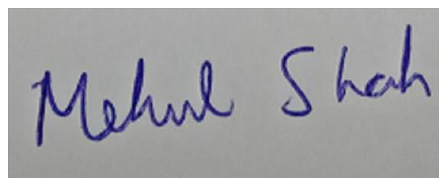
DECLARATION

I, MEHUL SHAH, pursuing Master of Laws (LL.M) from National Law University and Judicial Academy, Assam, do hereby declare that the present dissertation titled "HARMONISING THE CONFLICT BETWEEN NATIONAL SECURITY ACT, 1980 AND PERSONAL LIBERTY: AN ANALYSIS WITH SPECIAL REFERENCE TO THE VERDICT IN A. K. ROY VERSUS UNION OF INDIA" is an original research work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise, to the best of my knowledge.



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PREFACE

Laws enacted for the purpose of national security are essentially preventive detention laws that are meant to prevent an individual from engaging in any activity that might be prejudicial to the national interest. These preventive detention laws are different from punitive detention laws. Preventive detention laws such as the National Security Act, 1980 do not prescribe to the strict adherence of the procedural rights and safeguards that are otherwise accorded to the individuals who may be the subject of punitive detention. Thus, preventive detention laws are considered to be draconian in the sense of their perceived unwarranted intrusions upon the personal liberty of individuals that are not based upon proved facts but mere suspicion of the detaining authority as regards to the possibility of an individual engaging in Acts that are prohibited under the concerned law of preventive detention.

Notwithstanding the fact that the preventive detention laws deprive the personal liberty of individuals to an extent greater than that which may be provided for under the normal statute, yet, in light of the fact that India is continuously subjected to a lot of adverse activities that have the effect of seriously impeding the normal functioning of the State, it can be considered that preventive detention laws are a necessary evil.

Since, preventive detention laws directly affect the personal liberty of individuals and are a subject matter of great criticism, it becomes pertinent to have a look at the various preventive detention laws in the country as well as the opinion of the Courts with regard to the validity and limits of such laws which is the subject matter of this research and how the preventive detention laws can be harmonised with personal liberty all of which is essentially the subject matter of this research.

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1950	Preventive Detention Act
1955	Essential Commodities Act
1968	Jammu & Kashmir Public Safety Act
1971	Maintenance of Internal Security Act
1973	The Code of Criminal Procedure
1974	The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act
1976	The International Covenant on Civil and Political Rights
1978	Constitution (Forty-Fourth Amendment) Act
1980	The National Security Act
1980	The Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act
1980	National Security Ordinance
1987	Terrorist and Disruptive Activities (Prevention) Ordinance
1988	The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act
2019	Citizenship (Amendment) Act

Table of Abbreviations

Serial no.	Abbreviation	Explanation
1.	AC	Appeals Cases
2.	AFF.	Affairs
3.	AIR	All India Reporter
4.	Art.	Article
5.	Chap.	Chapter
6.	Chap.	Chapter
7.	CIV.	Civil
8.	Cl.	Clause
9.	COFEPOSA	Conservation of Foreign Exchange and Prevention of Smuggling Activities Act
10.	CrPC	The Code of Criminal Procedure
11.	DENV.	Denver
12.	DENV.	Denver
13.	ed.	Edition
14.	etc.	Etcetera
15.	HARV.	Harvard
16.	Ibid.	Ibidem
17.	ICCPR	International Covenant on Civil and Political Rights
18.	IJLLJS	International Journal of Law and Legal Jurisprudence Studies
19.	INT'L.	International
20.	INTL.	International
21.	IPC	Indian Penal Code
22.	J.	Journal
23.	JURIS.	JURISPRUDENCE
24.	L.	Law
25.	MICH.	Michigan
26.	MIL.	Military
27.	MISA	Maintenance of Internal Security Act
28.	NSA	National Security Act

29.	p.	Page
30.	PAC.	Pacific
31.	PDA	Preventive Detention Act
32.	POL'Y.	Policy
33.	Rev.	Review
34.	RTS.	Rights
35.	SC	Supreme Court
36.	SCC	Supreme Court Cases
37.	SCR	Supreme Court Reporter
38.	Sec.	Section
39.	STUD.	Studies
40.	Supp.	Supplement
41.	v.	Versus

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CHAPTER I

INTRODUCTION

Right to life and personal liberty is one of the most basic and fundamental right that can be given to people in a civilised society. It is one of the most basic right from which all other rights follow. Almost all the nations of the world have provision for conferring right to life as well as personal liberty, though the interpretation and extent of the words vary across different countries. The various international instruments such as the Universal Declaration on Human Rights too provide for the protection of life and personal liberty. Even though these rights are so fundamental and non-derogable, yet, they are not absolute. The enjoyment of such rights is subjected to certain limitations. Just like right to life and personal liberty accrues to human beings, in the same manner, sovereignty and national security accrues to the States.

A modern nation State has to deal with a lot of adverse interference in its day to day functioning both from external as well as internal factors. These seek to disrupt the public order, security of state, as well as the otherwise normal functioning of government and social life of the public. To deal with such situations, the governments enact certain legislations with stringent provisions. The provisions of such legislations are often such which seek to restrict the individual's life and liberty in a manner which would generally not be permissible. For instance, the rights available to the accused such as the right of information as to the grounds of arrest, right to legal counsel, etc. are not available to individuals who are booked under such legislations. The National Security Act, 1980 is one such legislation. Though these legislations are enacted with the legitimate aim of primarily protecting the national security and sovereignty, the provisions contained therein are a source of much discontent among the human rights activists in particular and the public in general. The different jurists too have different opinions upon the issue. As a result, a balance needs to be achieved between the needs of the State to protect its

sovereignty and security on one side and the right to life and personal liberty of individuals on the other.

1.1 INTRODUCTION

A government based upon a democratic system is founded upon the twin ideals of the supremacy of the rule of law as well as the judicial protection of the fundamental human rights and freedoms. Within this system of governance, the right to life and personal liberty has occupied a position of pre-eminence. This right to life and personal liberty is looked upon as the matrix of all other freedoms and the same is zealously safeguarded by the courts of law against any form of arbitrary encroachment by any branch of the government.

The concept of limited government basically means defining the spheres within which the government should function so as to not confer them absolute powers to interfere with the life of people. This sphere is basically determined by a statute. For instance, in India, the Constitution of India, 1950 provides the powers and functions of the government while at the same time providing limitations to the exercise of power by way of provisions of fundamental rights, etc. The primary objective of the State is to protect life and liberty of the people. But to what extent can the State interfere with such right of people for the preservation of the same is a question that needs to be answered. The concept of limited government ensures that the government does not unnecessarily interfere with the life and liberty of people by providing certain safeguards for the same. For example, in India, owing to the concept of limited government, the government cannot arbitrarily make a law concerning preventive detention for the sake of national security, public order, etc. so as to take away the liberty of persons except by adhering to the procedural safeguards. All preventive detention laws in India shall conform at least to the basic safeguards within Art. 22. as well as Art. 21.

As a result we can see that almost all the democratic Constitutions of the world contain provisions for protecting the life and personal liberty of individuals. Not only the democratic Constitutions of individual Nations, but even the international Conventions and Covenants contain provisions for the protection of life as well as personal liberty.

Apart from the concept of life and personal liberty, sovereignty of States also is a concept that is essential to understand the true nature of life and personal liberty and the limits upon the same. Sovereignty in its most basic sense implies the capacity of the Nation to have complete say in all the mattes within its territory. National security too implies the absence of any external or internal influence which might affect public order, security of State, etc. Sovereignty and national security are always key concerns for national governments.

Thus, in order to maintain the sovereignty and national security, the governments are forced to enact certain legislations providing for preventive detention, amongst other things, the provisions of which slightly tilt away from the otherwise protection accorded to the citizens. It means that the legislations concerning preventive detention contain provisions which are such that they are somewhat different from the ordinary processes involved in matters of punitive detention or detention in cases where the charge against the person has been proved by a competent Court.

This trend has been fuelled mainly by the following three powerful actors:

1. The exigencies of war and terrorism when for national survival, national security takes precedence over the personal liberty and security.

2. Technological advances enabling the anti-social elements to act against the state by sitting within the four walls of their house or even from outside the country.

3. The lack of a clear and specific legislation to deal with such problems.

The Preventive detention laws in India can be somewhat traced to the Bengal Regulation III of 1818[1] which prescribed the government the power to arrest anyone on grounds such as defence and public order while at the same time denying any remedy by way of judicial proceedings to the person so arrested. This was followed by the Rowlatt Acts of 1919[2] a century later that permitted the confinement of a suspect without trial. After independence, Preventive Detention Act of 1950 (hereinafter PDA, 1950) was the first law providing for preventive detention in India. It is to be noted that the National Security Act, 1980

[1] Bengal State Prisoners Regulation III 1818.
[2] The Anarchical and Revolutionary Crimes Act 1919.

(hereinafter NSA, 1980) is in tune with the PDA, 1950 with slight modifications. The PDA, 1950, expired in 1969 that paved the way for the Maintenance of Internal Security Act, (MISA) 1971, giving similar powers to the government. After the Maintenance of Internal Security Act (MISA) was repealed in 1977, it paved way for the government to enact the National Security Act (NSA), 1980.

Generally, when a person is put under arrest or detention, he or she is guaranteed of certain basic rights which include knowing the grounds of arrest[3]. Further, within twenty four hours of arrest, the person so arrested has to be produced before a Court or Magistrate.[4] Additionally, The Constitution of India, 1950 provides to the arrested person the right of being informed the grounds of arrest as well as the right to legal practitioner of his choice.[5]. However, it is to be noted that none of such rights and protections are granted to a person arrested or detained under the NSA, 1980. Under the said Act the grounds for detention can be denied to the person so detained for a maximum of five days and in exceptional circumstances (by providing the reason for the same in writing) not exceeding ten days. Also, while furnishing grounds of arrest, if public interest so desires, the government can withhold certain information. During proceedings before the Advisory Board constituted under the National Security Act, 1980, the arrested person is deprived of any aid by a legal practitioner. All these are considered to be grossly attacking upon the cherished notions of right to life and personal liberty.

The National Crime Records Bureau (NCRB) is the nodal agency in the country for collecting and analysing data regarding crimes. However, it does not include cases under the NSA, 1980 in its data as for the same no First Information Report (FIR) is registered. As a result, no statistics are present which show the number of persons detained under NSA, 1980. It is pertinent to note that recently in Uttar Pradesh, the NSA, 1980 was invoked on 3 persons for cow-slaughter. Similarly, in Manipur recently, the said Act was invoked on a person and he was detained for twelve months for an alleged post on the Chief Minister which the detaining authority thought as offensive. All these make one to come

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[3] The Code of Criminal Procedure 1973 § 50.
[4] *Id.* at § 56 & § 76.
[5] INDIAN CONST. art. 22(1).

to the conclusion that the Act is misused as an extra-judicial power and that it is high time to reconsider the said Act either by repealing the Act altogether or by suitably amending it to conform it to the established principles of personal liberty.[6]

Right to life and personal liberty in *A. K. Gopalan v. State of Madras*[7] was given a very narrow interpretation. However, the historic judgment in *Maneka Gandhi v. Union of India,*[8] was the beginning of a long line of liberal interpretations to the meaning of right to life and personal liberty. The Supreme Court too has in cases related to National Security Act, 1980, interpreted the various provisions so as to prevent any abuse of power by the executive authorities which will be discussed further in the research paper.

It is well established that the concept of preventive detention involves concepts such as sovereignty of the State as well as the liberty of the individuals. Thus, it would be interesting to note the opinion of some renowned jurists and philosophers as regards the concept of liberty and sovereignty and then to analyse the validity of preventive detention.

According to Thomas Hobbes[9], liberty consists in the absence of external impediments or opposition. He says that a free man is one who is able to do those things without hindrance which his wit and strength permit him to do if at all he has a will to do those things. However, he also states that liberty in no way means that the power of sovereign as to life and death is taken away or limited. The liberty of the individuals is to be consistent to the liberty of an unlimited power of the sovereign.

The main aim for which restraint is imposed upon people is for self-preservation to bring them out of a perpetual state of war. According to him, the best judge for the peace and security of individuals is the sovereign. Sovereign has the right to do beforehand all that is necessary for peace and security by means of prevention and when the same is lost, by means of recovery. He goes on to say that in such a situation, the liberty of individual gets

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[6] Soibam Rocky Singh, *What is National Security Act?*, THE HINDU, Feb. 16, 2019, https://www.thehindu.com/news/national/what-is-national-security-act/article26292232.ece (last accessed Apr. 01, 2020).
[7] A. K. Gopalan v. State of Madras, AIR 1950 SC 27.
[8] Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[9] THOMAS HOBBES, LEVIATHAN 99, 163, 164, 173 (Reprinted ed. University Press Oxford).

subsumed within the liberty of the common-wealth. And whatever the sovereign does cannot be accused by the individuals to be unjust or injurious. It is due to the fact that every individual is himself the author of the sovereign and by virtue of the institution of commonwealth which he himself has authorised. Thus, since the sovereign is in one sense acting under the authority of the individuals, he cannot cause any injury to them.

From this it is clear that in case of Hobbes, he placed great reliance upon the unlimited power of sovereign. The sovereign, by virtue of the best judge of the peace and defence of his people, can even enact laws of preventive detention to preserve security and public order with unlimited powers and the same cannot be questioned by the people.

According to Henry Shue, basic rights include within themselves the right to physical security. This means and includes right to not be subject to murder, rape, torture, etc. It is a basic right as in the absence of it, the government would interfere and prevent an individual from the exercise of such individual right. According to him, no right can be protected in the absence of physical security. The notion of being physically secure is a condition precedent for the enjoyment of all other rights. Thus, a guarantee of physical security is a part of guarantee of all other rights.[10]

He is of the view that there exists all-or-nothing core of rights which are vital to be enjoyed for the enjoyment of other rights. He says that basic rights cannot be sacrificed to promote other right as that would inevitably lead to the sacrifice of all other rights.

From the above discussion it is clear that he was a staunch proponent of the right to security and personal liberty. From this discussion, it can be inferred that the State has no right to resort to preventive detention as a means to protect its national security as doing so would lead to the deprivation of the liberty of an individual and that too not on the basis of a proved fact but mere apprehension. A person would not be able to enjoy his rights completely if there would be a continuous apprehension in his mind that whatever act he indulges in might result in his detention in case the State considered it fit in the name of

[10] HENRY SHUE, BASIC RIGHTS 21-22 (2nd ed. Princeton University Press, Princeton, New Jersey).

national security. To protect the security of State, the basic right to physical security cannot be curtailed.

John Stuart Mill was a strong proponent of the right to freedom and liberty as that right, according to him, led to the development of a civilized, humane and a moral person.[11] He was of the view that except in cases of self-defence of the State, the State had no power to coerce an unwilling individual to act as per the directions of the State. He gave the grounds of justifiable State interference by way of giving a difference between self-regarding and other-regarding activities. The former concerned with activities that concern the individual himself and is personal to the individual with no significant impact in the society as a whole and in that sphere no intrusion was to be allowed by the State and that the person was free act as per his will. However, the latter concerned with acts in which the individual's activities have a bearing upon others and the society. In such cases intrusion by the State is permitted to make the individual act according to some prescribed standard and conduct. However, he also stressed that the limit of intrusion that can be exercised by the State is subject to the condition that it should be used for the purpose of preventing harm to others.

However, Mill also was of the view that restraint on liberty can only be put on account of definite damage or injury to society. The same cannot be done on account of merely contingent or assumed injury to society[12] in which no specific injury is caused to people. The reason for the same being the greater good of human freedom.

From the above, it may be inferred that Mill accorded to liberty a high pedestal and that there is no place for preventive detention in Mill's philosophy of liberty. It is because the same is based on the apprehension of a contingent or future conduct which may happen in future but which has not happened at the time of detention of the person concerned.

Jeremy Bentham was a staunch proponent of the greatest happiness of the greatest number of people concept. According to him all laws should conform to the principle of the greatest

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[11] SUBRATA MUKHERJEE & SUSHILA RAMASWAMY, A HISTORY OF POLITICAL THOUGHT: PLATO TO MARX 411 (2nd ed. PHI Learning Private Limited, Delhi 2013).
[12] JOHN STUART MILL, ON LIBERTY 76 (2001 ed. Batoche Books Limited, Kitchener).

benefit to the greatest number of people. It means that the object of law should be to provide happiness to the greatest number of people based on the concept of pleasure and pain.

He was of the view that though every laws diminish liberty, yet they also provide liberty which is due to the fact that whatever is taken away by the individual is added to the common stock and is given back to him by virtue of him being its sharer. According to him, the sovereign is the supreme authority to make law of which he claims habitual obedience.

However, he said the sovereign power is not absolute and the same can be restricted and limited by virtue of it entering into agreements with external agencies which in turn put restrictions on its power.[13]

From the above it can be said that since the purpose of preventive detention law is to protect the national, security, public order, etc. which ultimately have a bearing upon the people, then going by the greatest happiness principle, preventive detention can be used by the government to prevent a few people from causing damage to the larger people of society. However, the same should not be unlimited and should be according to other agreements of the sovereign to be which he is subject to like the Constitution in case of India.

According to John Locke, all men possessed the natural rights of life, liberty and property and followed law of inward morality. The problem of inward morality being interpreted by individuals differently led to creation of government for preservation of life, liberty and property in which the people gave up their rights of life, liberty and property to the government in a very limited number to achieve their aim of preserving the same.

If the governments interfered or abused the right of life, liberty and property, men had the right of political resistance to preserve their rights as the aim of preservation of the same was limited by the same.[14] It is because the main purpose of entering into social contract was self-preservation. While the government has the power to make laws and punish for the same, the same should be limited. He also stated that in matters of public good where

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[13] Pragalbh Bhardwaj & Rishi Raj, *Legal Positivism: An Analysis of Austin and Bentham*, 1. no. 6 INTL. J. L. & LEGAL JURIS. STUD. 9 (2014).
[14] John Locke, *Two Treatises of Government* 169, http://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf (last visited Mar. 01, 2020).

there can be no fixed rules due to uncertain and variable human conduct and affairs, the executive has the prerogative to make laws depending upon unforeseen and uncertain circumstances for which there exists no definite law. Further, the same laws can be tolerated by the people if they are actually used for the benefit of the people and not against them. But if such laws are used to arbitrarily encroach upon the people then that would go against the law of nature and thus invalid.

From the above it is clear that John Locke placed liberty at a high pedestal. However, to deal with unforeseen situations and for which law was not sufficient, he provided for executive to make laws which may in a sense mean that law of preventive detention based on the future occurrence of conduct. However, the same must be strictly used for the purpose of self-prevention and for the supreme objective of protecting life, liberty and property. Otherwise, the same would be liable to struck down by people if found to be arbitrary.

From the above discussion, it is clear that the opinions of different philosophers and jurists, though very essential to understand the law and its philosophy, as to sovereignty and personal liberty are very different. While some manifest extreme cases of absolute sovereignty, some support inviolable physical security while other approach a middle position. It is also to be noted that the opinions were given at different points of time and circumstances and that no one opinion can be said to be entirely correct. However, in the present times, it is suggested that there should be a middle approach towards sovereignty and liberty.

The relevance of opinions of the above philosophers and jurists cannot be understated and they have a significant bearing upon the ability of the readers to get a fair idea of the notions of sovereignty and liberty. We should not forget that how the writings and teachings of famous philosophers such as John Locke, Jean-Jacques Rousseau and Montesquieu had a significant bearing upon the revolutionaries during the French Revolution.[15]

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[15] *Age of Enlightenment Impact on the French Revolution,* HISTORY CRUNCH, HTTPS://WWW.HISTORYCRUNCH.COM/ENLIGHTENMENT-IMPACT-ON-THE-FRENCH-REVOLUTION.HTML#/ (last accessed Aug. 1, 2020).

This research paper analyses the provisions of the National Security Act, 1980 and their effect on personal liberty as well as the view taken by the Supreme Court as regards the validity of such provisions and their interpretation. Finally the paper seeks to provide suggestions to harmonise national security with personal liberty.

1.2 STATEMENT OF PROBLEM

The National Security Act, 1980 is an act providing for prevention detention on grounds primarily concerned with the security, defence and India's relations with foreign powers. However, the procedure envisaged within the act for effecting such preventive detention has come under a lot of criticism for being violative of the personal liberty of individuals. Thus, understanding the nature of the Act and its effect on the liberty of individuals and attempting to harmonise national security and personal liberty is essential which is sought to be done in this paper by having an in-depth study of the judgment in *A. K. Roy v. Union of India*[16] which was the first case related to the National Security Act, 1980.

1.3 AIM

The aim of this paper is to analyse the necessity of prevention detention laws in India and various legislations supporting prevention detention particularly the National Security Act, 1980 and how do they affect the personal liberty of individuals who come within the fold of such legislations as well as the validity of such law in the light of the judicial decisions. The role of the Judiciary as the interpreter of such laws is also considered. Finally, the paper seeks to suggest measures as regards the balance that needs to be achieved between national security and personal liberty.

1.4 OBJECTIVES

The objectives of the present work that the researcher has undertaken are as follows -

1. To understand the concept of preventive detention and personal liberty.

2. To analyse the need for national security laws in India.

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[16] A. K. Roy v. Union of India, AIR 1982 SC 710.

3. To critically evaluate the provisions in the National Security Act, 1980 that impinge upon the personal liberty of individuals.

4. To examine the opinion and interpretation of the Supreme Court of India as regards preventive detention with special focus on the National Security Act, 1980 and its effect on personal liberty of individuals.

5. To explain the future of national security laws in India and suggest measures to integrate the National Security Act, 1980 with the personal liberty of individuals

1.5 SCOPE AND LIMITATIONS

The scope of the research paper is to analyse the National Security Act, 1980 in India in the light of its various provisions and also to determine how they affect the personal liberty of individuals. The research paper also explains in detail the opinion of the Supreme Court of India with regard to the provisions contained in the said legislation wherein its very constitutionality was under challenge. The researcher has also dealt with different decisions of the Supreme Court as regards the National Security Act, 1980 and other preventive detention laws wherein the Court has tried to inject an element of fairness, accountability and transparency to ensure that the persons charged under the Acts are not arbitrarily deprived of their liberty. Towards the end, the paper contains suggestions to harmonise national security with personal liberty.

Due to the ongoing pandemic situation and the unavailability of library to conduct the research, the researcher has been constrained to refer to online sources for the purpose of research which has inherent limitations in the nature of lack of comprehensive material and discourse on the subject matter of research online. Consequently, the researcher has limited his study primarily to understand the meaning of national security and personal liberty. Further, the researcher limits his research as regards preventive detention and national security to have a general overview of the provisions of different preventive detention legislations on one hand and an in-depth analysis of the National Security Act, 1980 and how the same have been interpreted by the Supreme Court.

1.6 REVIEW OF LITERATURE

1. PRITI SAXENA, PREVENTIVE DETENTION AND HUMAN RIGHTS (2007 ed. Deep & Deep Publications (P). LTD., New Delhi).

The book describes the concept of preventive detention in India in a very comprehensive manner. The author suggests that the human rights activists are not much concerned about the relevancy or continuity of preventive detention laws which are in any case are constitutionally sanctioned. The main contention of such activists is the misuse of such laws by the executive. The book begins by tracing the development of preventive detention laws in India. The book then moves towards the provisions of preventive detention as well as certain safeguards as available to the detained persons within the Constitution of India, 1950 such as the provisions under Part III as well as Schedule VII, etc. Further, the book examines the attitude of the judiciary as regards preventive detention and the evolution of the judiciary from a very literal interpretation to the liberal interpretation of human rights and how the judiciary attempts to strike a balance between national security and personal liberty. The book then moves towards the National Security Act, 1980 and provides a detailed analysis of its various provisions as well as the judicial response towards such provisions. Finally the book provides suggestions to make such preventive detention laws more effective so as to prevent any probability of its abuse and misuse by the executive authorities.

2. B. UMA DEVI, ARREST, DETENTION AND CRIMINAL JUSTICE SYSTEM, (1st ed. Oxford University Press 2012).

This book is a very comprehensive read as regards the various judicial pronouncements that seek to accord at least some minimal safeguards to the preventive detention laws. The preventive detention laws along with their different provisions mark a shift from the traditional justice administration system wherein the arrested and detained persons are subject to certain rights. Thus, to prevent these preventive detention laws from excessively and arbitrarily interfering with the personal liberty of individuals, the role of the judiciary is paramount. The book explains that apart from the procedural safeguards as enunciated in Art. 22(3) - Art. 22(7), the judiciary too has interpreted these provisions as well as the

provisions contained in other preventive detention laws to provide justice to people. The book very meticulously explains the various judgments of the Supreme Court in the light of preventive detention and how the same seek to protect the detained person against arbitrary detention. The book divides the judgments of the court into different headings such as the intimation and grounds of detention, mode of intimation, effect of delay, etc. so as to provide a clear picture as regards the various judgments of the Court under different aspects of preventive detention as how they provide protection to the detained persons.

3. DR. ASHUTOSH, LAW OF PREVENTIVE DETENTION (2014 ed. Universal Law Publishing, New Delhi).

This book is a valuable resource to anyone who wants to understand the concept of preventive detentions and the concept of liberty as well as the provisions in The Constitution of India, 1950 as regards personal liberty and preventive detention. The book begins with explaining the concept of liberty and how liberty and detention are closely related. The book then seeks to explain the difference between preventive detention and punitive detention by relevant examples as well as judicial pronouncements in that regard. While purpose of punitive detention is to punish for proved offence, preventive detention is used to prevent the occurrence of unintended consequences which might follow if the person concerned is not detained. Subjective satisfaction plays a key role in preventive detention. The book then explains that Art. 21 is the hallmark for personal liberty while Art. 22 contains the procedural safeguards against preventive detention.

4. Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 Mich. J. Int'l L. 311 (2001).

This article is a very interesting read on preventive detention. The article begins with the issue of human rights and how certain rights should be available to all persons universally and the pressing need for the universal acceptance and concretization of such rights. The article then moves towards the issue of preventive detention and how does it affect the fulfilment of such a purpose. The author states that certain limitations in rights may be imperative for the purpose of achieving certain objectives such as public order, national security, etc. Further, the author provides an introduction to preventive detention as well

as the development and general features of preventive detention laws. The author provides a descriptive analysis of one such law: The National Security Act, 1980. The author explains the said Act by expounding the relevant Constitutional, legislative, and jurisprudential developments. The author later shows how such laws are justified in India. The explanation provided by the author suggests that preventive detention laws are an exception of personal liberty. Finally, the author suggests that a balance needs to be achieved between the rights of the individual and the rights of the State by matching the needs for personal liberty with the reasonable needs of the State for protecting its sovereignty and national security.

5. Prof. (Dr.) Mukund Sarda, *Pre-Custody and Preventive. Detention: A Study in the Light of Huidrom Konung Jao. Singh's Case*, 48, no. 4 CIV. & MIL. L. J. 273 (2012).

This article deals with a very important aspect of preventive detention which concerns the detention of a person already in custody. It is common knowledge that preventive detention and punitive detention are two different concepts in the sense that the former is used to prevent the commission of acts prejudicial to the interests of the State while the latter is used to punish a person for a proved offence he had committed. A question thus needs to be answered that whether a person already in custody can be further subjected to an order of detention giving due regard to the implications it has on the liberty of the individual which are guaranteed by the Constitution. To this end, the paper succinctly explains the various judgments of the Supreme Court which permit the detention order of a person already in custody but which need to pass the test of certain procedural safeguards such as the knowledge of the detaining authority that the person was already in jail and the likelihood that the person would be released in the near future, the presence of relevant material on which basis compelling reasons exist to further detain the individual to prevent his propensity to further indulge in activities prejudicial to the order of the State. Towards the end, the article takes cognizance of the various objections to the law of preventive detentions such as its effect on the personal liberty, the fact that the order is based on mere suspicion of the detaining authority and that there is no regular trial to establish innocence. For this, the article suggests that the law of Preventive Detention should only be used in

case of emergencies and a detention order needs to be sanctioned by a judicial body before it can have any effect.

6. MP JAIN, INDIAN CONSTITUTIONAL LAW (7th ed. Lexis Nexis, Gurgaon 2014).

A study on the preventive detention laws along with its effect would be incomplete without referring to this book. The book is a must read for anyone who needs to get a brief understanding of the laws related to preventive detention along with a descriptive analysis of the various judgments of the Courts in which they have read into the provisions of law to provide rights and safeguards to the people detained under preventive detention so as to protect them for arbitrary processes of the detaining authority in complete violation of the rule of law. The book also succinctly explains the meaning of preventive detention along with the provisions in Constitution regarding preventive detention. The book also very comprehensively explains the meaning of personal liberty and how it has been evolved over time in India especially by means of a creative interpretation of Art. 21. The book begins with the *AK Gopalan* case and moves towards the *Maneka Gandhi* case to show the change in the attitude of judiciary as regards the interpretation of Art. 21. Further, the book shows how the judiciary has after the *Maneka Gandhi* case led to a creative interpretation of Art. 21 to provide various rights and liberties to people. Towards the end, the book suggests measures that can be undertaken to ensure that the rigorous procedures involving preventive detention can be somewhat diluted in favour of the detained person.

1.7 HYPOTHESIS

The National Security Act, 1980, despite its stringent provisions for detention, can be reconciled with the personal liberty of individuals.

1.8 RESEARCH QUESTIONS

The research questions of the present work that the researcher has undertaken are as follows-

1. What is the meaning of preventive detention and personal liberty?
2. Are preventive detention laws in excess of the concept of personal liberty?

3. What is the pressing need to have National Security Laws and how do the provisions of the National Security Act, 1980 affect the personal liberty of individuals?
4. How has the judiciary interpreted the national security laws and personal liberty with special reference to the judgment rendered in *A. K. Roy* v. *Union of India*?
5. How can national security laws and personal liberty be harmonised in the coming future?

1.9 RESEARCH METHODOLOGY

The research methodology used in the present work is doctrinal. The study is analytical and interpretative in nature. Primary as well as secondary sources have been used in this research work. Primary sources consists of the various laws and statutes – both national and international as well as the various judicial pronouncements upon the area of preventive detention.

Secondary sources like books, journals and articles both print and online have been made use in the research study. Due to the unavailability of library as a consequence of the Covid-19 pandemic, primarily, extensive use of internet resources has been undertaken. It includes various articles and journals which are available online, the various government reports that have been uploaded by the government, the pdf copies of books that are available online as well as various other websites including news publication websites have been referred to for the successful completion of the report.

The Bluebook (20th edition) mode of citation has been used throughout the paper.

1.10 CHAPTERISATION

The present work has been divided into six chapters the research design of which is summarised as follows:

Chapter I provides a general introduction to the subject matter under study in the present dissertation in the form of scope and limitations, objectives, research questions, research methodology, etc.

Chapter II provides an understanding of the meaning of preventive detention and how it is different from punitive detention. It also deals with the provision in the Constitution of India, 1950 regarding preventive detention as well as a brief overview of different Central preventive detention laws in India.

Chapter III deals with the meaning of personal liberty and how its meaning has evolved over the years in India. It also deals with certain provisions of International Instruments/Treaties, etc. that provide for securing the personal liberty of Individuals.

Chapter IV deals with the need and significance of the National Security Act, 1980 and a brief overview of its provisions.

Chapter V provides an understanding of how the National Security Act, 1980 affects the liberty of individuals. In this chapter, the landmark case of *A. K. Roy v. Union of India*[17] has been carefully analysed and presented in the form of various contentions put forth by the petitioners and the judgment of the Court in each of them. For better clarity and convenience, the case has been divided into different issues with each issue dealing with the contention put forth by the petitioner and the judgment of the Court on that issue. The chapter also deals with the ways in which the Judiciary, through its interpretations of the various provisions has sought to inject an element of objectivity into the provisions of preventive detention so as to secure the personal liberty of individuals. The chapter also explores the efficacy of the existing laws to deal with preventive detention. Towards the end, the paper seeks to highlight the major events in India which adversely affected the life and liberty of people. The chapter also provided instances where the National Security Act, 1980 has been misused or wrongfully applied.

It is expected that in the absence of sufficient material as regards the analysis of the judgment in the *A. K. Roy* case in which the Constitutionality of the National Security Act, 1980 was first challenged, the present paper would enable even the layman to understand the said Act and its Constitutionality and how the Supreme Court interpreted the said Act

[17] *Supra* note 16.

and tried to preserve the personal liberty of individuals even while upholding the validity of the Act.

Chapter VI attempts to provide an analysis of the National Security Act, 1980 and personal liberty in the light of the discussion made earlier in the paper and suggests steps that can be taken to harmonise the national security of the State and the personal liberty of the individuals.

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CHAPTER II

CONCEPTUALISING PREVENTIVE DETENTION

2.1 MEANING

The Indian legal system provides no precise definition of the term – preventive detention. The term preventive detention has its origins by virtue of Defence of Realm Consolidated Act, 1914[18] enacted during the World War I, wherein while enunciating the nature of detention under the said Act, the term was used by the Law Lords of England.

According to H.M. Seervai, *"the word preventive has to be understood in contradistinction to the word punitive."* According to Lord Finlay, "*preventive detention is a precautionary measure as opposed to punitive measure"*.[19] In, *Liversidge v. Anderson,*[20] it was opined by Lord Macmillan that the purpose of the preventive detention is to intercept an individual before he does anything wrong with a view of preventing him from doing the same. The justification of preventive detention is not the proving of any offence or the formulation of any charge or criminal conviction but suspicion and reasonable probability.

Preventive Detention can be construed as an anticipatory and precautionary measure which has no relation to an offence, while the function of a criminal proceeding is to provide punishment for the commission of an offence. Preventive Detention is preventive and not punitive. The same is set in motion only when the Executive is satisfied that detention is necessary to pre-empt the suspected person from acting in a manner that may be prejudicial to any of the grounds as contained in the relevant statute. Since preventive detention *prima-facie* appears to be offensive to the liberty of individuals, thus, the application of it should be strictly according to the terms of the law which provides for such preventive detention.[21]

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[18] Defence of Realm Consolidated Act 1914, Reg. 14(B).
[19] R v. Halliday, 1917 AC 260.
[20] Liversidge v. Anderson, 1942 AC 206.
[21] N.K. ACHARYA, SUPREME COURT ON CONSTITUTION OF INDIA 151 (1st ed. Asia Law House, Hyderabad 2012).

2.2 PREVENTIVE DETENTION VERSUS PUNITIVE DETENTION

In *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi,*[22] the Court underscored very succinctly the difference between preventive and punitive detention. It observed that punitive detention is meant for a person found guilty by means of way of the judicial process for committing an offence and the intention is to inflict punishment. But, Preventive Detention is for a person to prevent him for causing injury to society by way of his conduct and the intention is not to inflict punishment. It further held that preventive detention is a necessary evil and is used for the larger interest and goals of national security and public order. The power of detaining without trial of a person is a very drastic power and in many countries, recourse to the same is impermissible except in cases of war or aggression.

The law concerning "Preventive Detention" can be better understood with the help of the following example[23]: A man who enjoys tea with his friends is suddenly disturbed by his son due to which the man slaps the child and locks him up in a room. In the instant situation, the act of the father slapping the son can be understood as a punishment given by the father to his son due to the disturbance caused which is punitive in nature. However, the father locking the son in a room can be construed as detaining him preventively with the object of preventing him from doing any future disturbance. Also, the very act of the father of locking his son, keeping in mind the son's similar activities in the past, can be attributed to his "subjective-satisfaction" for taking such a step. From the above example, it is somewhat clear that preventive detention laws and be differentiated from punitive laws by the reasoning that the former is not punitive in nature and is meant to prevent a future conduct of the person from happening while the latter is to punish an individual for an act he has committed.

As preventive detention is mostly the result of subjective satisfaction of the detaining authority with a view to prevent certain unwarranted and detrimental activities as well as the fact that since the same is not punitive in nature, therefore many of the procedural rights

[22] Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, AIR 1981 SC 746.
[23] DR. ASHUTOSH, LAW OF PREVENTIVE DETENTION 1 (2014 ed. Universal Law Publishing, New Delhi).

and safeguards which are available to otherwise criminal proceedings are not available to the detained persons. Further, no objective standards of conduct are laid down by these laws the violation of which might invite preventive detention. Thus, these laws are always to be tested in the light of their effects on the personal liberty of individuals.

Keeping in mind the above contentions, it would be now be right to visit the opinion of the court in this matter in two cases: In, *Union of India v. Amrit Lal Manchanda*[24] it was observed that notwithstanding the typical situations and circumstances in society necessitating preventive detention, it is of utmost importance that the administration of such a law is justified by striking a right and proper balance between personal liberty on one hand and the needs of the society on the other. In, *Union of India v. Paul Manickam*[25], it was observed that the act of preventively detaining a person was an act of precautionary measure based upon the discretion of the detaining authority. For the same, it is impractical to espouse any objective rules of conduct to be followed, the failure of which alone would entail detention.

From the above, it is clear that preventive detention and punitive detention are two different concepts not only in terms of their meaning but also in terms of the processes and procedure involved in each of them.

2.3 PREVENTIVE DETENTION OF PERSON ALREADY IN CUSTODY

As regards the question as to whether an individual who is already detained or in jail can be subject to another order for detention, the Supreme Court has held that the same is to be determined from the facts and circumstances of the case. For instance, if a person is undergoing a short duration of imprisonment, say, one or two months and a possibility exists that he may be released from jail soon, then considering the antecedent history of the person and after being bona fide satisfied that the detention is necessary, the authority can provide for a valid detention order issued few days before the likely release of the person concerned[26].

[24] Union of India v. Amrit Lal Manchanda, AIR 2004 SC 1625.
[25] Union of India v. Paul Manickam, AIR 2003 SC 4622.
[26] Rameshwar Shaw v. District Magistrate, Burdwan, AIR 1964 SC 334.

In another case, the Court has held that the authority providing for the detention of a person already in jail, must disclose awareness of the fact that the detaining authority is aware that the person against whom the detention order is sought to be made is already in jail and yet there exist compelling reasons which necessitate the detention order to be made.[27]

Recently in another case[28], the law concerning the detention of a person already in jail has been summed up by the Court which held that there exists no prohibition in law with regard to the passing of detention order in respect of a person who is already in custody provided that in the event of a challenge to the detention order, the detaining authority has to justify the following subject to the satisfaction of the Court:

1. The detaining authority had complete awareness that the person sought to be detained was already under custody.

2. There existed reliable material before the detaining authority which satisfied him that there existed possibility of release of the person on bail and subsequent to that there are high chances the person would likely engage in activities prejudicial to public order.

3. In lieu of the above, the detaining authority considered it necessary to pass detention order to prevent the person concerned from indulging in such activities.

However, non-adherence to any of the above points shall have the effect of vitiating the order of detention.

From the above, it is clear that a detention order of a person already in custody can be made by the detaining authority subject to the fulfilment of conditions as have already been enumerated in the above paragraphs. Nevertheless, such orders of detention of persons already in custody should not be used as a ploy to ensure the continued detention of a person. Such a person has to be exercised sparingly and only when other alternatives do not exist.

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[27] Vijay Kumar v. State of Jammu & Kashmir and Others, (1982) 2 SCC 43.
[28] Huidrom Konungjao Singh v. State Of Manipur, (2012) 7 SCC 181.

2.4 PROVISIONS IN THE CONSTITUTION OF INDIA, 1950 RELATING TO PREVENTIVE DETENTION

The Constitution of India vests upon the Parliament of India as well as the Legislature of States the power to enact laws which deal with preventive detention.[29] Specifically, the Parliament and State Legislatures can enact laws providing for preventive detention for reasons connected with defence, foreign affairs, or the security of India and security of State, maintaining public order or supplies and services essential to the community respectively.

Under the Constitution of India, 1950, the provisions for preventive detention can be found in Cl.(s) 3 – 7 of Art. 22 which can be briefly described as below and which serve in the nature of being safeguards for personal liberty.[30] However, before we move to such provisions, we need to first have a look at Cl.(s) 1 -2 of Art. 22 which accords protection against arrest and detention:

1. Protection against arrest and detention - Art. 22(1) guarantees the right to know and be informed, as early as possible as regard the grounds of arrest, and the right of consultation and defence by a legal practitioner.

Art. 22(2) guarantees the production of the arrested or detained person within twenty four hours to the nearest Magistrate.

After perusal of the above two provisions, we can now move to the provisions of Art. 22(3) – 22(7).

2. Non applicability of rights - Art. 22(3) provides for the non-application of the rights contained in Art. 22(1) – Art. 22(2) to a person arrested or detained under preventive detention.

[29] INDIAN CONST. Schedule VII, List I, Entry 9 & List III, Entry 3.
[30] PRITI SAXENA, PREVENTIVE DETENTION AND HUMAN RIGHTS 29 (2007 ed. Deep & Deep Publications (P). LTD., New Delhi).

3. Period of detention - Art. 22(4) provides that a person detained under preventive detention has to be released within three months unless within the said period, the Advisory Board comprising individuals duly qualified to be High Court Judges reports the existence of sufficient cause for further detention.

4. Rights of person under preventive detention - Art. 22(5) provides the rights to person under preventive detention of knowing, as early as possible, the grounds of detention order as well as making an earliest representation against the same.

Art. 22(6) provides a limitation on the above stated right on grounds of public interest if it may so require.

5. Procedure of Advisory Board - Art. 22(7) provides the Parliament with the power of fixing the maximum period of detention under a law of preventive detention as well as the procedure of inquiry of Advisory Boards and further under any law of preventive detention to determine the circumstances and cases in which a person can be detained beyond three months without taking the opinion of the Advisory Board.

From the above, it is clear that the Constitution of India, 1950 empowers both the Parliament and the State Legislatures to make laws of preventive detention and also provides for the procedure to be followed in matters of preventive detention as well as the restrictions upon the exercise of such power.

2.5 A LOOK AT DIFFERENT CENTRAL PREVENTIVE DETENTION LEGISLATIONS IN INDIA

Since independence, India has enacted a series of Preventive Detention Legislations. Some have been repealed while some have been enacted in pursuance of the repeal of the preceding Act. The following are most relevant Union legislations concerning preventive detention. It is to be noted that there exist several State laws too that provide for preventive detention. However, for the purpose of this paper, the researcher has focused only on the major Central laws providing for preventive detention which are as follows -

1. Preventive Detention Act, 1950 - The first Act in India after independence providing for preventive detention was the Preventive Detention Act, 1950 (hereinafter PDA, 1950). The PDA, 1950 expired in 1969.[31] It provided for the arrest and detention of persons who, the government opined, represented a threat to the defence of India, relations with foreign powers, maintenance of public order and other grounds mentioned in Sec. 3.[32]

(a) Object - The primary purpose of such a legislation was to prevent activities that have the effect of subverting the Constitution, to maintain law and order and to prevent the activities that may interfere with the maintaining of supplies and services that are considered to be essential to the community.

(b) Main features - Some of the main features of PDA, 1950 are: The PDA provided for the right of the detained person to be informed within five days of the ground for his detention barring facts which are against the public interest to be disclosed. Any order made or approved by the State Government had to be notified (as soon as may be) to the Central Government. State Governments had to be notified forthwith of detention orders by their subordinate officers which would be in force for twelve days unless approved by the State Government. All the detention orders had to be then placed before an Advisory Board within thirty days of detention which would then review the order within ten weeks of the date of detention and give their opinion to the appropriate government. The Boards were empowered to collect such information which would be necessary to determine the validity of the detention order and then give its opinion upon the validity of the order. The Board could also give a personal hearing to the detained person albeit without a legal practitioner. After the Board had given its opinion to the appropriate Government, the Government could, if the order had been confirmed by the Board, confirm the detention order and thereafter detain him for such period it deemed fit.

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[31] Kritika A., *Preventive Detention Laws like the National Security Act, under which Chadrasekhar Azad of Bhim Army was Jailed, have no place in a Democracy,* THE LEAFLET, Jan. 30, 2019, https://theleaflet.in/preventive-detention-laws-like-the-national-security-act-under-which-chadrasekhar-azad-ravan-of-bhim-army-was-jailed-have-no-place-in-a-democracy/

[32] Preventive Detention Act 1950, § 3.

However, if the Board had opined in the negative as to the validity of the detention order, then the Government would revoke the detention order and immediately release the person. The maximum period of detention prescribed under the Act once the same had been confirmed by the Appropriate Government could not exceed twelve months from the date of detention.[33] A detention order could also be revoked or modified at any time. However, such revocation or modification could not have the effect of putting a bar on the making of fresh detention orders against the said person in case, after the date of revocation or expiry of the detention order, fresh facts had arisen which under the opinion of the authorities as specified under Sec. 3 were satisfactory to issue another detention order.[34]

It is to be noted that most of the provisions of the said Act have been incorporated in the Maintenance of Internal Security Act, 1971 (MISA) with slight modifications and additions.

2. Maintenance of Internal Security Act, 1971 (MISA) - After the expiry of the PDA, 1950, the Maintenance of Internal Security Act, 1971 (hereinafter MISA, 1971) was enacted.

(a) Object - The object of MISA, 1971 was to provide for the detention of persons to maintain internal security and other matters connected to it.

(b) Main features - The said Act was amended during emergency by inserting new provisions to provide for detention of persons while the Proclamation of Emergency was in operation with slightly different procedures and limits such as by changing the statutory limit as prescribed in different provisions, non-application of certain provisions, etc. However, these changes are not the subject-matter of this research as these changes were enacted for operation during emergency.

In times, other than emergency, the MISA, 1971 had almost the same provisions as its predecessor i.e., the PDA, 1950. However, certain provisions as to the time limits

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[33] David H. Bayley, *The Indian Experience with Preventive Detention*, 35, no. 2 PAC. AFF. 99, 102-03 (1962).
[34] *Supra* note 32, at § 13.

were changed to some extent in MISA: Unlike PDA, MISA, 1971 provided for a time limit of five days under ordinary circumstances (which was the same as PDA) and fifteen days under exceptional circumstances to communicate the grounds of detention to the person so detained.[35] As far as the notification of the detention order to the appropriate government was concerned, if an order of detention was either made or approved by the State Government, then the same had to be notified to the Central Government within seven days (the PDA used the term as soon as may be).[36] Further, under MISA, 1971, detention orders passed by the subordinate officers had to be communicated to the State Government which would remain in force for not more than twenty days unless approved by the State Government (the said time limit for twelve days under PDA). However, in case the grounds of detention were communicated to the detained person after five days but not more than fifteen days, then, unless approved by the State Government, the detention order would be in force for a maximum period of twenty-five days.[37]

MISA, 1971 also provided for the revocation or modification of the detention order. However, such revocation or modification could not have the effect of putting a bar on the making of fresh detention orders against the said person in case, after the date of revocation or expiry of the detention order, fresh facts had arisen which under the opinion of the authorities as specified under Sec. 3 were satisfactory to issue another detention order. But, in the absence of any fresh facts after the expiry or revocation of the earlier detention order, the subsequent order of detention could not be enforced beyond the expiry of a period of twelve months from the date of detention under the previous detention order or the expiry of the Defence and Internal Security of India Act, 1971, whichever was later.[38]

All other provisions of MISA, 1971 concerning the procedure before Advisory Board, maximum period of detention, etc. can be considered to be the same as PDA, 1950.

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[35] Maintenance of Internal Security Act 1971, § 8.
[36] *Id.* at 3(4).
[37] *Id.* at § 3(3).
[38] *Id.* at § 14.

3. The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 - The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter COFEPOSA, 1974) was enacted in 1974 for conserving foreign exchange and preventing smuggling.

(a) Object - The object of the COFEPOSA, 1974 was to conserve and augment the foreign exchange and to prevent smuggling activities and matters related to it. It was necessary as these acts were having a deleterious effect upon the national economy and consequently causing a serious effect upon the security of the State. Therefore, for the purpose of effective prevention of the activities mentioned above this Act was enacted to detain persons engaged in any manner in such activities.

(b) Main features - The Act empowered the Central Government (or any of its officer of the Rank of Joint Secretary or above specially empowered by this section) or the State Government (or any officer of the rank of Secretary and above of the said Government specially empowered by this section) to issue detention orders for any person (including a foreigner) upon the satisfaction that such a person would engage in any act that would prejudice the foreign exchange in terms of its conservation or augmentation or with a view to prevent the person from actually smuggling goods or abetting such smuggling, dealing with or engaging in transportation, concealing or keeping of such smuggled goods or harbouring persons engaged in smuggling of goods or in abetting the same.[39]

COFEPOSA, 1974 provided for a time limit of five says under ordinary circumstances and fifteen days under exceptional circumstances to communicate the grounds of detention to the person so detained.[40] As far as the notification of the detention order to the appropriate government was concerned, if an order of detention was either made or approved by the State Government, then the same had to be notified to the Central Government within ten days.[41]

[39] The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974, § 3.
[40] *Id.*
[41] *Id.*

All the detention orders had to be then placed before an Advisory Board within five weeks of detention which would then review the order within eleven weeks of the date of detention and give their opinion to the appropriate government. The Boards were empowered to collect such information which would be necessary to determine the validity of the detention order and then give its opinion upon the validity of the order. The Board could also give a personal hearing to the detained person albeit without a legal practitioner. After the Board had given its opinion to the appropriate Government, the Government could, if the order had been confirmed by the Board, confirm the detention order and thereafter detain him for such period it deemed fit. However, if the Board had opined in the negative as to the validity of the detention, then the Government would revoke the detention order and immediately release the person.[42]

However, under Sec. 9 of COFEPOSA, 1974, the requirement of reference to the Advisory Board within five weeks of the date of detention could be set aside and persons could be detained for periods exceeding three months without obtaining the opinion of the Advisory Boards. The same could be permissible in case the person concerned was served the order of detention at any time before July 31, 1999. In such a situation, the person concerned could be detained without the reference been made to the Advisory Board for a period exceeding three months but not more than six months from the date of detention in case the order of detention has been issued against the individual on grounds as mentioned in the said section.

The maximum period of detention prescribed under the Act once the same had been confirmed by the Appropriate Government could not exceed one year from the date of detention. However, in case an individual was detained to whom the provisions of Sec. 9 were applicable, the maximum period of detention would be two years from the date of detention.[43]

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[42] *Id.* at § 3.
[43] *Id.* at § 10.

A detention order could be revoked or modified at any time. However, such revocation of detention order could not have the effect of barring the making of another detention order.[44]

It is to be noted that while both PDA, 1950 and MISA, 1971 had a caveat of the arising of fresh facts before any subsequent detention order could be made after the expiry or revocation of the earlier detention order, the same was absent in COFEPOSA, 1974.

4. The Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 - The said Act was enacted in the same year as the National Security Act, 1980.

(a) Object - The said Act was enacted with the purpose of preventing the blackmarketing and maintaining the supplies of commodities that are considered essential to the community and for matters connected to it. To ensure the same, the Act provided for detention in certain cases.

(b) Main Features - The Act empowered the Central Government (or any of its officer of the Rank of Joint Secretary or above specially empowered by this section) or the State Government (or any officer of Secretary rank and above of the said Government specially empowered by this section) to issue detention orders for any person (including a foreigner) upon the satisfaction that such a person would engage in any act that would prejudice the maintaining of supplies of commodities that are essential to the community. The District Magistrates and the Commissioners of Police were also empowered to issue detention orders.

The Acts covered under the said provision included either committing or instigating another to commit any offence listed under the Essential Commodities Act, 1955, or any other law in force for the time being concerning the control of production, supply or distribution of, or trade and commerce in any commodity that is essential to the community. It also concerned the dealing in any commodity considered to be essential commodity either under the Essential Commodities Act, 1955 or with

[44] *Id.* at § 11.

respect to any other law in which provisions had been made to that effect with the aim of making a gain in a manner which had the effect of either directly or indirectly defeating or tending to defeat the provisions of the Act or the law as aforesaid.[45]

The Act provided for a time limit of five days under ordinary circumstances and under exceptional circumstances not more than ten days for the purpose of communicating the grounds of detention to the person so detained.[46] As far as the notification of the detention order to the appropriate government was concerned, if an order of detention was either made or approved by the State Government, then the same had to be bought to the notice of the Central Government within seven days.[47] Further, detention orders passed by the subordinate officers as mentioned in Sec. 3(2) had to be communicated to the State Government which would be in force for a maximum period of twelve days unless the State Government approved the same. However, in case the grounds of detention were communicated to the detained person after five days but not more than ten days, then, unless approved by the State Government, the detention order would remain in force for a period no longer that fifteen days.[48]

All the detention orders had to be then placed within three weeks of detention in front of the Advisory Board which would then review the order within seven weeks of the date of detention and give their opinion to the appropriate government.[49] The Boards were empowered to collect such information which would be necessary to determine the validity of the detention order and then give its opinion upon the validity of the order. The Board could also give a personal hearing to the detained person albeit without a legal practitioner.[50] After the Board had given its opinion to the appropriate Government, the Government could, if the order had been confirmed by the Board, confirm the order of detention and thereafter detain him for such period it deemed fit. However, if the Board had opined in the negative as

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[45] The Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act 1980, § 3.
[46] *Id.* at, § 8.
[47] *Id.* at § 3(4).
[48] *Id.* at § 3(3).
[49] *Id.* at § 10.
[50] *Id.* at § 11.

to the validity of the order of detention, then, the Government would immediately release the person by revoking the detention order.[51]

The maximum period of detention prescribed under the Act once the same had been confirmed by the Appropriate Government could not be more than six months from the date of detention.[52] It also provided for the revocation or modification of the detention order. However, such revocation or modification could not have the effect of putting a bar on the making of fresh detention orders against the said person in case, after the date of revocating or expiry of the detention order, fresh facts had arisen which under the opinion of the authorities as specified under Sec. 3 were satisfactory to issue another detention order.[53]

5. The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 - The said Act had been enacted almost on the same lines as the COFEPOSA, 1974. The only major difference involved the object of the two Acts.

(a) Object - The object of the said act was to prevent illicit traffic in narcotic drugs and psychotropic substances and for matters related to it and to this end provide for detention of persons concerned in such Act in any manner whatsoever. The reason for the same can be attributed to the serious effects these activities had upon the health as well as the welfare of the people and the deleterious effect that the activities of individuals who engaged in such illicit traffic had upon the national economy.

(b) Main features - The Act empowered the Central Government (or any of its officer of the Rank of Joint Secretary or above specially empowered by this section) or the State Government (or any officer of Secretary rank and above of the said Government specially empowered by this section) to issue detention orders for any person (including a foreigner) upon the satisfaction that such a person would

[51] *Id.* at § 12.
[52] *Id.* at § 13.
[53] *Id.* at § 15.

engage in any act relating to the illicit traffic in narcotic drugs and psychotropic substances and that thus it was necessary to detain him. [54]

The Act provided for a time limit of five days under ordinary circumstances and under exceptional circumstances not more than fifteen days for communicating the grounds of detention to the individual so detained.[55] As far as the notification of the detention order to the appropriate government was concerned, if the detention order was made by the State Government or an officer empowered by the State Government, then the same had to be notified to the Central Government within ten days.[56]

All the detention orders had to be then placed within five weeks of detention in front of the Advisory Board which would then review the order within eleven weeks of the date of detention and give their opinion to the appropriate government.[57] The Boards were empowered to collect such information which would be necessary to determine the validity of the detention order and then give its opinion upon the validity of the order. The Board could also give a personal hearing to the detained person albeit without a legal practitioner.[58] After the Board had given its opinion to the appropriate Government, the Government could, if the order had been confirmed by the Board, confirm the detention order and thereafter detain him for such period it deemed fit. However, if the Board had opined in the negative as to the validity of the detention order to the Government, the Government would revoke the detention order and immediately release the person.[59]

However, under Sec. 10 of the said Act, the requirement of reference to the Advisory Board within five weeks of the date of detention could be set aside and persons could be detained for periods exceeding three months without obtaining the opinion of the Advisory Boards. The same could be permissible in case the person

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[54] The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988, § 3.
[55] *Id.* at § 3(3).
[56] *Id.* at § 3(4).
[57] *Id.* at § 9(b) & § 9(c).
[58] *Id.* at § 9(c) & § 9(e).
[59] *Id.* at § 9(f).

concerned was served the order of detention at any time before July 31, 1999. In such a situation, the person concerned could be detained without the reference been made to the Advisory Board for a period exceeding three months but not more than six months from the date of detention in case the detention order had been issued against the person on grounds as mentioned in the said section.

The maximum period of detention prescribed under the Act once the same had been confirmed by the Appropriate Government could not exceed one year from the date of detention. However, in case an individual was detained to whom the provisions of Sec. 10 were applicable, the maximum period of detention would be two years from the date of detention.[60] A detention order could be revoked or modified at any time. However, such revocation of detention order could not have the effect of barring the making of another detention order.[61]

From the above, this, it can be said that COFEPOSA, 1974 as well as The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 have (except the object and purpose of the Act) almost the same provisions concerning the procedure to be followed after the detention of the person.

6. The National Security Act, 1980 - As would be discussed later, the National Security Act, 1980 (hereinafter NSA, 1980) provided for preventive detention. It is also to be noted that while the different preventive detention laws provided for the detention of persons in certain specific circumstances, NSA, 1980 provided for the detention of persons by providing a very wide amplitude and power to the detaining authority. In other words, it can be said that the power conferred upon the detaining authority under the NSA, 1980 encompass all such grounds which were not present in the other preventive detention Acts.

The laws concerning preventive detention such as the National Security Act, 1980 are amply criticized on grounds of serious violations of the right to personal liberty as have been guaranteed by the Constitution of India. Nevertheless, subject to the procedural

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[60] *Id.* at § 11.
[61] *Id.* at § 12 .

safeguards as envisaged under the Constitution[62], the State is empowered to take such right albeit for a limited time period.[63] Preventive Detention has been described as a jurisdiction of suspicion which however needs to be resorted to for the curtailment of individual liberty due to the compulsions of the preservation of the values of freedom, democratic society and social order.[64] However, care must be taken to ensure that such preventive detention laws are applied as an exception to meet the needs of special circumstances and situations and not in the normal and ordinary course of affairs of the State.

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[62] INDIAN CONST. art. 21 & art. 22.
[63] Prof. (Dr.) Mukund Sarda, *Pre-Custody and Preventive. Detention: A Study in the Light of Huidrom Konung Jao. Singh's Case*, 48, no. 4 CIV. & MIL. L. J. 273 (2012).
[64] Ayya Alias Ayub v. State of UP, AIR 1989 SC 364.

CHAPTER III

DECIPHERING THE MOST CHERISHED RIGHT: PERSONAL LIBERTY

3.1 MEANING

Liberty in the most absolute sense, means having the faculty of willing and the corresponding power to do such act that has been willed, in the absence of being influenced by any other source - either within or outside.[65] It entails self-determination and unrestrained action. However, in a political context, liberty takes a somewhat narrower interpretation and a different colour. It is because the State, by reason of being an association of individuals, has to necessarily contemplate regulation of the conduct of individuals by way of laying down common rules that need to be adhered to by the people.

All persons by virtue of their very existence are entitled to certain set of basic legal rights and guarantees which has also been formalised in most of the National Constitutions as well as international instruments. The right to personal liberty also finds a mention among such pool of rights. However, we see that there exists considerable gap between the actual State practice and the normative commitments made by the State to protect the personal liberty of individuals. At bottom, however, the word "liberty," while using it in the most broad and general sense, means and includes within itself all such great rights, remedies, and guarantees which a human being possess within a given state of society or within the government.[66]

The term 'personal liberty' as it appears in Art. 21[67] has been the subject of a liberal interpretation by the Courts. It does not only mean being free from physical restraint or

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[65] B. UMA DEVI, ARREST, DETENTION AND CRIMINAL JUSTICE SYSTEM XXIV (1st ed. Oxford University Press 2012).
[66] Charles E. Shattuck, *The True Meaning of the Term 'Liberty' in Those Clauses in the Federal and State Constitutions Which Protect 'Life, Liberty, and Property.'*, 4, no. 8 HARV. L. REV. 365, 368 (1891).
[67] INDIAN CONST.

being free from confinement within the bounds of prison. Going beyond such concepts, it does not mean mere freedom from arrest and detention or freedom from wrongful confinement and false imprisonment. Instead, it includes all such variety of rights which go on to protect the personal liberty of an individual.[68]

However, it is to be noted that the administration of any guaranteed rights involves the inevitable adjudication of the balance between rights on one hand and other public interests on the other. For instance, imposing limitations on the protection of rights may be imperative for the achieving of necessary social objectives like health, welfare and safety of the citizens in addition to the maintaining of public order or national security.

The question then is whether there exists any limitations on such power of the government to limiting the rights of the people.[69] Two questions are pertinent for this: One, to what extent may States use contextual circumstances to justify specific domestic policy choices which have the effect of curtailing the rights of the individuals? Second, to what degree may states invoke such contextual factors to justify rights restrictions?[70] While defining and subsequent administering the preventive detention laws, it is important for all the divisions of the government to think and consider objectively both sides of the situation. It means that there should be a limit to which the States can enact laws such as those providing preventive detention on the grounds of security of state, public order, etc. Further, it also means that there should be a limit to which the State can invoke such grounds for the purpose of justifying its actions that lead to the curtailment of the liberty of individuals.

While India is a democratic state with a considerable stable political order as well as a powerful and independent judicial system, it also has a peculiar problem in the sense that thought it favours the human rights protections, the socio-economic conditions however create significant, sustained challenges for continued order maintenance.[71] And this as

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[68] MP JAIN, INDIAN CONSTITUTIONAL LAW (7th ed. Lexis Nexis, Gurgaon 2014).
[69] LOUIS HENKIN, THE AGE OF RIGHTS 220-224 (Columbia University Press 1990)
[70] Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 Mich. J. Int'l L. 311,318 (2001).
[71] CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 71-89 (1998 ed. The University of Chicago Press).

result forces the government to enact laws such as preventive detention which are then subjected to a lot of criticism owing to their perceived arbitrary intrusion upon the personal liberty of individuals.

3.2 POSITION AND DEVELOPMENT IN INDIA

In India, personal liberty is provided under Art. 21[72] providing that *"no person shall be deprived of his life and personal liberty except according to procedure established by law."*

In the above definition, the phrase '*procedure established by law'* is the most important which has been a subject of great debate and scrutiny.

After the commencement of the Constitution, the question of interpretation of these words arose in the landmark case of *A. K. Gopalan v. State of Madras,*[73] case wherein the *vires* of the Preventive Detention Act, 1950 was questioned and challenged. The prime argument was whether Art. 21 envisaged any procedure that was to be followed as laid down by a law enacted by the legislature or whether the procedure was to be fair and reasonable. It was laid down by the Supreme Court that the Constitution gave no guarantee against arbitrary legislation that encroaches upon the personal liberty of an individual. Hence, even if a law enacted by a legislature was unreasonable, unfair or unjust, then its validity could not be challenged in a court of law on those grounds.

It was only in *Maneka Gandhi v. Union of India*[74] that Art. 21 was given a liberal interpretation. The Supreme Court held that the right to life as it appears in Art. 21 means something more than survival or animal existence and includes the right to live with human dignity. It includes all those aspects which go on to make an individual's life meaningful, complete and worth living. Some of these include: Right to livelihood, Right to sleep, Right to privacy, Right to speedy, fair and open trial, Right against custodial violence, Right to information, etc.

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[72] INDIAN CONST. art. 21.
[73] *Supra* note 7.
[74] *Supra* note 8.

Maneka Gandhi case was in stark contrast to the *A. K. Gopalan* case. In the instant case the Court creatively interpreted and broadened its powers of interpretation to permit natural justice to come within the fold of Art. 21. It can be said that the instant case was one of judicial activism wherein the Court observed that right to travel abroad is a fundamental and that one cannot be deprived of such right unless there exists a procedure provided by law and also such procedure must pass the test of it not being arbitrary.

Prior to *Maneka Gandhi* decision, Art. 21 was available to person only in cases of arbitrary actions by the executive. The same was not available for legislative actions. Thus, if the State had the force of law, it could interfere with the liberty of individual even if it was arbitrary. But, subsequent to the decision in the instant case, Art. 21 is protected both by executive as well as legislative action. After this case, if the State or the executive seeks to deprive a person of his liberty, the following conditions need to be fulfilled: There must be a law; the law must provide a procedure to deprive a person of his liberty; the procedure must be just, and must conform to the principles of fairness and reasonableness.

Two major changes were bought about in the instant case: The first one involved the applicability of natural law within Indian law and the second one was that the Judges were empowered by the principles of justness, fairness and reasonableness to decide upon the validity of the actions of the executive and the legislature.[75]

On the basis of the guidelines of the *Maneka Gandhi* case as well as considering the significance of Article 21, a lot of judicial law-making has taken place on Art. 21. The Supreme Court has made a novel use of Art, 21 to: prevent the sexually harassment of women at the hands of their male co-workers at their workplaces, ensure that there is no custodial violence, facilitate inter-country adoption, put a ban on smoking at public places and regulatory requirements of blood banks, etc. The same have been also used liberally to provide and protect the liberty of individuals who have been deprived of the same due to an Act of the legislature as in matters of preventive detention.

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[75] Bhavani Kumar, *Judicial Activism: Article 21 of the Constitution,* ACADEMIKE, Nov. 16, 2014, https://www.lawctopus.com/academike/judicial-activism-article-21-of-the-constitution/.

3.3 INTERNATIONAL INSTRUMENTS

The various international instruments too seek to protect the life and liberty of a person. Some of them along with their relevant provisions are as follows-

The ICCPR, 1976[76] provides that no person can be arbitrarily deprived of life. Art. 9 ensures the liberty and security of person which protects against arbitrary arrest and detention. It also provides right of information of grounds and reasons of arrest as well as right to be produced before a judge and legal proceedings. It also provides compensation for arbitrary arrest and detention.

However, the above rights are not absolute in the sense that Art. 4 provides that the countries can derogate from the above provisions on grounds of official proclamation of public emergency which threats the existence of the state. However, the derogation is permissible only to the extent of exigencies of the circumstances.

The UDHR, 1948[77] also ensures the right of life, liberty and security of an individual and provides protection from arbitrary detention.

The European Convention[78] also provides for right to liberty and security which is non-derogable except in cases of lawful detention, non-compliance of lawful order, detention for suspicion of offence or preventing from committing offence in future, etc.

From the above, it is clear that even the international instruments provide for the life and liberty and permit derogation from the same in exceptional circumstances as in cases of emergency, preventive detention, etc.

The right to life and personal liberty can be considered to be one of the most prized gift and cherished possession that has been given to individuals within the Constitution. However, the State, by reason of both the criminal laws as well as preventive detention laws, has been empowered to curtail such rights. This power of the State is to be exercised

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[76] International Covenant on Civil and Political Rights 1976, art. 6.
[77] Universal Declaration of Human Rights 1948, art. 3, art. 9.
[78] European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 5.

with due care and caution by a proper and careful appreciation of the facts before the detaining authority as to whether the act of the person sough to be detained is such which would tend to prejudice the security and interest of the State and its citizens or cause a disruption of public law and order thereby justifying the issue of such a detention order. An individual case of offence under the Code[79], however heinous that may be, is not a fit case for issuing an order of preventive detention.[80]

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[79] The Indian Penal Code 1860.

[80] Yumman Ongbi Lembi Leima v. State Of Manipur, (2012) 2 SCC 176.

CHAPTER IV

A CONSPECTUS OF NATIONAL SECURITY ACT, 1980

The National Security Act, 1980 was enacted with the objective for providing for certain cases in which orders for preventive detention can be issued and executed and for matters connected therewith. The National Security Act, 1980 was passed on December 27, 1980 and it replaced the Ordinance of 1980.[81]

4.1 NEED AND SIGNIFICANCE

The main need and significance of such a legislation can be inferred from the statement of objects and reasons of the said Act which can be summarised as follows:

1. To tackle problems such as communal disharmony, extremist activities, social tensions, industrial unrest, etc. which affect the law and order situation in the most effective and determined way.

2. To prevent the anti-social and anti-national elements as well as all such elements, who adversely affect and influence the essential community services posing grave challenges to the lawful authority and even have the effect of holding the society sometimes to ransom.

3. To grant powers of preventive detention to prevent the government and the administration from getting handicapped in dealing effectively with complex problems such as defence, public order, security and maintaining services that are considered essential to the community.

[81] National Security Ordinance 1980.

4.2 BRIEF OVERVIEW OF PROVISIONS

The National Security Act, 1980 (hereinafter NSA, 1980) contains 18 sections. The main provisions for the purpose of the paper are as follows:

1. Persons empowered to issue detention orders and related matters - The NSA, 1980[82] provides the powers for issuing detention orders on grounds of defence of India, relations with foreign states, security of India, public order, or any act prejudicial to the maintenance of supplies and services that are considered to be essential to the community. It also provides the power to delegate the same to the District Magistrate and Commissioner of Police for a period not exceeding three months and may further exceed for three months at a time from time to time.

Further a report of the order of detention made by the officers above needs to be sent forthwith to the State Government containing the grounds of detention and other related matters and such detention order lapses at the end of twelve days unless the State Government approves the same. Further, a detention order made either by the State Government or approved by it needs to be reported to the Central Government consisting of the grounds of detention and other matters relevant to it.

2. Place and conditions of detention - The Act provides empowers the appropriate Government to prescribe orders as to the conditions and place of detention along with orders providing for the transfer of the detained person from one place to another either in the same State or different State.[83]

3. Disclosure of grounds of detention - NSA, 1980 provides the right to the detained person to know the grounds of detention as soon as possible but not exceeding five days and not later that fifteen days in exceptional circumstances, the reason for which needs to be put into writing,. The purpose of the same is to provide the earliest possible opportunity to the detained person for sending a representation to the appropriate Government against the order of detention.

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[82] The National Security Act 1980, § 3.
[83] *Id.* at § 5.

However, the disclosure of any fact concerning the ground of arrest can be curtailed on public interest.[84]

4. Constitution, reference and procedure before the Advisory Boards - The NSA, 1980 provides the Central Government and the State Government the power to constitute Advisory Boards. The Board is to contain three persons appointed by the appropriate Government who either are sitting High Court Judges or retired High Court Judges or are otherwise qualified to be appointed as High Court Judges. Out of the three members, one shall be a Chairman, who either is or has been a High Court Judge.[85]

Except as otherwise provided in NSA, 1980, the appropriate Government has the duty to make a reference to the Advisory Boards within three weeks of detention which shall include the report of the detention authority and the representation of the detained person.[86]

The Advisory Board will, after considering the material concerned and after further examining any such information which is necessary for the purpose of the instant case which it may call from the appropriate Government or any person called for the purpose either through the appropriate Government or from the person concerned, submit its report within seven weeks of detention to the appropriate Government which shall also contain its opinion on the need for continued detention. The proceeding before the Advisory Board is without any legal practitioner and the same is confidential expect the report of its opinion. Further, if it is desired so by the person concerned to be heard in person, the Advisory Board shall hear him in person before submitting its report along with the opinion to the appropriate Government.[87]

5. Effect of opinion of Advisory Board - In case the Advisory Board opines in the positive as regard to the continued detention of the person, then the appropriate

[84] *Id.* at § 8.
[85] *Id.* at § 9.
[86] *Id.* at § 10.
[87] *Id.* at § 11.

Government may confirm the order of detention and may provide for the continued detention of the person for a time period as appears fit to it for the purpose.

However, if the opinion of the Advisory Board as regard to the continued detention of the person is in negative, the appropriate Government shall not confirm the order of detention and release the person so detained forthwith by revoking the detention order.[88]

6. Maximum period of detention and revocation of detention orders - Twelve months from the date of order of detention is the maximum time period for which a person can be detained in case the order of detention is confirmed by the appropriate Government.[89]

A detention order may be modified or revoked at any time. However, such expiry or revocation of an earlier detention order shall not have the effect of barring a subsequent detention order issued against the same person. However, in the absence of any new fresh facts subsequent to the revocation or expiry of the earlier detention order, then the maximum period of detention of the person under a subsequent detention order shall not exceed twelve months from the date of such earlier detention order.[90]

7. Circumstances providing the detention of persons for periods longer than three months without obtaining opinion of the Advisory Boards - Under Sec. 14A of NSA, 1980, the requirement of opinion of the Advisory Board within three weeks of the date of detention could be dispensed with and persons could be detained for periods exceeding three months without obtaining the opinion of the Advisory Boards. The same could be permissible in case the person concerned was served the order of detention at any time before June 08, 1989. In such a situation, the person concerned may be detained without the reference been made to the Advisory Board for a period exceeding three months but not exceeding six months

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[88] *Id.* at § 12.
[89] *Id.* at § 13.
[90] *Id.* at § 14.

from the date of detention in case the order of detention has been made against the person on grounds of :

(a) Preventing the individual from interfering in the efforts of the Government for coping with terrorist acts and disruptive activities (as defined in the Act[91]) in any disturbed area as has been defined under Explanation 2 of the said section.

(b) Preventing him from acting in a manner which would have the effect of prejudicing the defence of India, the security of India or the State, maintenance of either public order or supplies and services which are considered to be essential to the community.

The section also provides for modifications upon the existing provisions (Sec. 3, 8, 10 to 14) with regard to the person who has been detained under the instant section including enhancement of the existing maximum period of detention from twelve months to two years.

8. Immunity against suits and proceedings - NSA, 1980 provides for immunity from suit and legal proceeding to the Central Government as well as the State Government for actions taken or intended to be taken in good faith for the purposes of the Act.[92]

It is to be noted that the above provisions consist of the most relevant provisions which would be required further in the paper. It is also to be noted that the NSA, 1980 also (barring the grounds of detention) has almost the same provisions with other preventive detention laws as discussed earlier with slight variations as regard to the different time limits as specified under different provisions of the Act.

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[91] Terrorist and Disruptive Activities (Prevention) Ordinance 1987.
[92] *Id.* at § 16.

CHAPTER V

HARMONISING THE CLASH OF NATIONAL SECURITY ACT, 1980 WITH PERSONAL LIBERTY

The term "National Security" does not have a precise, analytical meaning. The phrase generally refers to the ability of the government to defend itself from the possibility of being removed from power or control of the State through domestic disturbances and adverse activities or by means of external aggression. However, it also means the capability of the government to serve the interests of its citizens effectively by functioning without any hindrances.[93]

There has been a continuous struggle between the needs of national security and political/civil liberties. There is a need to ensure that there is no overestimation of the needs of national security at the hand of those in power to ensure that consequently there is no detriment of civil liberties of the people.

Striking the right balance between the powers of the State and the rights of the citizens is one of the essential attributes of democracy. In the present age, even though many nations are driven by issues concerning human rights, yet, they are often made subservient to national security.[94] This subservience of human rights and personal liberty to national security is both unnecessary and questionable. The better and desirable approach would be to put both national security and personal liberty at the same pedestal and try to achieve a balance between the two thereby ensuring minimum friction between the otherwise two very important and inevitable needs of the modern State and society.

The States view the goals of national security and personal liberty as mutually exclusive to each other. It means that promoting national security would be at the expense of human

[93] *Developments in the Law: The National Security Interest and Civil Liberties*, 85, no. 6 HARV. L. REV. 1130, 1133 (1972).
[94] Deepika T & Dr. S. Pandiraj, *National Security vs. Human rights: Whistle Blowing Act of Edward Snowden*, 120, no. 5 INTL. J. PURE & APPLIED MATHEMATICS 4885, 4886 (2018).

rights while promoting human rights would be at the cost of national security.[95] However, this is not the correct understanding of the two concepts. Both, national security and personal liberty are mutually inclusive. Failure of one would inevitably lead to the failure of the other. For instance, not giving due importance to national security would put in danger the personal liberty of its citizens by way of external threats, aggression, etc. Similarly, giving undue importance to national security at the expense of personal liberty would entail the citizens to fight and revolt against the oppressive policies of the government (in the name of national security) which would in turn would hamper the national security. Any action to preserve national security or personal liberty giving undue and arbitrary importance to either one of the two would disturb their delicate balance and would result in anarchy leading to the fall of both of the highly cherished concepts thereby nullifying the very purpose for which the impugned action was undertaken in the first place. Thus, there needs to be a balance between national security and personal liberty, if both are to co-exist.

The National Security Act, 1980 is often criticized for its draconian provisions which affect the personal liberty of individuals. In this chapter, we will look at the clash of the said Act with personal liberty and how the judiciary opined about the validity of the same as well as the various decisions of the Supreme Court to provide safeguards to people under preventive detention. This chapter also explores the efficacy of the regular laws to provide for preventive detention of indviduals and provides examples of past instances in the country which tend to strengthen the argument in favour of preventive detention laws. The chapter also provides instances wherein the National Security Act, 1980 was alleged to have been arbitrarily applied upon individuals.

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[95] William W. Burke-White, *Human Rights and National Security: The Strategic* Correlation, 17 HARV. HUM. RTS. J. 249 (2004)

5.1 DEBATING THE CONSTITUTIONALITY AND JUSTIFIABILITY OF NATIONAL SECURITY ACT, 1980 AND ITS CLASH WITH PERSONAL LIBERTY – A. K. ROY V. UNION OF INDIA

A. K. Roy v. Union of India[96] was outcome of slew of writ petitions which challenged the Constitutional validity of the National Security Ordinance, 1980 as well as certain provisions of the National Security Act, 1980, filed under Art. 32 of the Constitution of India, 1950.

The main issues for determination were as follows:

Issue 1) The scope and limitations of the Ordinance-making power by the President thereby depriving the person of his life and liberty.

(a) Contention by the Petitioner - The petitioner contended that the powers of issuing ordinance is an executive power and not a legislative power. Art. 21 implied the virtual denial to the executive to use ordinance as a measure of abridging the life and personal liberty of an individual as ordinance doesn't correspond to law within the meaning of Art. 21.

Judgment - The Court placed reliance upon the heading of Chap. III of Part V[97] which was "Legislative Powers of the President". Reliance was also placed on Cl. (2) of Art. 123 which provides that an Ordinance that has been issued within Art. 123 is to have, just like an Act of Parliament, the same force and effect subject to the remaining provisions of the said Article.

In the question of whether an Ordinance was law, reliance was placed on Art. 13(3) which provided that "law" unless the context might so otherwise determine, also included, among other things, Ordinance. In lieu of the fact that in the instant case, the context did not otherwise so required, it followed that an Ordinance was law. Reliance was also placed upon Art. 367(2) which provided that references in the

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[96] A. K. Roy v. Union of India, AIR 1982 SC 710.
[97] INDIAN CONST.

Constitution to any Acts or laws of the Parliament or Legislature of a State shall also be meant as references being made to Ordinance.

(b) Contention by the Petitioner - The petitioner contended that since Ordinances, by their very nature have a limited duration, the procedure for promulgation of an Ordinance is not established as per law as per Art. 21.

Judgment - The Court held that the word 'established' as it occurs in Art. 21 is used to denote that certainty is one of the essential attributes of the procedure that is to be laid down within the meaning of the said Article. In *State of Orissa v. Bhupendra Kumar Bose*[98], and *Mohammadbhai Khudabux Chhipa and v. The State of Gujarat*[99], it was held that an Ordinance has the capacity to create enduring rights and obligations. The limited and temporal duration of Ordinance for the purpose of Art. 21 is immaterial.

(c) Contention by the Petitioner - The petitioner contented that it was well settled that separation of powers is an intrinsic part of the basic structure of the Constitution which would be grossly violated if an Ordinance that has been promulgated by an executive is equated to the laws that are made through the legislature.

Judgment - The Court observed that Ordinance making power does not violate doctrine of separation of powers as Art. 123(1) has been an integral part of the Constitution since its inception and the Constitution doesn't envisage a strict separation of powers like America.

(d) Contention by the Petitioner - The petitioner contented that power under Art. 123 must be construed harmoniously having regard to the other provisions of the Constitution and Art(s) 14, 19 and 21 of the Constitution of India, 1950 would inevitably become a dead letter in case the executive is empowered and authorized

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[98] State of Orissa v. Bhupendra Kumar Bose, AIR 1962 SC 945.

[99] Mohammadbhai Khudabux Chhipa v. The State of Gujarat, 1962 Supp. 3 SCR 875

to deprive people by virtue of an Ordinance, the right under Art. 21 in the absence of any supporting law made by the legislature.

Judgment - The Court observed that Art(s) 14, 19 and 21 would not be reduced to a dead letter as power under Art. 123 is to be exercised keeping in view the limitations and restrictions as are applicable to a law made by the legislature as provided under Art. 13(2).

Issue 2) The Constitutional validity of Preventive Detention having regard to the extreme violations of personal liberty which it necessarily warranted.

Judgment - The Court observed that the objective of the founding fathers was for two purposes: One was to provide a Constitution creating a Government and secondly, the object was to accord protection to the citizens against the same. For the same, the people had been provided the Bill of Rights under the Constitution to protect the fundamental rights against legislative and executive despotism while at the same time conferring powers of declaring emergency, suspending fundamental rights and making Ordinance to the government.

It observed that owing to public interest, however, and within reasonable bounds, the liberty of the individual has to give way for the common good of the people. In light of this, provisions were made in Entry 9, List I & Entry III, List III empowering the Parliament and Legislatures of States to enact laws concerning the preventive detention of individuals

Further, the Court held that Art. 22 of the Constitution expressly deals with the laws of preventive detention and their scope is appropriately defined therein. As long as the preventive detention laws function within the limitations of the Constitution, the Court cannot hold the same as invalid on the deceptive ground that it interferes with the liberty of the people.

Notwithstanding the fact that preventive detention is not resorted to in England and America during normal times, the framers of our Constitution decided to adopt and legitimize preventive detention during normal times. Thus, the same cannot be

declared unconstitutional by importing the Courts own conception of righteousness and wrong. Further, the Constitution does not contain the "due process clause" which though initially introduced by Pandit Thakur Dass Bhargava was negated by putting it to vote.

In view of this and giving due regard to the fact that that the Constitution accepts preventive detention as a measure of limiting the liberty of individuals subject to the limitations provided under Part III, the Court rejected the claims of preventive detention being invalid under the Constitution.

Issue 3) The Forty-Fourth Amendment concerning the constitution of Advisory Boards and the effect of it not being brought into force by the Central Government.

(a) Context -

(i) Sec. 1(2) of the Forty-Fourth Constitution Amendment Act, 1978 empowers the Central Government to appoint the date from which the Act shall come into force and that different dates may be specified for different provisions of the Act by notifying the same in the Official Gazette.

(ii) Sec. 3 of the Forty-Fourth Constitution Amendment Act, 1978 provided for amendment to Art. 22(4) that a person cannot be detained beyond 2 months unless the same is reported in the opinion of Advisory Board (constituted under the recommendation of the Chief Justice of the concerned High Court) that there exists sufficient reasons for detention. It also provided that the said Board shall consist of a Chairman who shall be a serving Judge of the appropriate High Court and in addition to that not less than 2 other members who shall be serving or retired Judges of any High Court.

(iii) The Constitution of Advisory Boards under The National Security Ordinance as given under Cl. (9) was conforming to provisions of Sec. 3 of the Forty-Fourth Amendment Act even it had not been brought into force. However, The NSA, 1980 replaced the Ordinance and retained Art. 22(4) in its original character for the Constitution of Advisory Boards.

(b) Contention by the Petitioner - The petitioner contented that sec. 1(2) of the Forty-Fourth Amendment Act was *ultra vires* Art. 368(1) of the Constitution and the same could be severed from the rest of its provisions, in case it was proved to be bad for any reason.

Judgment - The Court observed that Article 368(2) provides that when a Constitutional Amendment Bill is passed by Parliament, the same should be mandatorily presented to the President who thereafter shall give his assent to the Bill, after which the Constitution stands amended according to the terms of the Bill.

The terms of the Forty-Fourth Amendment Act provide by virtue of Sec. 1(2) a condition precedent i.e., the Central Government has to notify in the official gazette a date of the coming into force either the entire Act or certain provisions therein. As a result, unless a notification is issued by the Central Government to that effect, the provisions of the Forty-Fourth Amendment Act cannot come be brought into force.

The Court also observed that no internal contradiction existed between Art. 368(2) and Sec. 1(2) of the Forty-Fourth Amendment Act with the former laying a rule as regards the date from which the Constitution would be considered amended while the latter specifying the procedure in which the Act or for that purpose, any of its provisions would come into force. For the purpose of deciding the date from which the Constitution Amendment, shall come in force, recourse had to be taken to the Central Government notification under Sec. 1(2) of the Act.

(c) Contention by the Petitioner - The petitioner contented that refusal to bring Sec. 3 into force within a reasonable time is violative of Art. 21 and mala fide. Since the constitution of Advisory Boards under NSA, 1980 does not conform to Sec. 3 of the Forty-Fourth Constitutional Amendment Act, the entire Act should be declared bad and invalid in law as no such law can be valid unless it conforms to Art. 22 of the Constitution and specifically Cl. 4.

Judgment - The Court rejected the argument that it was the mala fide intention by the government of not bringing into force Sec. 3 of the Forty-Fourth Amendment. Though the delay raised many questions, it was not possible on the basis of the data placed before the Court to hold that the government had any ulterior motive behind the same.

It observed that delay in implementation of the will of Parliament can arouse suspicion, but on the basis of material before the Court, it would be unfair to hold that the Central Government is motivated by ulterior considerations for not bringing Sec. 3 into force.

It further held that the Parliament as a matter of fact had not been deprived of its power for bringing into force the necessary Amendment even though the same had been delegated to the Central Government. If the government failed in its duty, the Parliament was empowered to delete the relevant provisions of the Amendment Act conferring power upon the Central Government to bring into force the provisions of the Act and assume to itself the power of bringing into force the desired provisions of the Act.

(d) Contention by the Petitioner - The petitioner contented that the very fact that the National Security Ordinance provided for the constitution of Advisory Boards in line with the Forty-Fourth Amendment Act bears testimony to the fact that the Parliament had not foreseen any difficulty in bringing into force the concerned provision. However, the National Security Act, 1980 had the effect of dissolving the Advisory Boards duly constituted under the Ordinance and substituting them by Boards the composition of which was not in consonance with the letter and spirit of the Forty-Fourth Amendment. Though Sec. 3 of the Forty-Fourth Amendment had not been put in force, the wisdom of the said Amendment was available to the Court and the extent that the NSA, 1980 did not conform to such a view, the NSA, 1980 must be declared to be suffering from the vice of unreasonableness and thus liable to be struck down.

Judgment - The Court held that **t**here can be no objection to the Constituent body appointing itself a specific date in the future from which the Amendment Act would be brought into force. The amendment of Constitution in accordance with the provisions of the Bill and the coming into force of the amendment are two different things. An amendment to Constitution has no effect until and unless the same is brought into force.

The Court held that it cannot be thus accepted that the Amendments as brought about by the Act when assented to by the President will immediately come into force. The same would become a part of the Constitution only when they are notified under Sec. 1(2) by the Central Government.

It was observed that the contention of the petitioners that it is the Constituent power of the Parliament to bring in force a Constitutional Amendment by notifying a date in the official gazette for the same and therefore the delegation of the same to an outside agency is impermissible did not stand much ground. It is because the same did not carry with itself any power as to the Amendment of the Constitution. Thus, the same could be delegated to an outside agency which in the instant case was the Central Government who was responsible for its actions to the Parliament.

On the question of delegated legislation, the Court observed that the *Re Delhi Laws Act*[100] case was a leading authority. In the case, it was observed that conditional legislation in which an outside agency was authorized by the legislature the discretionary power to select the time and place of enforcement and subsequent notification was permissible. The making of laws is a means to an end and that end was sometimes secured more effectively by delegating the power of Legislature particularly in cases wherein practical difficulties might exist in the enforcing of such laws concurrently with their enactment and which cannot be predicted at the time of making of laws. Thus, leaving the judgment of the same to an outside

[100] *Re* Delhi Laws Act, 1951 SCR 747.

agency becomes inevitable. The Court, therefore held that Sec. 1(2) of Act was not *ultra vires* the power of amendment under Art. 368(1).

(e) Contention by the Petitioner - The petitioner contented that it is the Constituent power of the Parliament to notify a date for bringing a Constitutional Amendment into force and therefore the delegation of the same to an outside agency cannot be done and thus Sec. 1(2) of the Forty-Fourth Amendment which vested uncontrolled power in the executive was bad in law.

Judgment - The Court held that as far as the argument that Sec. 1(2) of the Forty-Fourth Amendment granted the executive uncontrolled power and was thus bad by reason of such vesting was concerned, it may be pointed out that in the past similar or even greater delegation to the executive of such powers had been held to be valid by the Court. In *Sita Ram Bishambhar Dayal and Ors. v. State of U.P. and Ors,*[101] it was held that the vast complexities of problems of modern society and the chilling effect it has on the Government, have invariably made it imperative and inevitable for the legislatures to confer enhanced powers to the executive.

(f) Contention by the Petitioner - The petitioner contented that it was the obligation of the Central Government after the Presidential assent to Sec. 1(2) & Sec. 3 of the Forty-Fourth Amendment Act to bring the same into force within a reasonable time. Owing to the failure of the government, the Court must ask the Central Government to do the same without further delay by issue of writ of Mandamus.

Judgment - The Court observed that since the Parliament had left it to the wisdom of the Central Government for notifying the provisions into force, the Court could not, as a matter of fact, compel the Government by issuing Mandamus to do that which lied absolutely in its discretion to do. Had the Parliament laid down any objective test or standard to be followed while exercise such powers of notifying the Act, the Court would have subjected the same into judicial scrutiny. However,

[101] Sita Ram Bishambhar Dayal v. State of UP, 1972 SCR (2) 141.

in the absence of any norms of guidelines, the Court cannot substitute its own judgment for that of the Central Government. Further, there was also no disability in the Parliament to enact a provision in the NSA, 1980 in accordance with the said section in case the Central Government failed to do so.

Issue 4 - The vague language of the provisions of the National Security Act which excessively and unreasonably interfered with the liberty of the people.

(a) Contention by the Petitioner - The petitioner contented that Sec(s) 3(1) & 3 (2) of the NSA, 1980 were very vague and wide in extent due to which it would be extremely easy for the appropriate government for depriving the liberty of individuals for any reason, however trivial, which would deem fit to them. The expressions such as – ‘defence of India’, ‘security of India’, ‘relations of India with foreign powers’, ‘security of the State’ as they appeared in Sec. 3(1)(a) & 3(2) were very vague, elastic and general, the effect of which was that even that conduct which would otherwise appear to be legal or lawful could be easily subsumed within the above expressions on the whims and fancies of the detaining authority which as a result conferred unfettered and unregulated discretion on the hands of the detaining authority which was to the detriment of the liberty of the people.

Judgment - As regards the question that the expressions as they occurred in Sec. 3 were uncertain and vague, the Court held that the above mentioned expressions cannot be accorded a precise and appropriate definition. Even if a definition could be accorded to a term, it did not imply certainty to that definition. Some expressions are such to which one can comprehend an infinite variety of situations and definitions. If the legislature had been empowered to make laws concerning preventive detention, then a certain minimum latitude had to be given to them in order to enable the laws to be effective which in the opinion of the Court was a realistic approach to the situation. The vagueness or uncertainty of terms did not always imply difficulty in applying the same to the practical realities of life.

The Court observed that even in criminal law, there are usage of vague expressions such as hatred or contempt', 'maintenance of harmony or 'likely to cause

disharmony or hatred or ill-will', or 'annoyance to the public', etc. Though it is difficult to define these terms, yet the lack of definition does not prevent their just application to practical situations.

Thus, even though it was difficult to define the concepts as mentioned in Sec. 3 of the Act, the Court held that it cannot repeal such provisions by reason of their vagueness and uncertainty.

(b) Contention by the Petitioner - The petitioner contented that the lack of an accurate definition essentially meant that it would cause difficulties to a reasonable man to understand with practicable certainty the limits of conduct beyond which he shall not lawfully transgress which was one of the cardinal requirement of the rule of law. The vice of Sec. 3 lied in the fact that the application of the same was based upon the opinion of the detaining authority which was quite subjective and personal. The argument that a habeas corpus petition may be filed in the event of any wrongful detention and that the Court may release the detained person was not an appropriate justification to the vice of the section.

Judgment - It was held that the Courts must interpret those concepts by according a construction narrower than what the literal words might suggest. The Courts must exercise caution to restrain their application to as few situations as possible while construing and interpreting laws of preventive detention such as the NSA, 1980. Indeed, in one way this reasoning could be considered as an unstated premise to uphold the validity of clauses like that in Sec. 3, which if construed liberally can have a chilling effect on personal liberty.

Issue 5 - The reasonableness of the procedure provided under the Act as being violative of the fundamental rights as provided under the Constitution.

(a) Contention by the Petitioner - The petitioner contented that the National Security Act, 1980 deprived personal liberty and unreasonably conferred upon the executive broad and arbitrary powers of detention by way of procedure which was

neither fair nor just. The Act thus stood in violation of Art(s) 14, 19 and 21 and was therefore unconstitutional.

Judgment - The Court observed that In, *R.C. Cooper v. Union of India*[102], *Sambhu Nath Sarkar v. The State of West Bengal*[103] and *Maneka Gandhi v. Union of India*[104] it was well settled that the fundamental rights under the Constitution are not mutually exclusive and thus a law providing for prevention detention under Art. 22 should also conform to Art. 14, 19 and 21.

Reliance was also placed upon the decision in *Khudiram Das v. The State of West Bengal*[105] wherein it was observed that the question now stood well settled and concluded that no one could now contend that a law of preventive detention which falls within Art. 22, does not need to conform to the requirement of Art. 14 or Art. 19.

The Court also placed reliance on *Haradhan Saha v. The State of West Bengal*[106] to determine whether a law providing for preventive detention was invalid for violating Art(s) 14, 19, 21 & 22 of the Constitution. In the instant case, the Maintenance of Internal Security Act (MISA), 1971 and its validity was under challenge by contending that it violated the above stated Art(s) since its provisions were discriminatory and that they provided for an unreasonable infringement upon the rights protected under Art. 19. It was also contended that it violated the fair procedure guarantee and that there was no impartial machinery for hearing the representation made by the detained person to the Government. The Court rejected all the contentions and held that the MISA, 1971 was not suffering from the vice of constitutional infirmity and that it did not violate Art(s) 14, 19, 21 & 22 of the Constitution.

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[102] R.C. Cooper v. Union of India, AIR 1970 SC 564.
[103] Sambhu Nath Sarkar v. The State of West Bengal, 1974 SCR (1) 1.
[104] Maneka Gandhi v. Union of India, 1978 SCR (2) 621.
[105] Khudiram Das v. The State of West Bengal, AIR 1975 SC 550.
[106] Haradhan Saha v. The State of West Bengal, 1975 SCR (1) 778.

The Court extended the same argument in the instant case and held that the argument that the NSA, 1980 is by its very nature violative of Art(s) 14, 19, 21 & 22 and thus is unconstitutional cannot be sustained as the said Act is in *pari materia* to the MISA, 1971. Thus the Act cannot be challenged on grounds that it interfered unduly with the liberty of the people.

Issue 6 - The different provisions of the Act being unreasonable, arbitrary and violative of the fundamental rights of the Constitution.

(a) Contention by the Petitioner - The petitioner contented that Sec. 3(3) by which the District Magistrate or the Commissioner of Police can issue orders for detention was wholly unreasonable.

Judgment - The Court held that the power under Sec. 3(3) was conferred to the officers subject to the satisfaction of the State Government that circumstances were such which made it necessary to confer such power. Another safeguard was in the form that such order remained in force only for a maximum period of three months and could be extendable further from time to time, but could not exceed three months at a time by the State Government. Further by Sec. 3(4), the officer concerned had to report forthwith the order and grounds of detention to the State Government and which, unless it approved, could only remain in force for a maximum term of twelve days. In the opinion of the Court, since there existed inherent safeguards within the Act, it could not be contended that the section vested excessive or unreasonable power upon the officers aforesaid to pass detention orders.

(b) Contention by the Petitioner - The petitioner contented that Sec. 5 which conferred power to regulate place and conditions of detention was unreasonable.

Judgment - It was held that the objections of the petitioners as to unreasonableness of Sec. 5 partly had some substance. It was because measures of punitive kind could not be introduced under laws of preventive detention by back-door. It was observed that *"Detention without trial is an evil to be suffered, but to no greater extent and*

in no greater measure than is minimally necessary in the interest of the country and the community."

It was observed that it would be unfair and unjust if a detenu was made to undergo detention in "such place" as the Government so specified. Generally, the detention should be within the environs of ordinary place of residence. Absence of the same would make it impossible for the detained person to meet his friends or relatives or have his own food.

It further observed that even if for the sake of the requirements of administrative convenience and safety and security, the detained person had to be transferred to a place away from his ordinary place of residence, the same should be a matter of exception and not a general rule. In matters concerning preventive detention, whatever was in the nature of punishment or a punitive measure (though not directly) must be avoided.

The Court held that to ensure that the procedure for detention was fair, just and reasonable in conformation to Art. 21, it was necessary to ensure that as soon as a person was detained, the close members of the detenu's family such as parents, children, spouse, etc. must be notified in writing of the detention and custody as well as the place of detention. A person, by the very nature of arrest, did not forfeit all of his fundamental rights. Thus, it was imperative that the detained person was treated with human dignity as well as civilized norms of behaviour.

(c) Contention by the Petitioner - The petitioner contented that Sec 8(1) which dealt with the disclosing of grounds of detention unreasonably allowed the detention authority a maximum period of five days and in extraordinary cases as late as ten days from the date of detention to furnish the grounds of detention to the detained person.

Judgment - The Court observed that the argument against Sec. 8(1) was that it overlooked the primary requirement of the said section which provided for the expedient communication of the grounds of detention. The normal rule provided

that the grounds of detention should be notified at maximum efficiency. However, it was only in the light of meeting the urgent needs and demands of the detaining authority that it was granted some extra time to make such disclosure. Further, the detention authority was mandated by Sec. 8(1) for recording in writing the reasons for such delay. Thus, in the opinion of the Court, there should not have been any objection to the said section.

(d) Contention by the Petitioner - The petitioner contented that Sec. 13 which provided for upper limit of 12 months of detention from the date of detention in all cases, notwithstanding the different nature and circumstances of the grounds on which the order was passed was unreasonable.

Judgment - The Court observed that as regard to Sec. 13, there was no substance in the objection of the petitioners because just like any punitive law such as the Indian Penal Code, 1860 was required to provide for the maximum period of sentence, in the same manner, any law providing for preventive detention had to give the maximum period of detention. Providing a minimum period of detention, in the opinion of the Court, would have been wrong. Further, the detention authority had also been empowered to exercise discretion regarding the time period for detention by virtue of the proviso to Sec. 13 through with it could modify or revoke the detention order at an earlier time.

(e) Contention by the Petitioner - The petitioner contented that Sec. 16 provided for protection of actions taken in good faith which had the effect of conferring an unwarranted immunity and protection to officers who might have passed detention orders with mala fide intention and was thus unreasonable. Further the term "good faith" as it appeared under Sec. 16 had to be construed in the light of the way it was defined in Sec. 3(22)[107] which provided that an act is done in good faith is one which is done honestly irrespective of whether it is negligent or not which is unreasonable.

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[107] The General Clauses Act 1897, § 3(22).

Judgment - The Court observed that since the policy of the said law was to protect honest acts, notwithstanding they may be negligent, the law cannot be declared unreasonable. Honest acts should be given the highest possible protection. There was a very thin line dividing a dishonest act from one that is negligent and thus it would be difficult for an officer for justifying that his conduct was honest, if the same was marred by even the slightest bit of negligence. Thus, the fact that the term "good faith" as was present in Sec. 3(22) of the General Clauses Act, 1897 also included within its ambit acts that were negligent would not every time make a substantial difference to the proof of matters as arising in proceedings commenced under Sec. 16 of NSA, 1980.

Issue 7 - The constitution, reference and procedure before the Advisory Board being violative of the Constitution.

(a) Context - Sec. 3 of the Forty-Fourth Amendment Act, 1978 introduced an amendment to Art. 22(4) of the Constitution as follows:

(i) The Advisory Boards have to be constituted on the basis of recommendation provided by Chief Justice of the concerned High Court, whereas, in the original provision, it is not necessary to obtain the recommendation of the Chief Justice.

(ii) The Chairman of the Advisory Board is to consist of sitting Judge of concerned High Court and the other members can be either serving or retired Judges of any High Court, whereas, under the original provision, it is not necessary that the members are sitting or retired Judges of the High Court. The only condition is that they need to be qualified for appointed as Judges of a High Court.

(iii) If a person has practiced as an advocate of a High Court for ten years, then he becomes qualified to be appointed a Judge of a High Court owing to section Art. 217(2) of the Constitution of India, 1950.

(b) Contention by the Petitioner - The petitioner contented that Sec(s) 9, 10 and 11 of the NSA, 1980 which dealt with the constitution, reference and procedure before the Advisory Board were arbitrary and violative of the Constitution. Sec. 9

of the NSA, 1980 was bad in law as its provisions were not in consonance to Sec. 3 of the Forty-Fourth Constitutional Amendment. The difference between the amended as well as the unamended provisions of Art. 22(4) was very important from the point of view of the detained person as his detention was based on the grounds of reports that were *ex parte* as regards to his conduct in the past with the object to prevent him from engaging in the same conduct at a future date. It was thus very essential that unbiased, independent, competent and persons possessing a trained judicial mind comprised the Advisory Board.

Judgment - The Court rejected the view that Sec. 9 of the NSA, 1980 was bad in law for not being in consonance to Sec. 3 of Forty-Fourth Amendment Act. The Court held that earlier in the judgment, it had considered Sec. 1(2) of Forty-Fourth Amendment Act as valid. Since the Government had not brought into force Sec. 3 of the Amendment Act dealing with the composition of Advisory Boards, that provision was not a part of the Constitution. Thus, the validity of the Constitution of the Advisory Boards under Sec. 9 had to be tested scrutinized in light of Art. 22(4) of the Constitution as it originally was. Since Sec. 9 of NSA was in conformity to Art 22(4) of the Constitution, the Court could not declare as bad the provision which strictly conformed to the provisions of the Constitution.

The Court held that Parliament was free to bring about the necessary amendments in Sec. 9 of NSA. Similarly, there was nothing which prevented the appropriate government from ensuring that serving or retired judges of the High Court constituted the Advisory Board. It further stated that it was essential for the executive to strive in reaching the highest attainable limit of justice and fairness in all its actions irrespective of either any compulsion by law or otherwise. Advisory Boards constituted in accordance to Sec. 3 of the Forty-Fourth Amendment would give credibility to their proceedings. This would provide a reasonable assurance that Advisory Board proceedings would be objective, fair and competent. This would ensure that the implicit promise of the Constitution gets fulfilled.

Issue 8 - The procedure before the Advisory Board was violative of the principles of Natural Justice.

(a) Contention by the Petitioner - The petitioner contented that the procedure under Sec(s) 9, 10 & 11 was wholly unreasonable and arbitrary as it violated the natural justice principles and was against the requirements of Art. 21. The detained person must have the right of legal counsel, cross-examination, present evidence in rebuttal, etc.

Judgment - On the contention that the procedure as envisaged under Sec. 9 & 10 of NSA, 1980 was violative of natural justice and Art. 21, the Court held as follows:

The rights of legal counsel, cross-examination and right to present evidence in rebuttal ensure a just process and their absence partly disable the detained person to refute the allegations against him. However, the same depends upon the nature of the proceeding and the statutory provisions governing the proceeding.

In the instant case, as regards the right to legal representation, Art. 22 (1) provided that the arrested person had the right of legal counsel. Sec 22 (3) provided that nothing in Cl, 1 & 2 shall apply to any person arrested or detained under a law of preventive detention. A joint reading of the both provided a clear picture that the right of legal practitioner provided under Cl. (1) to a person was taken away by Cl. 3 to a person detained by a law concerning preventive detention. Owing to the express provision in the Constitution itself, it was held that the detained person had no right of legal representation and that the same was not unfair, unreasonable or unjust.

Had, Art.22 been silent as to the right of legal representation, then the Court could have held that the detained person should not be deprived of the right to legal representation. The Court observed that it was unfortunate that it had been deprived of the choice by Art. 22(3)(b) read with Art. 22(1). What the said provision considered as just, fair and reasonable could not be held to be unjust, unfair and unreasonable for the purpose of Art. 21.

The issues that are usually dealt with in a criminal trial are virtually very different from what exists before the Advisory Board. An accused person in criminal trial can possess rights that may not be available to a person under preventive detention consistently with reason and fair play and thus the decisions of the Court as regards the right of legal representation in criminal cases could not be extended to this case. The Court, thus regretfully held that the detained person had no right of legal counsel in matters before the Advisory Board.

The Court however placed a caveat that allowing the detaining authority access to legal counsel before the Advisory Board while denying the same to the detained person would be violative of Art. 14 of the Constitution. If the facility of legal practitioner was given to the detaining authority, the same shall be extended to the detained person. The Court however observed that the detained person had the right of assistance by a friend who was not a legal practitioner. Fairness, as held by Lord Denning in *Maynard v. Osmond*[108] could be ensured even without legal representation. However, it would be unfair that the detained person should not be allowed to take the help of even a friend also when the relevant statute did not exclude that right. Thus, whenever the detained person demanded, the Advisory Boards must permit the same.

As regards the rights of cross-examination and its relation to the principles of natural justice, the Court observed that there existed no fixed standard for natural justice and the same were evolved on a case to case basis in accordance with the broad requirements of justice in a given case. The Court also placed reliance upon the English case – *Govt. Board v. Arlidge*[109] where it was held that the expression 'natural justice' lacked in precision and was vacuous.

The Court held that it in no way suggested that natural justice principles, notwithstanding their vagueness and variable nature, were not worthy of preservation. However, the ambit of the rules of natural justice must vary according

[108] Maynard v. Osmond, 1 Q.B. 240, 253 (1977).
[109] Govt. Board v. Arlidge, 1915 A.C. 120, 138

to the context and the nature of the proceeding. On the basis of this test, the Court held that it cannot declare that the detained person had the right of cross examining in matters of the Advisory Board.

It was because, cross-examination is generally applied in proceedings wherein witnesses are examined and documents are adduced as evidence for the purpose of proving a point in which circumstances, cross-examination becomes an effective weapon for proving the veracity and credibility of the evidence. But, in case of proceeding before Advisory Board, the question is not to decide upon the guilt but whether sufficient causes exist which render the detention of the person concerned. The detention is based not upon the application of the test of preponderance of probabilities and of reasonable doubt but upon the subjective satisfaction of the detaining authority. Thus, proceedings before an Advisory Board have to be engineered differently from any other regular proceeding.

The Court also drew attention not the fact that apart from the above reasoning, it was not uncommon that in matters of preventive detention, the witness were often themselves not willing to come forward and further that the disclosures of sources of information would be detrimental to public interest. It was because, disclosure of identity would frustrate the very process of preventive detention as individuals would be dispirited to give information in case their identity would be disclosed as the same would be a grave threat to their well-being and security.

The Court also drew attention to certain decisions such as *New Prakash Transport Co. Ltd. v. New Suwarna Transport Co. Ltd.*[110], wherein the Court held that that the observance of natural justice principles must be according to rules provided by the Legislature and in accordance with the constitution of the statutory body and depending upon the position, the rules must be varied and applied. In *State of Jammu Kashmir v. Bakshi Ghulam Mohammed*[111], the Court rejected the argument

[110] New Prakash Transport Co. Ltd. v. New Suwarna Transport Co. Ltd., 1957 SCR 98, 106.
[111] State of Jammu Kashmir v. Bakshi Ghulam Mohammed, 1966 Supp. SCR 401, 415.

that right to hearing involved right of cross examining witnesses and held that such right depends upon case to case basis and on the terms of the statute concerned.

The court also rejected the reliance put up by the petitioners in the following two cases to prove that the right to cross-examination was inevitably part of natural justice. In *Union of India v. T.R. Varma*[112] it was observed that rules of natural justice involve an opportunity of cross-examination of the witnesses that have been examined by the other side. Further, in *Khem Chand v. Union of India*[113] it was held that if the purpose of Art. 311(2) was to be fulfilled, a person should be empowered to prove that the evidence provided against him is not credible of consideration and the same can only be possible if he cross-examines the witnesses who depose against him and he examines himself and such other witnesses which he may so require for the purpose.

The Court held that the observations in the above two cases have to be looked into the context in which they were made. They should not be misconstrued to believe that they lay down a general rule of cross-examination in every proceeding as an inevitable part of natural justice. Since in matters before the Advisory board, witnesses were not examined by the detaining authority, therefore, the above 2 decisions had no application to such proceedings.

Thus, the Court, in the light of the above reasoning held, was of the opinion that given the nature of proceedings of the Advisory Board, the detained person had no right of cross-examination as against neither the detaining authority nor the persons whose statements were relied for the detention order.

As regards the rights to lead evidence in rebuttal before the Advisory Board, the Court found no objection to the same as neither the Constitution nor the NSA, 1980 prohibited the same. The Court held that the detained person may provide in front of the Advisory Board both oral as well as documentary evidence. However, the detained person shall have to ensure the presence of the witnesses at the appointed

[112] Union of India v. T.R. Varma, 1958 SCR 499, 507.
[113] Khem Chand v. Union of India, AIR 1958 SC 300.

time and the Advisory Board had no obligation to summon them. Further, the Advisory Board, within the limitations imposed by Constitution and the statute, was free to make rules for its procedure including the time within which the detained person must complete his evidence.

Issue 9 – Ensuring the minimum basic rights and safeguards to the detained person and the powers of the Advisory Board

(a) Contention of the Petitioner - The petitioner contented that it was imperative to accord to the detained person maximum safeguards to protect and preserve his liberty by providing him, at the very least the basic principles of due process which could be subjective and moulded upon the extent of grievous loss to be suffered as a result of the detention. Preventive detention led to the loss of the right to personal liberty which was very precious and thus all procedural facilities needed to be made available to the detained person which would enable him to defend the allegations made against him and also disprove the same.

Judgment - On the contention of the petitioners that the Advisory Board must decide two questions which are of prime significance to the detained person - firstly, whether there existed sufficient grounds for the detention of the person concerned and secondly, whether the continued detention of the person was necessary after the date of its report, the Court rejected both the contentions.

The Court held that Sec. 11(2) of the NSA, 1980 clearly laid down that the Advisory Board's report shall contain its opinion on the matter of continued detention of the person by considering the grounds for the same. The question before the Advisory Board was that whether or not on the date of its report, there existed causes that were sufficient for the continued detention of the person. However, the jurisdiction of the Advisory Board could not be extended to determine the question as to necessity of continued detention either beyond the date of it submitting its report or beyond the time period of three months of detention. The same was exclusively for the detaining authority to decide.

In *Puranlal Lakhanpal v. Union of India*[114], on the question of the powers of the Advisory Board, the majority of the Court had rejected the contention that the words "such detention" in Art. 22(4)(a) should be construed as detention exceeding three months. It held that it was not for the Advisory Board to consider whether the detention should exceed three months.

For deciding the above, the Court placed reliance on the decision in *Dattatraya Moreshwar Pangarkar v. State of Bombay*[115] in which it was observed that the Advisory Board was limited to give its opinion on the sufficiency of causes for detention. To decide upon the period of time for which a person shall be detained was beyond the scope of the Board.

As regards the contention of the petitioner of making the proceedings before the Advisory Board public, the Court held that the right of public trial was not provided under our Constitution. Further, giving regard to the nature of the inquiry the Advisory Board undertook, it opined that it was not the case that justice would be better administered by opening to the public, the proceedings of the Advisory Board.

As regards the post-detention conditions applicable to the detained individuals, the Court held that dignity of the human as well as the well-being of the people was the basic object of' our Constitution. In pursuance of the same, in recent times, the Court had on several occasions reminded the authorities to treat even the convicts with human dignity. The Court held that it was the duty of the Government for ensuring that all reasonable facilities that would enable the detained person to exist with dignity be given to the detenus which included but were not limited to wearing own clothes, having own food, meet with the family members at least once a week, etc.

The Court further stressed on the need to segregate persons detained under NSA, 1980 from regular convicts and to lodge them in a separate part from the regular

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[114] Puranlal Lakhanpal v. Union of India, 1958 SCR 460, 475.
[115] Dattatraya Moreshwar Pangarkar v. State of Bombay, 1952 SCR 612, 626.

convicts at the detention place. It observed that the detained persons must be protected against the evils of "custodial perversity" at all costs.

Reliance was placed in *Sunil Batra v. Delhi Administration*[116], in which it was observed that integrity of physical person and mental personality were the most important rights accruing to the detained person. Even inside the prison, a person could not be deprived of his rights in the absence of a just, fair and reasonable procedure. Within a society founded upon democratic ideals, a wrong caused to one person meant a wrong to every person and thus it was imperative to make sure that the detained person was not put under such circumstances which affected his dignity.

Issue 10 - Dissenting Judgment

Though the judgment as enunciated above expressed the view of the majority, Justice Gupta dissented on two points. The first one related to the Central Government failing to bring Sec. 3 of the Forty-Fourth Amendment Act into force and the second one related to the question whether an ordinance was 'law' within Art. 21. It is to be noted that on the first point, even Justice Tulzapurkar was in agreement of the view expressed by Justice Gupta in his Judgment.

1. Issuance of writ of Mandamus - As regards the first one, he was of the view that Sec. 1(2) could not be considered so as to mean that the Parliament had left it to the Central Government for bringing into force the said Act. Post the President's assent, the government should have been obliged to bring into force the provisions of the Act and that too within a reasonable time. The government could not arbitrarily keep it in a dead state for any period of time as it so pleased.

He observed that from the statement of objects and reasons of the Amendment Bill, it was clear that the intention of the Parliament was to make effective the provisions of the Forty-Fourth Amendment Act as soon as possible. The statement of objects and reasons mentioned that from the recent experience, it had become apparent that

[116] Sunil Batra v. Delhi Administration, 1979 SCR (1) 392.

the transient majority might take away the fundamental rights, including that of life and liberty of the citizens. Thus, it was imperative to provide necessary and proper safeguards to prevent the possibility of such an event happening in the future and to ensure that the people had an effective voice so as to determine the kind of government under which they intended to live.

Justice Gupta opined that the Parliament was empowered enough to take appropriate steps to rectify the situation. Therefore, he would issue a writ of mandamus for the same.

2. Meaning of Ordinance - Justice Gupta opined that an Ordinance was not 'law' for the purposes of Art. 21 of the Constitution. The nature of the Ordinance making power could be construed from Art. 123 which provided that it is to have an effect of an Act of Parliament implying thereby that it was not in reality an Act of Parliament.

He further observed that the same could be further elaborated by reference to Art. 356 and 357 of the Constitution containing the emergency provisions. Under Art. 357(1)(a), the President could be empowered by Parliament to make laws for the State Legislature. Thus, wherever it was essential for the President to make laws, the Constitution had provisions for the same.

He also gave reference to the observation made by Justice Patanjali Sastri., in *A. K. Gopalan v. State of Madras*[117], wherein it was observed that the word "established" under Art. 21 implied firmness, permanence and general acceptance. From the same, the difference between a law under Art. 357 as well as under Art. 123 by the President could be inferred. A law made by the President under Art 357 remained in force unless altered, repealed or amended. However, an Ordinance under Art. 123 unless approved, ceased its operation after the expiry of a maximum period of six weeks from the reassembly of Parliament. Thus, from the above it was clear that the Ordinance could not by virtue of its very character be considered to be

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[117] A. K. Gopalan v. State of Madras, AIR 1950 SCR 88.

espousing ‘firmness’ of ‘permanence’ that the word ‘establish’ implied and thus it could not be used to deprive a person of his life and personal liberty under Art. 21.

Thus, it can be said that the Court in the instant case upheld the validity of the National Security Act, 1980 and declared the various provisions of the NSA, 1980 which were under criticism for their violation of the established principles of natural justice and personal liberty as constitutionally valid. The Court very meticulously analysed all the contentions of the petitioners and gave detailed reasoning for its observations and decisions upon a particular issue.

The Court specifically relied upon the very peculiar nature of preventive detention in addition to the provisions in the Constitution concerning preventive detention to arrive at its decision. While upholding the NSA, 1980 and all of its provisions which have a drastic effect upon the liberty of individuals, the Court also, within its perceived limits and powers sough to provide certain protections and safeguards to the persons detained under the NSA, 1980. These included the right to be lodged in separate jails from the other convicts, the right to lead evidence in rebuttal before the Advisory Board, the right to the assistance of legal practitioner in case the detaining authority took the aid of a legal practitioner, the right to dignity, the right of informing the close relatives as to the fact and place of detention, etc.

5.2 JUDICIAL PRESCRIPTIONS OF PROCEDURAL SAFEGUARDS TO PROTECT PERSONAL LIBERTY

The Constitution can be considered to be all pervasive document. Thus, all the laws made or enacted by the State must, therefore conform to limitations and restrictions as put forth in the Constitution including the right to personal liberty guaranteed under Art. 21. In, *Narendra Purshotam Umrao v. B. B. Gujral*[118], it was observed that in matters concerning preventive detention of individuals, the Court has provided certain procedural safeguards that need to be given due regard. Such safeguards can be understood to means as a regulative 'Postulate of Respect', i.e., respect for the intrinsic dignity of the human person.

[118] Narendra Purshotam Umrao v. B. B. Gujral, AIR 1979 SC 420.

The powers of prevention detention thus have to be exercised subject to the aforesaid regulative 'Postulate of Respect'.

The preventive detention laws such as the National Security Act, 1980 are largely engineered around the subjective satisfaction of the detaining authority. However, in an attempt bring the preventive detention laws in line with personal liberty as provided under Art. 21, the Judiciary, through its pronouncements has tried to inject an element of objectivity into such preventive detention laws.

The Supreme Court has through its interpretation of the provisions of the preventive detention statutes provided certain procedural safeguards to preserve personal liberty some of which are as follows:[119]

1. Intimation as to the fact of detention and place of detention – In *A. K. Roy v. Union of India*[120], the court while reading Art. 21 & 22 together held that in order to ensure that detentions correspond to Art. 21 in the matter of justness, fairness and reasonableness of procedure, it is necessary that as soon as a person is detained, his immediate relatives like parent, children or the spouse need to be notified in writing with regard to the fact that a detention order and order of custody has been passed against the detenu.

2. Communication of the grounds of detention: It is a well settled position in law that the grounds of detention of an individual in addition to all the relevant documents and statements must be provided to the detained person. However, even to this day, the persons who are detained are unable to approach a court of law for the simple reason that the detaining authority has failed to supply the requisite documents and materials.

In *Khudiram Das v. The State Of West Bengal*[121], the Court observed that the requirement of communicating to the detained person the grounds of detention checks upon the possibilities of arbitrariness. The grounds of detention must be

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[119] SAXENA, *supra* note 30, at 142-155.
[120] A. K. Roy v. Union of India, AIR 1982 SC 710.
[121] Khudiram Das v. The State Of West Bengal, AIR 1975 SC 550.

intimated to the detained person so that he may be aware of the facts and materials which are forming the basis of the satisfaction of the detaining authority and also to enable him to invoke the power of judicial review. Further, the person so detained shall be accorded the right of making a representation against the detention.

3. Mode of Communication – The grounds of detention should always be communicated in writing and in a language that is understandable to the detained person.

In *Mehrunissa v. State of Maharashtra*[122], it was argued by the respondents that as the detained person was already aware of the contents of the documents referred to in the detention order, therefore he was not supplied with the documents. Rejecting the argument, the Court held that there exists no answer to the submission made by the respondents. The detained person was entitled to be supplied with all the copies of the material documents instead of him having to rely upon his memory with regard to the contents of the matter in the documents

In *Lallubhai Jogibhai v. Union of India,*[123] a contention was raised that the grounds for detention were served in English to the detained person and that he was not acquainted with the language. The contention was accepted and the petition was allowed.

4. Grounds communicated should not be vague – In *Prabhu Dayal Deorah, v. District Magistrate, Kamrup,*[124] it was held that the detained person has been accorded a right within Art. 22(5) of the Constitution to be granted with the earliest opportunity to make a representation against an order of detention. For that, adequate particulars as to the ground of detention need to be furnished. Violation of the said right enables the detained person to seek redressal the same by approaching the Court under Art. 32.

[122] Mehrunissa v. State of Maharashtra, AIR 1981 SC 1861.
[123] Lallubhai Jogibhai v. Union of India, AIR 1982 SC 1500.
[124] Prabhu Dayal Deorah v. District Magistrate, Kamrup, AIR 1974 SC 183.

5. Form of representation – The manner in which the representation is to be made for the purpose of Art. 22(5)[125] was considered by the Court in *Shalini Soni v. Union of India*[126]. In the instant case, the Court observed that there exists no formula or straitjacket solution as to the form of representation. It is not necessary to make the representation in any prescribed form. A representation is deemed to have been made even if it consists of a mere request or demand along with a ground or reason for the same so as to release the detained person irrespective of the form and language and the same can be construed and dealt with as representation.

6. Delay vitiates detention order – The Courts have often regarded delay as a sufficient ground for vitiating the detention orders.

(a) Delay in passing the order – In *S.K. Serajul v. State of West Bengal*[127], the failure to explain the inordinate delay (in the passing of detention orders) of eight months lapsing after the incident occurring which is said to be the basis of the subjective satisfaction of the detaining authority and the subsequent delay of another 8 months in arresting the person concerned made the Court to quash the detention order by holding that absence of reasonable and satisfactory explanation as to the causes for the delay means that the condition precedent to the passing of the order is not satisfied.

(b) Delay in execution of order – The presence of unreasonable and unjustified delay between the order of detention on one hand and the arrest of the individual on the other, unless satisfactorily explained, casts serious aspersions upon the veracity of the subjective satisfaction of the detaining authority.

Thus, in *Shafiq Ahmad v. District Magistrate, Meerut,*[128] the Court considered the delay of six months between the date of detention order and actual detention of the

[125] INDIAN CONST. art. 22(5).
[126] Shalini Soni v. Union of India, AIR 1981 SC 431.
[127] S.K. Serajul v. State of West Bengal, AIR 1975 SC 1517.
[128] Shafiq Ahmad v. District Magistrate, Meerut AIR 1990 SC 220.

individual under the National Security Act, 1980 as fatal to the case of the detaining authority.

(c) Delay in supply of grounds – The Court has time and again re-iterated that the delay in supplying the grounds of detention to the detained person vitiates the detention order. Thus, in *Tushar Thakker v. Union of India,*[129] the Court considered the detention order to be invalid as about thirty two days had lapsed in supplying to the detained person the documents and materials of his detention.

The Court observed that Art. 22(5) guarantees to the detained person the constitutional right to be furnished with all the materials and particulars relied upon for detention within a reasonable expediency. Failure to do so stultifies the rights of the detained person of an effective representation and a speedy consideration of the same by the concerned authorities.

(d) Delay in sending representation to concerned authorities - The delay in sending representation to the concerned authorities invariably entails the delay in the disposing off of the representation which thereby violates Art. 22(5) and the detention order can thus be set aside.

In *Saleh Mohammed v. Union of India,*[130] the representation of the detained person was forwarded to the jail superintendent but the same lay in his table for a period of twenty two days. The Court quashed the order of detention by holding the delay to be unwarranted, unreasonable and inordinate and violative of Art. 22(5).

(e) Delay in considering the representation – The representation as provided by the detenu must be considered and disposed as expeditiously as possible.

In *Pabitra N. Rana v. Union of India*[131]*,* the court read into the provision of Art. 22(5) and observed that it imposes a corollary duty upon the detaining authority to consider and dispose the representation as early as possible. The absence of same

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[129] Tushar Thakker v. Union of India, AIR 1981 SC 436.
[130] Saleh Mohammed v. Union of India, AIR 1981 SC 111.
[131] Pabitra N. Rana v. Union of India, AIR 1980 SC 798.

would nullify the right of the detained person to make his representation as expeditiously as possible. Thus, in the instant case, wherein there was an inordinate delay of thirty five days in considering the representation provided by the detained person, the court declared the continued detention as void.

(f) Failure to forward representation- It is the solemn duty of the detaining authority to forward the detained person's representation to the concerned authorities.

In *Jai Prakash v.District Magistate, Bulandshahar*[132], the detained person on being informed of his right to send representation against the order of detention to the State and Central Government sent nine copies of his representation to the jail superintendent with a request to forward the same to the concerned authorities. On the failure to forward the same to the Central Government, the Court held that the detained person was denied of his right to effective representation and thus the detention order was liable to be quashed.

7. Oral hearing in proceeding before the Advisory Board – Earlier the view of the Court was that oral hearing was not imperative in proceedings before an advisory board. Thus, in *Hardhan Saha v. State of West Bengal,*[133] wherein the *vires* of the Maintenance of Internal Security Act, 1971 were been examined, it was observed by the Court that oral hearing is not a necessary condition for fair consideration of representation before the Advisory Board and that fairness can be ensured even in the absence of oral hearing.

However, in the subsequent developments, the Court has held that it is a necessary perquisite for the Advisory Board to hear the detained person who wishes to be heard. Thus, in *State of Punjab v. Sukhpal Singh,*[134] it was held by the Court that though the Advisory Board possesses the power to regulate its own procedure but the same should be within the constraints as specified in the Constitution and the

[132] Jai Prakash v.District Magistate, Bulandshahar, AIR 1993 SC 473.
[133] Hardhan Saha v. State of West Bengal, AIR 1974 SC 2154.
[134] State of Punjab v. Sukhpal Singh, AIR 1990 SC 231.

statute. If the Advisory Board submits its report without hearing the detained person, then it would be a gross violation of Art. 22 of the Constitution. Even the failure to produce the detained person, unless the same is by his own wilful refusal, would be violative of the provisions.

8. Assistance and right to produce evidence in proceedings before the Advisory Board – As regards the position of the right of assistance and the right to produce evidence before the advisory board is concerned, the same has already been discussed above in the case of *A. K. Roy v. Union of India*[135]. It that case, it was observed that the right to assistance was limited to the right to assistance by a friend who is not a legal practitioner. As far as the right to produce evidence in proceedings before the Advisory Board is concerned, it was held that the detained person has the right to lead as well as rebut evidence as neither the Constitution nor the NSA, 1980 expressly prohibits the same. However, for exercise of the same, the detained person would have to ensure the presence of all the persons he wishes to examine at the appointed time and that there shall be no obligation upon the Advisory Board to summon them.

9. Right of judicial review – As the preventive detention cases are largely based upon the subjective satisfaction of the detaining authority concerned, it becomes very difficult to judge the same by using objective standards. However, the same has not deterred the Courts from examining as to whether the subjective satisfaction which is an essential condition precedent to be followed by the detaining authority before passing the order of detention has actually been arrived at or not. In the absence of the same, the condition precedent to the exercise of such a power would remain unfulfilled and thus the order of detention would be considered to be bad in law.

A case in point in this regard is *Khudiram Das v. State of West Bengal*[136] in which the Court held that there can be no unfettered discretion which is immune from

[135] *Supra* note 120.
[136] Khudiram Das v. State of West Bengal, AIR 1975 SC 550.

judicial review. And in cases involving the personal liberty of individuals, it becomes all the more necessary. As a result, in the instant case, several tests were laid down to determine cases wherein the subjective satisfaction was not arrived at. Some of them are as follows: when there was no application of mind on the part of the authority, when the power was exercised dishonestly, when the satisfaction is not that of the authority exercising the power, but a third party, where the satisfaction is arrived at by misconstruction of a statute or a test, etc.

From the above instances, it is clear that the Judiciary has assumed a significant role in protecting and preserving the personal liberty of individuals from arbitrary detention by enunciating certain procedural safeguards which need to be adhered to while the wheels of preventive detention of an individual are in motion. For this, the Judiciary has interpreted the various terms as contained in the relevant statute and used the same to provide safeguards to the people.

5.3 EFFICACY OF REGULAR LAWS AND STATUTES TO DEAL WITH SITUATIONS REQUIRING PREVENTIVE DETENTIONS

While the NSA, 1980 provides for the preventive detention of individuals to prevent persons from doing something that might prejudice the grounds upon which a preventive detention order can be made as mentioned in the Act, it becomes necessary to look at the existing legal framework in the country as to whether the same can be resorted to in place of the NSA, 1980. This becomes particularly necessary as the provisions related to Preventive Detention laws are always criticized for their arbitrary interference to the personal liberty of individuals. Thus, it becomes apposite to look at the existing legal framework to determine whether the same can be substituted for NSA, 1980.

Generally, the IPC, 1860[137] is the basic law code which provides for the definition of offences and their punishments along with the general exceptions available to the persons charged under an offence under the Act. The Act encompasses a variety of offences such as offences against the State, offences against public tranquility, offences affecting the

[137] The Indian Penal Code 1860.

public health, safety, decency and morals, offences against the human body and several other offences grouped together under different chapters. Now, the grounds upon which the NSA, 1980 may be invoked are security of state, public order, relations of India with foreign powers, defence of India, maintaining of supplies and services essential to the community, etc.

A careful reading of the provisions of the NSA, 1980 would show that the grounds mentioned under NSA, 1980 are such that they can be construed to fall within the meaning of offences under the IPC, 1860. Even in cases where there are gaps in the provisions of IPC, 1860 and the grounds of detention under NSA, 1980, the same can be filled by special legislations. For instance, with regard to the ground of maintaining the supply and services essential to the community under NSA, 1980, the same can be somewhat looked after by the Essential Commodities Act, 1955 with such modifications as may be required.

The CrPC, 1973[138] deals with the criminal procedure to be followed when the wheels of any offence or criminal activity are set in motion. A careful study of the CrPC, 1973 also would bring into light the fact that the provisions of CrPC also provide for provisions that can be construed to be falling within the domain of preventive detention. The following are some of such provisions:[139]

The CrPC allows for the arrest of a person by the police officer without a warrant and without an order from a Magistrate in cases where the person sought to be arrested is one against whom a reasonable complaint has been made or a credible information has been received or there exists a reasonable suspicion that the person concerned has committed a cognizable offence the punishment of which involves imprisonment for a maximum period of seven years and where the police officer concerned has been satisfied that to prevent the person from committing any further offence, such arrest in necessary.[140]

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[138] The Code of Criminal Procedure 1973.

[139] Kritika A., *Preventive Detention Laws like the National Security Act, under which Chadrasekhar Azad of Bhim Army was Jailed, have no place in a Democracy,* THE LEAFLET, Jan. 30, 2019, https://theleaflet.in/preventive-detention-laws-like-the-national-security-act-under-which-chadrasekhar-azad-ravan-of-bhim-army-was-jailed-have-no-place-in-a-democracy/.

[140] The Code of Criminal Procedure 1973, § 41.

The CrPC also provides the power to police for preventive arrest of a person without a warrant and order from the Magistrate in case if any design of committing a cognizable offence comes to the knowledge of the police officer and he has reason to believe that such Act cannot be otherwise prevented expect by arrest of the person concerned. A safeguard in this regard exists that the person so detained cannot be kept in custody for more than twenty-four hours unless his continued detention is authorized under the provisions of the Code or any other law in force for the time being.[141]

A look at the above provision makes it clear that the above provision is somewhat similar to preventive detention under NSA, 1980. In the above provision, the police has the power to arrest the person if he has reason to believe that otherwise a cognizable offence might be committed. Similarly, the law providing for preventive detention under NSA, 1980 also empowers the appropriate Government or their subordinate officers so authorized to provide for detention orders if they are satisfied that the detention is necessary for preventing acts that may be prejudicial to the grounds as mentioned in the Act.

The CrPC also empowers the Executive Magistrate, upon receiving information that any person might either likely or probably occasion to commit a breach of peace or lead to the disturbances of public tranquility and satisfied that sufficient grounds exist, to issue show cause notice to the person concerned as to why the person should not be required to execute a bond for the purpose of keeping peace for a period as the Magistrate deems fit but not exceeding one year.[142]

From the above, it is clear that there exists provisions in the existing laws that can be resorted to by the Government or the detaining authority for providing for preventive detention of the person concerned without resorting to prevention detention under the NSA, 1980.

However, what needs to be understood is that the above mentioned provisions are found in the law books which essentially deal with punitive detention. Along with these provisions, other provisions such as bail, police custody and judicial custody, production before

[141] *Id.* at § 151.
[142] *Id.* at § 107.

Magistrate within twenty-four hours, defence by a legal practitioner, etc. also exist. The proceeding concerning all such provisions takes place within the concerned Magistrate or Judge concerned in which the degree of proof required, the level of evidence required to be adduced stand at a much higher pedestal than the processes involved under laws providing for preventive detention.

As has already been mentioned that under laws providing for preventive detention, the person so detained does not have the rights available to a person who is detained under the ordinary criminal process. Even when, the person detained under preventive detention is given certain rights, the same are very diluted than the otherwise normal rights available to the arrested person.

All of these might tempt one to believe that these is no requirement of laws such as NSA, 1980 and that the existing laws, with all their procedural safeguards are sufficient to deal with the issues that serve as grounds for detention under the NSA, 1980. However, such a reasoning is flawed to some extent. The primary reason to enact laws such as NSA, 1980 providing for preventive detention over and above the existing laws is for the purpose of administrative efficiency.

The examples of terrorist attacks as well as other major law and order and public order problems as would be mentioned later are such that they need to be effectively and immediately dealt with by the concerned authorities. Such activities are not the work of one or two persons. A lot of persons are involved in such Acts. For instance, the persons actually committing the Act would be some, the persons providing local support would be some, persons funding as well as supplying materials and objects necessary for the commissions of the act may be some. A lot of persons are indirectly involved and often not much credible evidence is available against such persons to commit them to ordinary criminal trial with the object to prevent them from indulging in such adverse acts.

In such a situation, the ordinary processes of criminal justice system involving the requirement of warrant, production before the Magistrate within twenty-four hours, requesting the Court for enhanced police custody, the standard of proof required along with the possibility of being released on bail, etc. may seem to hinder the processes of

controlling and immediately attending to such alarming situations. In such a scenario, Acts such as NSA, 1980 come into play wherein they somewhat dilute the ordinary rights and safeguards available to persons detained and arrested under the normal circumstances.

However, that does not mean that Acts such as NSA, 1980 with their stringent provisions hampering the liberty of persons are justified. However, they are a necessary evil which need to be carefully and objectively applied to situations and circumstances when the ordinary process of criminal justice administration may fail to give prompt results.

Thus, it can be concluded that there exists provisions in the existing statutes which provide to some extent for preventive detention of individuals. Nevertheless, Acts such as the NSA, 1980 are also equally required to deal with major acts affecting drastically the public order and security of State, among other related things.

However, to decide which laws need to be applied in a particular situation, the following guidelines can be resorted to –

1. Preventive detention or criminal proceedings under the ordinary statute should be the norm and use of preventive detention under special statute such as NSA, 1980 should be the exception.

2. As far as crimes are committed which are related to provisions and grounds which can be dealt with both under the ordinary statute and special statute providing for preventive detention, care should be taken to try to act and proceed according to the provisions of the normal statute.

3. Only when the crime committed is such or the material before the authority is such, which if not attended to immediately would have serious and irreparable ramifications for national security and the public order should the means of preventive detention as provided under laws such as NSA, 1980 and the like should be resorted to and the processes involved within the ordinary criminal justice system should be dispensed with.

4. Further, while committing a person to preventive detention under laws such as NSA, 1980 care must be taken to ensure that the detaining authority, the persons manning the Advisory Boards as well as the persons in connection with the process of preventive detention whose acts have a significant bearing upon the entire process are such who are people of utmost integrity, credibility and an honest conscience. All the procedural requirements concerning such preventive detention which seek to benefit or provide rights to the detained person must be strictly followed.

The above points if followed, would to a great extent ensure that the persons are not arbitrarily detained under preventive detention laws and when they are so detained, they are accorded the best possible rights and measures that ensure that their detention is not arbitrary

5.4 RECENT INSTANCES OF ALLEGED MISUSE AND MISAPPLICATION OF NATIONAL SECURITY ACT, 1980

The NSA, 1980 is essentially used for the purpose of prevention detention with the aim to prevent a person from acting in a manner that might be prejudicial to security of State, public order, etc. However, there are a lot of examples where the NSA, 1980 comes under great criticism allegedly due to the misuse of its provisions which are used to silent either the critics of the government or its policies or are used as a means to subvert the ordinary process of justice. For instance, the NSA, 1980 has been alleged to have widespread abuse in several States where human rights defenders have been detained under the NSA.[143]

While the allegations against the misuse of the NSA, 1980 are several, however, for the purposes of this paper, only a few examples would be given to put forth the point that the NSA, 1980 has a lot of propensity to be misused and misunderstood.

1. The case of Dr. Khan - Dr. Khan was arrested for a speech which he had given at a University on Dec. 12, 2019 against the CAA 2019.[144] He was arrested on Jan.

[143] Amnesty International Public Statement, *India: Revoke Preventive Detention of Human Rights Defender in Manipur*, Oct. 14, 2009, https://www.amnesty.org/download/Documents/44000/asa200192009en.pdf.
[144] Citizenship (Amendment) Act, 2019

29, 2020 under different sections of the IPC, 1860.[145] Subsequent to his release on bail on Feb. 10, 2020, he was charged under the NSA, 1980 on Feb. 13, 2020. Further, by way of the extension order dated Aug. 4, 2020, he is to be detained till Nov. 13, 2020.[146] His continued detention raises several questions as to the reasons for his continued detention.

When, the Court had also deemed it fit to grant him bail after considering the various aspects of the case, then it is opined that there should not have been a strong enough reason for his subsequent detention under NSA, 1980. Further, subsequent to him being granted bail, if he would further engage in activities that might be prejudicial to the interests of maintaining law and order, then his bail order could have been cancelled by the appropriate Court. Further, the provisions under IPC, 1860 under which he was charged were sufficient to deal with the situation. Further, even if he had been detained under the NSA, 1980, there did not exist strong grounds to extend his detention for another three months. The reason for the same being that the schools, colleges and universities are already closed owing to the pandemic situation. Further, the social gatherings are also very restricted. Thus, there was a very less possibility of him engaging in such activities had he been released.

The above instance is one such example of either improper application of the existing law or a ploy to silence those who criticise the policies of the Government.

2. Cow slaughter incident - In an incident of alleged cow slaughter in Bulandshahr District of Uttar Pradesh on Jan. 2019 and the subsequent violence that led to the death of a police inspector, the NSA, 1980 was invoked against the three men accused of cow slaughter.[147]

This incident also raised criticisms on the ground that if at all NSA, 1980 was to be imposed, the same had to be imposed upon the violent mob which resulted in the death of

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[145] Indian Penal Code 1860, § 153A, § 153B, § 505(2).
[146] Apporva Mandhani, *Got only PDFs of Kafeel Khan case from SC in May, not Original case Record, says Allahabad HC*, THE PRINT, Aug. 19, 2020, https://theprint.in/judiciary/got-only-pdfs-of-kafeel-khan-case-from-sc-in-may-not-original-case-record-says-allahabad-hc/485139/
[147] Outlook Web Bureau, *National Security Act Invoked Against three Accused in Bulandshahr Violence*, OUTLOOK, Jan. 14, 2019, https://www.outlookindia.com/website/story/india-news-national-security-act-invoked-against-7-accused-in-bulandshahr-violence/323531/?next.

a police officer. As far as the three persons were concerned, they could be booked under the relevant provisions of the IPC, 1860 as well as any other law in force concerning cow slaughter. The imposition of NSA, 1980 upon the three persons was perceived to be a blatant misuse and misapplication of the provisions of the said Act.

3. Arrest of journalist - The arrest of a Manipur TV journalist and subsequent imposition of the NSA, 1980 for posts on social media criticizing the Prime Minister and the ruling party at the Centre drew worldwide criticism. The Government was widely criticized for firstly arresting the journalist under Sec. 124A[148] which deals with sedition and secondly under the NSA, 1980 subsequently to him being discharged of Sec. 124A by a local Court. The Advisory Board had approved his detention for twelve months. However, the detention order was subsequently set aside by the High Court.[149]

The justification offered by the Government as to the detention was that the detention was imperative to prevent the journalist from acting in a way that would prejudice the security of the state and public order for the reason that the journalist had called the Chief Minister of Manipur as a puppet of the Prime Minister along with other objectionable social media posts. [150] Many viewed this detention as a way of the State to silent dissent.

4. Coronavirus pandemic - During the coronavirus pandemic too, there were several news items that provided for the detention of persons under NSA, 1980 on grounds of attacking the health workers[151], warnings that those found attacking policemen enforcing lockdown would be slapped with NSA, 1980,[152] as well as

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[148] Indian Penal Code 1860

[149] The Wire Staff, *Manipur HC Orders Release of Journalist held under NSA since November*, THE WIRE, Apr. 08, 2019, https://thewire.in/media/kishorechandra-wangkhem-manipur-journalist-release.

[150] Ratnadip Choudhury, *Manipur Journalist Jailed for Criticising BJP, PM Released ahead of polls,* NDTV, HTTPS://WWW.NDTV.COM/INDIA-NEWS/MANIPUR-JOURNALIST-KISHORE-CHANDRA-WANGKHEM-JAILED-UNDER-NATIONAL-SECURITY-ACT-FOR-CRITICIZING-BJP-R-2019794 (last updated Apr. 08,2019).

[151] Press Trust of India, *COVID-19: 4 men slapped with NSA for attacking health workers*, THE ECONOMIC TIMES, https://economictimes.indiatimes.com/news/politics-and-nation/covid-19-4-men-slapped-with-nsa-for-attacking-healthworkers/articleshow/74964708.cms (last updated Apr. 03, 2020).

[152] Press Trust of India, Lucknow, *Coronavirus: NSA to be slapped against those who attack policemen enforcing lockdown in UP*, DECCHAN HERALD, Apr. 03, 2020,

warnings that deliberate violators of lockdown would be booked under NSA, 1980.[153]

While the detaining authorities would have been tempted to impose the NSA, 1980 considering the state of conditions in the country, yet, in doing so, they unknowingly exposed the fact as to how the said Act could be arbitrarily imposed without due application of mind. It is because, the Epidemic Diseases Act, 1897 as well as the Disaster Management Act, 2005 contained provisions which could have been resorted to for dealing with these situations.

Thus, from the above discussion, a fair idea can be obtained as to how the NSA, 1980 can be misused or improperly applied in certain situations. Thus, to prevent the misuse of NSA, 1980 as well as to ensure that it is not improperly applied in a given situation, the appropriate Government as well as the detaining authority should carefully apply their mind as to the necessity of imposing NSA, 1980 in a given situation. Further, in case the Government or the detaining authority is confused as to the proper application of law, they should seek proper legal advice so as to get a fair idea of the various laws that can be applied to effectively deal with a particular situation in place of NSA, 1980.

A proper application by the detaining authority of its mind as well as the need to have a proper idea of different laws is necessary to ensure that, in a given situation, the NSA, 1980 is not misused as a substitute of all other laws thereby depriving the personal liberty of persons so detained under the Act.

5.5 INSTANCES OF MAJOR ATTACKS IN INDIA CAUSING GREAT DISRUPTION OF LIFE AND PROPERTY

India has suffered at the hands of a lot of terrorist attacks as well as other attacks which have significantly hampered the security of the State claiming lives of a lot of people in the

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https://www.deccanherald.com/national/coronavirus-nsa-to-be-slapped-against-those-who-attack-policemen-enforcing-lockdown-in-up-820813.html

[153] Kalyan Das, Covid-19 Outbreak: NSA Against Lockdown Violators, HINDUSTAN TIMES, Apr. 15, 2020, https://www.hindustantimes.com/india-news/covid-19-outbreak-nsa-against-lockdown-violators/story-t7f4r5EwZhk8MHY8D59U2O.html

process and injuring several others. The following are some of the major attacks in India which claimed a lot of lives and caused widespread destruction to life and property which in turn even threatened the security of the State along with India's unity and integrity.

1. The 2001 Parliament attack - While several Parliamentarians were still within the Parliament, the Parliament Building on Dec. 2001 was attacked by five gunmen who were armed with explosives. Nine people in addition to the five gunmen lost their lives in the attack.[154]

2. Mumbai terror attack in 2008 - No one can forget the deadly terrorist attacks in Mumbai on Nov. 26, 2008 where heavily armed terrorists stormed into some of the most popular and populated places in the city shooting, bombing and killing about 166 people and injuring over 300.[155]

3. Serial bomb blasts in Assam - The serial bomb blasts that took place in the State of Assam on October 30, 2008 by the NDFB in Guwahati, Kokrajhar, Bongaigaon and Barpeta took the lives of about 88 people and injured more than 500 people.[156]

4. Jaipur Blasts in 2008 - The attack in Jaipur in May 2008 happened within the span of twenty minutes in which about eight high powered bombs exploded killing about seventy one and injuring around 200.[157]

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[154] Rama Lakshmi, *India hangs man for his role in 2001 Parliament Attack*, THE WASHINGTON POST, Feb. 09, 2013, https://www.washingtonpost.com/world/india-hangs-man-for-his-role-in-2001-parliament-attack/2013/02/08/98e42608-726c-11e2-b3f3-b263d708ca37_story.html.

[155] ET Online, *Revisiting the night of Mumbai Terror Attack: When 10 Pak Terrorists Attacked India's Financial Capital*, THE ECONOMIC TIMES, HTTPS://ECONOMICTIMES.INDIATIMES.COM/NEWS/DEFENCE/REVISITING-THE-NIGHT-OF-MUMBAI-TERROR-ATTACK-WHEN-10-PAK-TERRORISTS-ATTACKED-INDIAS-FINANCIAL-CAPITAL/ARTICLESHOW/72235424.CMS (last updated Nov. 26, 2019).

[156] NDTV, *Bodo Terror Outfit Chief, 14 Others Convicted in 2008 Assam Bombings,* NDTV, Jan. 28, 2019, https://www.ndtv.com/india-news/bodo-terror-outfit-chief-ranjan-daimary-14-others-convicted-in-2008-assam-bombings-1984310.

[157] Mohammed Iqbal, *Death for 4 in 2008 Jaipur bomb Blasts case,* THE HINDU, HTTPS://WWW.THEHINDU.COM/NEWS/NATIONAL/OTHER-STATES/FOUR-SENTENCED-TO-DEATH-IN-2008-JAIPUR-SERIAL-BLASTS-CASE/ARTICLE30358914.ECE (last updated Dec. 20, 2019).

5. The train bombings in Mumbai - Set off in pressure cookers, seven bomb blasts spread over a span of eleven minutes took off in the Mumbai Suburban Railways on July 11, 2006. These blasts killed about two hundred and nine people and injured close to seven hundred people.[158]

6. Uri Attack of 2016 - On Sep. 18, 2016, terrorists that were heavily armed stormed into an army base in Uri. Close to seventeen army personnel were killed.[159]

7. The Pulwama Attack in 2019 - It was one of the most deadly attack on the security forces. A minimum of forty CRFP personnel were martyred when an explosive-laden vehicle driven by a Jaish-e-Mohammed terrorist was rammed into a bus which was a part of the convoy carrying the CRPF personnel.[160]

8. A high-ranking police officer of Jammu and Kashmir in touch with terrorists and militants – A Deputy Superintendent of Police (DSP) has been alleged to be aiding the safe passage to terrorists as well as providing sensitive information concerning the deployment of the security forces. He also has been accused of hiding Hizbul Mujahideen (HM) terrorists in the guest house of Jammu and Kashmir police merely a day prior to his arrest. These are the allegations against the police officer that have been put by the National Investigation Agency in the charge sheet filed against him. He has also been accused of being in touch through secure messaging platforms with Pakistan through the aid of an officer of Pakistani High Commission situated at New Delhi.[161] It is pertinent to note that the said police officer was arrested on Jan. 11, 2020 when he was found with other terrorists of a banned organization in his car.

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[158] ET Online, *Six Terror Attacks that shook India*, THE ECONOMIC TIMES, Feb. 15, 2020, https://economictimes.indiatimes.com/news/defence/six-terror-attacks-that-shook-india/1993-bombay-blasts/slideshow/74146291.cms.

[159] Peerzada Ashiq, *18 Jawans killed in Pre-Dawn Strike at Uri*, THE HINDU, HTTPS://WWW.THEHINDU.COM/NEWS/NATIONAL/18-JAWANS-KILLED-IN-PRE-DAWN-STRIKE-AT-URI/ARTICLE14988716.ECE (last updated Nov. 1, 2016).

[160] Shikha Goyal, *List of 8 major terror attacks that shook India*, JAGRAN JOSH, May 21, 2020, https://www.jagranjosh.com/general-knowledge/list-of-major-terror-attacks-that-shook-india-1590080570-1.

[161] Neeraj Chauhan, *Davinder Singh hid Hizbul terrorists: NIA Charge sheet*, HINDUSTAN TIMES, Aug. 21, 2020, https://www.hindustantimes.com/india-news/davinder-hid-hizbul-terrorists-nia-charge-sheet/story-SKjT5YUNwCRV8HYv8sj7LO.html.

Apart from the above, in a recent turn of events in Jammu and Kashmir, the security forces after receiving inputs of possibility of suicide attack by militants intercepted a car laden with around forty to forty five kilograms of high-grade explosives allegedly to be used to target a CRFP convoy consisting of around four hundred personnel.[162]

Though not exhaustive, the instances are capable enough to put forth the point of the researcher that India has continuously been a victim of such attacks. All of these examples show that India is under a continuous threat of attacks from people both outside and within. The above instances clearly depict the large scale destruction of life and property they result in.

It is to be understood that these Acts are such which involve a lot of people in different capacities. Concerns of public order, security of State, etc. force the government to take pre-emptive measures to ensure that such activities and plans do not see the light of the day. However, such pre-emptive measures cannot be taken unless the Government are given some latitude to deal with such extra-ordinary situations. A State needs to defend itself from persons who can cause serious harm. Protective measures are required in cases where there is a perception of the existence of public vulnerability.[163]

For this, the ordinary criminal process with all its strict procedures and safeguards cannot come to the aid of the Government. When a credible information is received or there exists reasonable suspicion that a person or a group of person might engage in the kind of activities mentioned above, it is very necessary that the Government takes immediate steps to avert such a situation, including preventive detention. While there exists laws in our country that can deal with such situations, however, they most often only come into picture once the adverse activity has been committed. To remedy this, the Preventive Detention Acts such as the National Security Act, 1980 (NSA) with their relaxed procedures and timelines as compared to the traditional criminal system come handy. Acts such as NSA,

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[162] Fayaz Wani, *J&K Police foils car bombing bid in south Kashmir's Pulwama,* THE NEW INDIAN EXPRESS, May 28, 2020, https://www.newindianexpress.com/nation/2020/may/28/watch--jk-police-foils-car-bombing-bid-in-south-kashmirs-pulwama-2149067.html.

[163] Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114, no. 5 HARV. L. REV. 1429, 1432-1433 (2001).

1980 have been enacted with the sole objective of ensuring that the security of State, public order, etc. do not get prejudiced by such activities.

However, this does not mean that the Government can unnecessarily and arbitrarily resort to the application of NSA, 1980 in all cases. Only in the kind of cases mentioned above wherein the security of the State, defence of the country as well as public order are under imminent threat and where recourse to the ordinary criminal system would frustrate the process of preventing such acts should the Government apply laws such as NSA, 1980. Under normal circumstances including normal law and order problems in which the ordinary laws and procedures are effective to deal with the situation, the Government should not apply NSA, 1980 to bypass the ordinary criminal process as that would tantamount to digressing from the very objective for which the NSA, 1980 was enacted. This would consequently lead to further resentment among the people with regard to the NSA, 1980 and its intrusions upon the personal liberty of individuals.

Thus, from a reading of this chapter it can be concluded that the National Security Act, 1980 (NSA) has been constitutionally held to be valid by the Court. However, to prevent unnecessary intrusion upon the liberty of individuals, the Court has time and again interpreted the various provisions of the existing statutes to provide some sort of objectivity to the detention process and also to ensure that the detained person also gets some basic rights and safeguards. It has been seen that there exists provisions in the existing laws that provide for preventive detention. However, for reasons of prompt action and to pre-empt certain undesirable activities having major ramifications, recourse cannot be taken to ordinary criminal process. Acts such as NSA, 1980 come to the aid in such situations. However, it is not that NSA, 1980 is applied only for such major adverse situations. There have been instances of its misuse and misapplication thereby arbitrarily depriving people of their liberty. However, that does not mean that we need to completely do away with NSA, 1980. There have been several instances where the security of India has come under great threat leading to the loss of lives of several people.

Thus, there needs to be a balance between national security and personal liberty. National Security Act, 1980, by its very objective, cannot be completely dispensed with. However,

care must be taken to ensure that it is only applied in situations where no other alternative either exists or is incapable of dealing with the exigencies of the situation. Further, the persons detained under such Act need to be given the basic rights and procedural fairness's which would ensure that they are not deprived arbitrarily of their right to personal liberty in complete violation of the rule of law.

To ensure this, the suggestions in the following chapter along with the suggestions that have already been given in the relevant parts of the instant chapter need to be sympathetically considered, meticulously reviewed and diligently applied so ensure that the conflict between the needs of national security of State and the personal liberty of individuals is kept to the minimum.

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CHAPTER VI

CONCLUSION

6.1 FINDINGS

As would be clear from the discussion of the paper, the Preventive Detention laws are enacted primarily for the purpose of preserving and protecting national security, public order, maintaining the steady supply and flow of commodities which are considered to be essential to the community and society. All of these have the effect of safeguarding the State from certain unwarranted situations which, if allowed to persist, can have adverse consequences in the form of substantially affecting the even tempo of the society and the State. To prevent the possibility of such adverse circumstances, the States need to ensure that the very activities which lead to such undesirable situations need to be controlled and prevented. This involves keeping check on the persons who have the propensity to engage in such condemnable activities. Thus, in the event the State or any authorities subordinate to it are satisfied that an individual might commit certain acts which would be prejudicial to the interests of the State particularly in the form of the detrimental effect it would otherwise have upon the security and stability of the State if left unchecked, they need to take effective measures to curb the activities of the person even before any untoward step is taken towards its commission.

Preventive Detention is considered to be the most effective measure for the purpose mentioned above. Under, preventive detention, the person who is reasonably suspected to commit acts which would go against the interests of the State is kept under detention for such time as may be provided for under the law providing and authorizing such preventive detention. While detaining such person under a law of Preventive Detention would appear to be desirable, it is also extremely important to ensure that such laws are in conformity and in tune with the established principles of personal liberty. The reason for ensuring that the Preventive Detention laws are in conformity with the principles of personal liberty is

because of the very nature of preventive detention which takes away the personal liberty of individuals which is quite different from the nature of punitive detention.

A person is put under punitive detention when the charges against the person as regards the offence which he has been accused of committing have been proved by a Court of competent jurisdiction while following all the due procedures of trial. Not only during trial, right from the stage of arrest, a person sough to be punitively detained is accorded certain basic rights such as the right to be produced before a Magistrate with twenty-four hours of arrest, right to be defended by a legal practitioner at all stages of the criminal process, etc. Since, in such a process, the person so detained is accorded all the procedural safeguards, thus, even if such procedures tend to deprive the liberty of individuals, they are somewhat willing to suffer the risk of deprivation of their liberty. A person under a process of punitive detention is also to a great extent willing to suffer the deprivation of liberty even when the charges against the accused person have not been proved. For instance, a person accused of theft may be arrested and after production before a Magistrate may be sent to policy custody for the time period so specified. In such a situation, even though the charge of theft has not been proved against the person his liberty has been curtailed by sending him to the custody of the police, yet there is not much protest against the move as the person so arrested has been granted all the rights and procedural safeguards which guarantee that he would not be arbitrarily deprived of his liberty.

Per contra, a person is put under preventive detention when the detaining authority so empowered to issue detention orders under the relevant statute is satisfied that the person sought to be detained is such that he may commit such act which would tend to disturb and attract the grounds of detention as may be mentioned in the concerned statute. Thus, while under punitive detention, the person is sought to be arrested by the police officer concerned if a complaint against the person regarding the commission of a cognizable offence has been received or the police officer has reason to believe that the person has committed a cognizable offence, a person is put under preventive detention when reasonable suspicion exists in the mind of the detailing authority that the person might commit an offence in the absence of any overt act to the contrary. As a result, the liberty of an individual under preventive detention is curtailed not because an offence has been committed and the person

has been accused of committing such offence, but, because the detaining authority suspects that the person will in future commit such offence.

Even when the liberty of the individual is curtailed under a law of preventive detention on the basis of mere suspicion and not on the basis of any overt act, yet, the person so detained is denied many of the procedural safeguards and rights which are otherwise available to the persons detained under a punitive measure. For instance, a person detained under a Preventive Detention law such as the National Security Act, 1980 is denied the right to be defended by a legal practitioner. Such a person can be denied from knowing the grounds of his arrest for about five days under normal circumstances and in extraordinary circumstances for a period not exceeding fifteen days. Further, the decision upon the continued detention of the person vests upon the opinion of the Advisory Board which consist of either a sitting or retired High Court Judge as Chairman and other two members who are qualified to be Judges of High Court. Further, the decisions of the majority of the Advisory Board is taken into account in case of difference of opinion between the members of the Advisory Board.

Thus, while under punitive detention, the decision as regard to the detention of the person is given by an independent and impartial judge, the opinion as regard to the detention of the person under preventive detention (which serves as a significant guide to the appropriate Government to either continue the detention of the person or to release the person forthwith) is given by the Advisory Board which, even though consists of a sitting or retired High Court Judge as its Chairman, also consists of two other person qualified to be Judges of High Court which can even include Advocates provide they fulfil the necessary criteria as provided in the Constitution.[164] Now, since the said two members are appointed by the appropriate Government, serious concerns are raised as to the impartiality and credibility of the other two members of the Advisory Board. Concerns are raised as to the possibility of the other two members misusing their majority to give opinions that are in favour of the detaining authority and use their majority as a virtual veto against the opinion of the Chairman.

[164] INDIAN CONST. art. 217.

Owing to the above reasons, Preventive Detention laws are subjected to widespread criticism due to their perceived arbitrary procedure and its effect upon the personal liberty of an individual which is central to the enjoyment of all other rights. Thus, a balance needs to be created between the needs of the State to protect itself and its national security and the needs of the citizens to preserve their personal liberty. Only when the Preventive Detention laws are enforced in conformity with the established notions and principles of personal liberty, would they begin to gain social acceptance among the members of the society. Otherwise, these laws would only be considered as a veil used by the government to suppress arbitrarily the liberty of its citizens in the name of protecting the national security, public order, etc. of the State which it would otherwise be unable to do in the absence of such a law.

The concepts of preventive detention and personal liberty are two concepts that cannot be overlooked and isolated from one another. Preventive detention means detaining a person with the objective of preventing him from engaging in activities that might go against the interests of the State. While there can be no definite definition of personal liberty, it includes within its ambit all such rights which enable the person to lead a wholesome life. It is seen that national security laws involving preventive detention and the notions of personal liberty are always in conflict with each other.

Considerations of national security, public order, etc. necessitates the provisioning of preventive detention laws whose main purpose is to prevent certain activities that might happen in future. Personal Liberty is a very significant concept in the sense that it is the basis for the enjoyment of all other rights as well as for the wholesome development of the individual. Absence of or curtailment of personal liberty affects the enjoyment of all other rights which are very necessary for leading a wholesome life.

The rampant terrorist attacks and activities and the presence of anti-social elements in the country whose main aim is to jeopardise the regular functioning of the government and national security as well as the day-to-day lives of the citizens justifies the use of preventive detention laws. These preventive detention laws ensure that the State does not have to defer its actions over such individuals by having to submit itself to the ordinary processes of

criminal trial. These laws ensure that the Government is given certain amount of flexibility to deal with such situations that, if not given immediate attention, can have a significant bearing upon the security of the State. It one is to look at examples of even the last two decades, one can get a fair idea as to the extent to which India has been subjected to such adverse activities that have resulted in countless deaths and injuries as well as a significant blow to the unity and integrity of the country as a whole. To deal with such situations and to pre-empt persons who might be engaged in such activities, it becomes imperative to enact preventive detention laws and impose them upon such people who are reasonably suspected to jeopardise the security of the state, public order, etc. by reason of their overt activities.

Though the existing laws can deal with such situations to a certain extent, yet, by reason of administrative efficiency and prompt actions required to deal with such situations, preventive detention laws become imperative. The grounds of detention being very general in such laws allow the State to effectively apply them in the necessary situations. However, care must be taken to ensure that such general provisions do not become a weapon of the State to unnecessary apply laws of preventive detention such as the National Security Act, 1980.

National Security Act, 1980 (NSA) is one of the most widely applied preventive detention law in India based upon the grounds of security and defence of State, public order, the maintaining of supplies of essential commodities and services, etc. While its constitutionality was challenged on the primary ground of its arbitrary intrusion into the liberty of individuals, yet, it was upheld by the Court. While deciding upon the validity of the NSA, 1980, the Court also provided/re-iterated certain rights to be made available to the accused such as being lodged in separate cells than the regular convicts, informing the family and close relatives of the ground of arrest, etc.

Just as national security is very essential to the State, so is personal liberty very essential for the individual. Thus, the various preventive detention laws need to be enacted with much caution to ensure that they do not affect the personal liberty of individual. As has been mentioned in the paper, there are several examples wherein the NSA, 1980 was

misused and misapplied. Even in the presence of necessary laws to deal with a particular situation which in turn did not have a significant bearing upon the public order or security of State, yet, NSA, 1980 was imposed upon individuals. This amounts to unnecessary and arbitrary intrusion upon the personal liberty of individuals. Laws providing for preventive detention should be applied sparingly and as a measure of last resort when the government is satisfied that its legitimate objectives would not be better met unless such preventive detention laws are resorted to in the instant case.

The various preventive detention laws such as the National Security Act, 1980 contains provisions which have a detrimental effect upon the liberty and right of individual such as no right of legal counsel, cross examination, etc. which are considered necessary owing to the very peculiar nature of the law. Whatever they may be, care must be taken to provide to the people maximum rights and protections available under the law considering the fact that their liberty is seriously constrained by such laws and that too without any proved fact. The processes involved in preventive detention, insofar as they do not relate to the right and benefit of individuals, should not be too strictly enforced to the detriment of the detained person. Wherever possible, and subjective upon the facts and circumstances of the case in question, the provisions of such laws which seek to deprive the detained person of his rights and liberty need to be relaxed and maximum possible rights and safeguards need to be made available to them.

The concept of limited government is to create a boundary for the powers of the State to interfere with the lives of individuals while at the same time protecting their liberty. Thus, a balance need to be struck to ensure that the government interferes with the liberty of individuals only to the extent that is necessary for the ends of society and does not do so arbitrarily. It needs to be understood that the State exists for the man and that man does not exist for the state. Thus, for the sake of security of the State, the security of the individuals should not be unnecessarily trampled with and should be limited to the objective sought to be achieved by the State and that too within the contours of personal liberty and other rights of man.

For this, the role of the Judiciary in striking a balance between the State's need for national security and the individuals' need for personal liberty can never be understated and the Judiciary should always stand as a guard between the preventive detention laws and the individuals so that the personal liberty of individuals in not unnecessarily and arbitrarily deprived by such laws.

The Judiciary should always stand vigil against the arbitrary encroachment of liberty by the State and should always ensure that all the procedural safeguards are complied with. In the absence of any intent of the legislature, the Judiciary should also not shy away from assuming the role of the legislature to protect the liberty of individuals giving due regard to the existing circumstances and situations. As had been observed in the paper, the Judiciary has very widely and creatively applied the various provisions of such laws to make them more objective, certain and less intrusive.

The detaining authority and the State should also apply the laws very carefully and with caution and not for any ulterior motives and not misuse them so as to accord at least a minimum sense of legitimacy to such laws. The State should understand that the survival and existence of the State depends upon its citizens as without the existence of citizens, there is no meaning and role of State and the citizens should understand that their very existence and liberty depends upon the continued existence of State. As without State, the people are always vulnerable to forces both outside and inside who may seriously impede their liberty. Thus for the same, the people should be willing to give up some of their liberty to the State, as long as it is not arbitrary, for the preservation of the larger liberty of the community and, as an extension, of the State. This would ensure that a right balance and harmony is achieved between the rights and interests of the State for preserving national security on one hand and the right of the people of preserving personal liberty on the other.

6.2 SUGGESTIONS AND ANALYSIS

Thus, from the above discussion, it is clear that harmonizing the Preventive Detention laws with personal liberty becomes impetrative if the government wants to have social acceptance of such laws. The following suggestions, though not exhaustive, but if followed would go a long way in harmonizing the national security with personal liberty:

1. Two sides of the same coin – National Security and personal liberty are two sides of the same coin. Both cannot exist without each other. The existence and basis of liberty depends upon the continued presence of the State as a sovereign institution. Thus, the State needs to devise mechanisms such as preventive detention laws to protect itself, both from domestic as well as outside influence and the same cannot be permitted to be compromised in the name of personal liberty of individuals.

However, the essence of limited government is to ensure that the government functions within its defined sphere and does not resort to absolutism. The same is necessary even to preserve the liberty of the individual. Thus, on grounds of national security, public order, etc. the government should not have unrestricted powers to curtail liberty. Otherwise, it would be ironical that the very Act that was enacted to preserve the liberty of the individual would be the one which causes the most unnecessary inroads into the liberty of people.

For the same, the government should at least strive to adapt the laws of preventive detention in line with the procedural safeguards as present in Art. 22(3) - (7) as well as Art. 21.

2. The concentric circles concept – In cases of preventive detention, not all acts should be regarded as threats to security of State or public order. Most often, the laws of preventive detention are used on the grounds of public order.[165] However, a distinction needs to be kept in mind that all law and order problems in a given situation do not necessarily involve breach of public peace. There are some acts which may only affect the law and order and not necessarily the security of state or public order and in such cases it is not necessary to invoke preventive detention. For this, we can refer to the following judgment:

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[165] Kartikay Agarwal & Arjun Sharma, *National Security Act, 1980 - Iniquitous Act and Constitutional Tyranny or a Justified Piece of Legislation*, JURIST, May 01, 2020, https://www.jurist.org/commentary/2020/05/agarwal-sharma-national-security-act-1980/.

In *Ram Manohar Lohia v. State of Bihar,*[166] it was held that the terms namely security of state, public order and law and order can be understood by way of putting these terms into three concentric circles. The outermost circle being law and order, the next circle being public order and the innermost circle being security of State.[167] The Court held that though an act may affect law and order, it is not necessary that it would affect public order and the same argument extends to public order and security of state meaning that if an act affects the public order, it is not necessary that it also affects the security of state.

The court held that preventive detention is permissible only when an act affects either public order or security of state in addition to law and order. In all other circumstances, preventive detention is impermissible. Thus, from this it is clear that national security or security of a State is a term which needs to be given a strict and conservative interpretation and the usage of the same should be limited when considering the necessity of passing of preventive detention orders.

The Central Government and State Government or any of their officers subordinate to them who have been empowered to issue detention orders should keep in mind the fact that while all national security/security of State problems are law and order or public order problems, all law and order or public order problems are not problems of security of State or national security. Thus, the detaining authority while exercising its mind over the application of preventive detention on a person should be careful and should not consider mere law and order problems as those affecting the public order or the security of State at large and subsequently impose preventive detention upon the person concerned.

It is also to be noted that even in cases that the detaining authority is satisfied that an act leads to the creation of a public order or national security problem, it is not always necessary to invoke preventive detention upon a person. Considering the effect of preventive detention upon the liberty of an individual, the detaining

[166] Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740.
[167] Nishant Mittal, *Role of Supreme Court on Sedition Law: An Analysis*, 1, no. 1 LEGALPEDIA J. 9 (2018).

authority should first explore the possibility of taking recourse to the existing laws to deal with such public order and security of State problems. It is only in extraordinary circumstances, when the detaining authority is fully satisfied that the ends of justice and peace would be better fulfilled by invoking a detention order, should the detaining authority issue preventive detention orders.

3. Judgment in *A. K. Roy* v. *Union of India*[168] case – The judgment in the said case is very important as it decided upon the Constitutionality of the National Security Act, 1980. The Court delved deep into the various aspects of the case. The Court upheld the validity of the National Security Act, 1980. The Court also rightfully stressed on the need to accord the basic tenets of dignity to the detained person such as allowing him to have his own food, meet his family, be lodged in a separate place from regular convicts, etc.

However, there are 3 things which the Court could have considered and passed necessary directions to that effect. The first thing is with regard to the right of cross-examination of the informants. This is necessary to ensure that the detained person at least gets a sufficient leverage to present his case and disprove the case of the other side.

The second concerns with the right to legal counsel. Rejecting the right to legal counsel, the Court placed reliance on the express prohibition to that effect in the Constitution as well as the peculiar nature of the proceedings in front of the Advisory Boards.

In doing so, the Court failed to take into consideration the fact that in cases of prevention detention, the personal liberty of the individual is at stake and which is also more important in this case as against punitive detention as while in case of punitive detention, the same is based on proved facts while in preventive detention it is based on mere apprehension.

[168] A. K. Roy v. Union of India, AIR 1982 SC 710.

Thus, the detained person should get the benefit of legal counsel as a legal counsel is a skilled and knowledgeable person in the domain of law and who by virtue of his experience would be able to present the case of the detained person in a better position than the case in which the detained person would have to present his case himself with the assistance of a friend.

Third, the Court could have provided justice better by issuing a writ of Mandamus directing the Central Government to bring into force Sec. 3 of the Forty-Fourth Constitutional Amendment Act, 1976. The Court rejecting to issue a writ of Mandamus placed reliance on Sec 1(2) of the said Amendment Act as well as on the fact that the Parliament was free to bring about a law to bring the said provision to effect. However the Court erred in doing so by not considering the fact that about 6 years had already passed and still the government hadn't notified the date of coming into force the said provision nor had the Parliament done anything to that regard.

The Court failed to take into consideration the fact that the era of judicial activism had begun and that it is the same court which would in future draft guidelines and laws to make good the existing problems in society in the absence of any legislative intent to that effect. Pertinent examples in this regard been the sexual harassment guidelines in *Vishaka v. State of Rajasthan,*[169] ban on smoking in public places in *Murli S. Deora v. Union of India.*[170], inter-country adoption in *Laxmikant Pandey v. Union of India*[171], custodial violence in *D.K. Basu v. State of West Bengal,*[172] etc.

4. Sec. 3 of Forty-Fourth Amendment Act, 1976 - The Central Government should take immediate steps for bringing into force Sec. 3.[173] The coming into force of this section would to a large extent ensure that the detained person's case is heard by a fair, objective and impartial tribunal.

[169] Vishaka v. State of Rajasthan, AIR 1997 SC 3011.
[170] Murli S. Deora v. Union of India, AIR 2002 SC 40: (2001) 8 SCC 765.
[171] Laxmikant Pandey v. Union of India, AIR1984 SC 469.
[172] D.K. Basu v. State of West Bengal, AIR 1997 SC 610.
[173] Constitution (Forty-Fourth Amendment) Act 1978.

However, a cause of concern is that Union Law Minister Ravi Shankar Prasad had some time back replied to a query and had observed that no particular time frame can be given for the purpose of issuing the notification to bring Sec. 3 into force.[174]

The importance of the coming into force of such a provision is because it contains provisions which seek to reduce the time period for which a person may be put under preventive detention without obtaining the opinion of the Advisory Board to two months. It also contains provisions for the composition of the Advisory Board which are to be based upon the recommendations provided by the Chief Justice of the concerned Court. The Advisory Board shall have at least three members of which one is to be the Chairman who shall be a sitting High Court Judge of the appropriate Court and the qualifications of other members would be that they should be either sitting or retired High Court Judges.

From the very content of the above provisions, one can get a fair idea of the need to immediately bring into force the provisions as envisaged under the Amendment Act. As has already been discussed earlier, under the present scheme of provisions related to Advisory Boards, the NSA, 1980 provides for the constitution of Advisory Board of three members of which one shall be a Chairman who is either a sitting High Court Judge or retired High Court Judge while the other two members would be such who either are a sitting High Court Judge or retired High Court Judge or who have been otherwise qualified to be High Court Judges. The Constitution too, provides for composition of Advisory Boards which shall consist of members who either are sitting High Court Judge or retired High Court Judge or who have been otherwise qualified to be High Court Judges[175].

The phrase 'qualified to be appointed as Judges of High Court' is one which can be used by the Government concerned to appoint its own persons to the Advisory

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[174] Utkarsh Anand, *Modi Govt Shows no Urgency to Change law much Abused During Emergency by Indira Gandhi,* CNN-NEWS18, https://www.news18.com/news/india/centre-shows-no-urgency-to-change-law-much-abused-during-emergency-by-indira-gandhi-1989955.html (last updated Jan. 3, 2019).

[175] INDIAN CONST. art. 22(4).

Board who might work as the agents of the Government and would influence the opinion of the Board by virtue of their majority.

Thus, considering the essential role that the Advisory Boards have to perform during the preventive detention of a person, it is necessary to ensure that the Advisory Boards consist of persons of unquestionable integrity and high ethics. This would be possible if the Amendment as mentioned above is brought into force. This would also provide some kind of legitimate status to the Advisory Boards as post the Amendment coming into force, the Boards would be constituted upon the Chief Justice's recommendation of the concerned Court and the Board would comprise of a serving High Court Judge as Chairman and at least two other members who would be either serving or retired High Court Judges.

It would have been quite fortunate had the *A. K. Roy v. Union of India* case had come up during the end of the twentieth century or the twenty first century. The reason for the same being that the Court could have drawn inspiration from several instances wherein the Court had stepped into the shoes of the legislature or the executive to provide justice in the case.

Notable examples include the Supreme Court monitored National Register of Citizens exercise for the State of Assam as well as the directions of the Supreme Court to grant statutory status to the Central Vigilance Commission.[176]

5. Credibility and Efficiency - The obedience and acceptance to any law depends upon its credibility and efficiency. Thus, to ensure that the preventive detention laws in general and National Security Act, 1980 in particular receive acceptance among the masses, care must be taken to ensure that such Acts are imposed only for the purpose to maintain public order, national security, etc. and not for frivolous political ends and minor offences as is seen these days.

Laws regarding preventive detention, by their very peculiar nature, and considering the effect they have upon the personal liberty of individuals, need to be objectively

[176] Vineet Narain v. Union of India, (1996) SCC 2 199.

implemented strictly according for the purpose for which they have been enacted. They should not be used for the purpose of political gains or silencing and crushing dissent against the government.

Use of preventive detention for the purpose of settling political scores or for the purpose of silencing the critics of the Government should be shunned if the Government is to preserve the credibility and the social acceptability and tolerance of such laws. Recently, a Supreme Court Judge said that the right to dissent is of vital importance in a democracy and that it is not proper to term as "anti-national" the criticism of the executive, bureaucracy, judiciary as well as the armed forces.[177] Thus, invoking preventive detention law by viewing any criticism of the organs of the government as "anti-national" and thus against the security of the State would be improper and wrong which would even attack at the credibility of such laws.

6. Right of Cross-examination - It is suggested that while owing to national security concerns, the disclosure of sources of information which form the base of the satisfaction of the detaining authority may not be possible, the detained person, nevertheless, should be granted the opportunity to cross-examine such persons and individuals on whose information, the detention orders were based and issued. Further, to protect the interests of the informant, there cross-examination should be done in a manner in which the identity of the informant is not disclosed in any manner to the detained person. For this, there can be a separate wall or obstruction between the informant and detenu wherein neither of the two can see each other, but can hear each other for the purpose of cross-examination.

This will ensure at least a basic opportunity to the detained person to prove and disprove his as well as the informant's evidence which has had a significant bearing on the satisfaction of the detaining authority as to the necessity of the detention order.

[177] Press Trust of India, *Right to Dissent is Essential to Democracy, Criticism can't be Termed anti-National: SS Judge*, THEWEEK, Feb. 24, 2020, https://www.theweek.in/news/india/2020/02/24/right-to-dissent-is-essential-to-democracy-criticism-cant-be-termed-anti-national-sc-judge.html.

7. Right of legal counsel - As regards the rights of legal counsel are concerned, the same should be made available to the detained person. The Court[178] placed reliance upon the express provisions in the Constitution, namely Art. 22(1) and 22(3)(b) to deny the right to legal representation. The Court also pointed out the peculiar nature of proceedings that are undertaken by the Advisory Board to deny the right to legal practitioner to the person who has been detained under a preventive detention law.

In cases of preventive detention, the person is detained based on future apprehension and past conduct as well as the subjective satisfaction of the authorities, concerned, while at the same time denying the detained person the benefits and rights of regular criminal trial. From the above, it is clear that the authorities are already in a dominant position over the detained person. The counsel of a regular legal practitioner can never be substituted for assistance by a close friend since the former is well versed with the intricacies of law and can provide better and structured arguments over the latter.

Thus, being considerate of the fact that a person detained under a preventive detention law is already deprived of his liberty and that too which is based upon the subjective satisfaction of the detaining authority as regards the propensity of the detained person to commit acts prejudicial to the grounds as may be mentioned and that too in the absence of a proved fact against the detained person, the least the Government can do is to provide for the assistance of a legal counsel to enable the person so detained to make effective representation to the appropriate Government and also before the Advisory Board by taking the aid of the invaluable experience of the legal practitioner.

8. Defining the terms – The government should take earnest steps to define the various terms as present in the National Security Act, 1980. As the terms are quite vague and wide in their amplitude, the same are prone to misuse. A definition though not precise, but sufficiently close to the meaning would go a long way in providing some form of direction to the concerned authorities as to what actions

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[178] A. K. Roy v. Union of India, AIR 1982 SC 710.

would fall within the prrview of preventive detention laws. The same would also provide clarity to the common individuals as regards the limits of their actions. Inspiration for the same can be taken from Sec. 8(3)[179] which seeks to define the terms "*acting in any manner prejudicial to the security of State"* and *"acting in any manner prejudicial to the maintenance of public order"*.

9. Role of Judiciary – In cases of preventive detention, the Judiciary has a significant role to play. The liberty of the people can be best saved from abuse by a vigilant Judiciary which ensures that the liberty of the people is not snatched at the mere whim and fancies of the detaining authority. In cases of Habeas Corpus petitions against the detention of individuals, the same need to be expeditiously and sympathetically decided.

The Judiciary has to interpret the terms of the preventive detention laws in a manner that the provisions concerning deprivation of liberty are interpreted very narrowly and carefully while provision for safeguarding liberty are given a wide and liberal interpretation.

Further, the Judiciary should make extensive use of judicial activism in matters of preventive detention so as to preserve the liberty of individuals. Judicial Activism and not Judicial Restraint should be the rule in matters concerning the preventive detention of individuals. Just as the peculiar nature of preventive detention is used as a means to justify the curtailment of liberties of people, in the same manner, the peculiar nature of preventive detention and its regrettable impact on the liberty of the people should be used as a justification for increased judicial interference in cases of preventive detention.

Though it is desirable that the Judiciary does not become over enthusiast and interfere in every matters and procedures concerning preventive detention, however, in matters where there is even the slightest hint of abuse of power or liberty, the Judiciary should step in and make necessary corrections even though

[179] Jammu & Kashmir Public Safety Act, 6 of 1968, § 8(3).

that entails stepping into the shoes of the legislature. The Court should not shy away from issuing guidelines and should not leave it to the wisdom of the legislature to make the necessary corrections. For this purpose, the Court can seek the aid of Art. 142 of the Constitution which empowers the Supreme Court to do complete justice in matters before it.

10. Setting up of monitoring bodies – It is desirable that monitoring bodies be set-up at the State and National level to ensure that the administration of various laws providing for preventive detention is done effectively and that the established procedures as per statute and judicial decisions are being adhered to. This will ensure that the people do not have to approach the Courts for even the slightest of reasons if the same can be addressed by the concerned monitoring bodies.

11. Accountability and transparency – To make the preventive detention laws more accountable, details regarding the detention of persons under various preventive detention laws should be publicly released insofar as they do not affect the public interest. For instance, the concerned authorities should regularly at uniform intervals publish the number of persons detained under the preventive detention laws as well as the number of persons who have been set free as well as statistics regarding the no. of days they were detained before the matter came up before the advisory boards as well as after that. This would serve as a guiding light upon the different Advisory Boards as well as the detaining authorities and would push them to act more efficiently.

12. Actions taken in good faith - While Sec. 16 of NSA, 1980 protects actions taken in good faith, the same should not be absolute and certain guidelines should be evolved as to the manner in which the subjective satisfaction is to be arrived, etc. In cases, where there is sufficient grounds to believe the existence of mala fide intention or patent negligence, the people should have the power to approach the Court and the Court should not be constrained from hearing the case by virtue of Sec. 16 and that the erring officials should be dealt with accordingly. The legislature should also prescribe punishments for the same.

The above suggestions, though not exhaustive, but if implemented properly would go a long way in harmonizing the conflicting interest between national security and personal liberty and ensure that both of them can co-exist with each other and fulfil their respective mandates while ensuring minimum friction between the two.

As an ending note, it can be said that the laws providing for preventive detention, such as the National Security Act, 1980 are a necessary evil. However, the degree of evilness in such laws can be greatly minimized by ensuring that they are in tune with the cherished and established concepts of personal liberty.

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