PREVENTIVE DETENTION LAWS IN INDIA AND VIOLATION OF HUMAN RIGHTS: A STUDY WITH SPECIAL REFERENCE TO ARTICLE 22 OF THE INDIAN CONSTITUTITON

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DECLARATION

I, Mridusmita Sarkar, pursuing LL.M. from National Law University and Judicial Academy, Assam, hereby declares that at present dissertation titled PREVENTIVE DETENTION LAWS IN INDIA AND VIOLATION OF HUMAN RIGHTS: A STUDY WITH SPECIAL REFERENCE TO ARTICLE 22 OF THE INDIAN CONSTITUTITON is an original work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.

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PREFACE

Despite many indications of an emerging transnational consensus on the scope of human rights law, fundamental disagreements still persist. Whether these disagreements are understood as cultural, economic, or political; international lawyers must develop a better understanding of the specific practices that generate divergent interpretations of human rights standards. Without such an understanding, these loopholes seem to highlight only the political conception of human rights.

Substantive disagreements regarding "due process" and fair trial rights are often characterized as "exceptional measures" that could only be justified by appeals in the court of law.

Unfortunately, this characterization of controversial practices conceals important disagreements in international society, thus precluding the kind of constructive dialogue essential to fashioning durable, collective visions of the good.

Moreover, by masking fundamental disagreements by defining human rights, this characterization precludes the need to have wider meaning of human rights. In this Article, I explore these themes and defend these conclusions through a detailed examination of the case of preventive detention laws in India. This case is especially informative because India's conception and institutionalization of preventive detention illustrate several structural deficiencies in human rights law.

I conclude that the rush to concretize and enforce universal standards has pushed international legal institutions away from developing the conceptual and normative resources to negotiate the tension between assertions and importance of national interests and demands for international justice, a central problem in the elaboration of any legal entity.

Mridusmita Sarkar

LL.M. (Batch of 2017-18)
UID No. SF0217011

TABLE OF CASES

1. *Ahamed Nassar v. State of Tamil Nadu*
2. *A.K. Gopalan v. State of Madras*
3. *A.K. Roy v. Union of India*
4. *Anil Dey v. State of West Bengal*
5. *Arun Ghosh v. State of West Bengal*
6. *Ashok v. Delhi Admn*
7. *Debu Mahto V. State of West Bengal*
8. *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*
9. *Gora v. State of West Bengal*
10. *Kali Charan Mal v. State of West Bengal*
11. *Kanu Biswas v. State of West Bengal*
12. *Magan Cope v. State of West Bengal*
13. *Masood Alam v. Union of India*
14. *Mustakmiya Jabbarmiya Shaikh v. M.M. Mehta, Commissioner of Police and Others*
15. *Naga People's Movement of Human Rights v. Union of India*
16. *Piyush Kantilal Mehta v. Commissioner of Police*
17. *Gayathri v. Commissioner of Police, Madras*
18. *Ram Bahadur Rai v. State of Bihar*
19. *Ram Manohar Lohia v. State of Bihar*
20. *Sambunath Sarkar v. State of West Bengal*
21. *Sampat Prakash v. State of Jammu and Kashmir*
22. *State of Bombay v. Atma Ram*
23. *Vijay Narain Singh v. Bihar*
24. *Wasi Uddin Ahmed v. District Magistrate, Aligarh*

TABLE OF STATUTES

1600 - Charter Act

1784 - East India Company Act

1793 - East India Company Act

1804 - The Bengal State Offences Regulation of;

1812 - The Foreign Immigrants Regulation of;

1818 -Bengal State Prisoner's Regulation

1819 - Madras State Prisoner's Regulation XI and

1827 - Bombay State Prisoners Regulation XXV

1860 - Indian Penal Code

1898 - The Criminal Procedure Code

1914 - Foreigners Ordinance

1915 - The Defence of India Act

1919 - Anarchical and Revolutionary Crimes Act

1919 - The Government of India Act

1935 - The Government of India Act

1939 - Defence of India Act

1942 - Armed Force (Special Powers) Ordinance

1944 - Restriction and Detention Ordinance

1947 - Assam Disturbed Areas

1947 - Bihar Maintenance of Public Order Act

1947 - Bombay Public Security Measures Act

1947 - Bengal Disturbed Areas

1947 - Delhi Disturbed Areas

1947 - The Punjab Disturbed Areas Act

1947 - U.P. Communal Disturbance Prevention Act

1947 - U.P. Maintenance of Public Order (Temporary) Act

1948 - Madras Suppression of Disturbances Act

1948 - Orissa Maintenance of Public Order Act

1948 - Public Safety Ordinance

1948 - Bihar Maintenance of Public Order Act

1950 - The Preventive Detention Act

1958 - Armed Forces (Special Powers) Act

1962 - Defence of India Act

1964 - Jammu and Kashmir Preventive Detention Act

1970 - Andhra Pradesh Preventive Detention Act

1970 - Maharashtra Preventive Detention Act

1970 - Orissa Preventive Detention Act

1970 - West-Bengal (Prevention of Violent Activities) Act

1971 - Maintenance of Internal Security Act

1973 - Criminal Procedure Code

1974 – Conservation Of Foreign Exchange and Prevention Of Smuggling Activities Act

1980 - The Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act

1980 - Assam Preventive Detention Act

1980 - Madhya Pradesh Rajya Suraksha Tatha Lok Vyavastha Adhiniyam

1980 - Maharashtra Prevention of Communal Anti-Social And Other Dangerous Activities Act

1981 - Maharashtra Prevention of Dangerous Activities of Slum-Lords, Boot-Leggers and Drug-Offenders Act

1981 - Bihar Control of Crimes Act

1982 - Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Cyber law offenders, Drug-offenders, Forest offenders, Goondas, Immoral traffic offenders, Sand-offenders, Sexual-offenders, Slum grabbers, and Video pirates Act

1985 - Gujarat Prevention of Anti-Social Activities Act

1985 - Terrorism and Disruptive Activities (Prevention) Act

1985 - Karnataka Prevention of Dangerous Activities of Boot Leggers, Drug-offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum-Grabbers Act

1986 - Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land-Grabbers Act

1988 - Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act

1988 - The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act

1995 - Meghalaya Preventive Detention Act

2002 – Prevention of Terrorism Act

2011 - Jammu and Kashmir Preventive Detention Act

LIST OF ABBREVIATIONS

1	AFSPA	The Armed Forces (Assam and Manipur) Special Powers Act, 1958
2	BSF	Border Security Force
3	CAD	The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
4	CED	International Convention for the Protection of All Persons from Enforced Disappearance,2006
5	CERD	Committee on the Elimination of All Forms of Racial Discrimination, 1969
6	CESCR	Committee on Economic, Social and Cultural Rights
7	CRPC	Code of Criminal Procedure, 1973
8	CSPSA	The Chhattisgarh Special Public Security Act, 2005
9	GOI	Government of India
10	HRC	Human Rights Council
11	ICDS	Integrated Child Development Scheme
12	J&K	Jammu and Kashmir
13	MEA	Ministry of External Affairs
14	NGO	Non-Governmental Organizations
15	NHRC	National Human Rights Commission
16	PSA	J&K Public Safety Act, 1978
17	PUCL	People's Union for Civil Liberties
18	RTE	Right of Children to Free and Compulsory Education Act, 2009
19	RTI	Right to Information Act, 2005

CONTENTS

PAGE NO.

Supervisors Certificate

Declaration

Acknowledgement i

Preface ii

Table of Cases iii

Table Of Statutes iv-vi

List of Abbreviations vii

CHAPTER 1: INTRODUCTION 1

1.1.STATEMENT OF PROBLEMS 5

1.2. AIM OF THE STUDY 8

1.3. OBJECTIVES OF THE STUDY 8

1.4. SCOPE AND LIMITATION 8

1.5.LITERATURE REVIEW 8

1.6. HYPOTHESES 17

1.7. RESEARCH METHODOLOGY 17

1.8. RESEARCH DESIGN 17

CHAPTER 2: PREVENTIVE DETENTION LAWS IN INDIA: AN ILLUSTRATIVE STUDY 19

2.1 DURING BRITISH REGIME IN INDIA 19

2.2 THE POSITION OF PREVENTIVE DETENTION LAWS IN INDIA DURING THE POST INDEPENDENCE AND PRE-REPUBLIC ERA 21

2.2.*1 Statutes in Pre-Constitutional Era*

2.2.2. Statutes in the Post-Constitutional Era

CHAPTER 3: AN ANALYSIS OF THE STATE PRACTICE OF THE PREVETIVE DETENTION LAWS IN INDIA **41**

3.1 CONSTITUTIONALIZING PREVENTIVE DETENTION LAWS IN POSTCOLONIAL INDIA 42

3.2 THE PREVENTIVE DETENTION ACT AND ITS PROGENY 44

3.3 UNDERSTANDING THE INSTITUTION OF PREVENTIVE DETENTION IN CONTEMPORARY INDIA: THE NATIONAL SECURITY ACT 45

3.3.1 The Grounds Justifying Detention: Defining "Public Order" And "National Security"

3.3.2. The "Subjective Satisfaction" Of The Detaining Authority

3.3.3 The Executive Review Process: Advisory Boards And Quasi-Judicial Review

3.3.4. Procedural Safeguards: The Detainee's Rights

CHAPTER 4: LEGITIMATING PREVENTIVE DETENTION LAWS OUTSIDE THE EMERGENCY CONTEXT IN INDIA **58**

4.1 EMERGENCY LAW AND PERSONAL LIBERTY IN INDIA 59

4.2 FUNDAMENTAL RIGHTS PROVISIONS IN THE INDIAN CONSTITUTION 64

CHAPTER 5: PREVENTIVE DETENTION IN INDIA AND COMPARING IT WITH INTERNATIONAL HUMAN RIGHTS STANDARD **67**

5.1 "STATES OF EXCEPTION" IN INTERNATIONAL HUMAN RIGHTS LAW 68

5.1.1 States of Emergency

5.1.2 General Limitations

5.2 PREVENTIVE DETENTION, PERSONAL LIBERTY, AND "STATES OF EXCEPTION" 74

CHAPTER 6: CONCLUSION AND SUGGESTIONS **79**

BIBLIOGRAPHY

CHAPTER 1

INTRODUCTION

The universally applicable international human rights standards arguably represent the single most important legal development of the twentieth century.[1] Indeed, the notion that all persons are entitled to an identifiable set of basic legal guarantees has been formalized in many international instruments[2] and most national constitutions.[3] Nevertheless, gross and systematic human rights abuses continue apace.[4] Given this lamentable gap between normative commitments and actual state practice, the development of effective institutional arrangements-both international and domestic-to concretize and enforce these standards is perhaps the greatest challenge of the next century.[5] The effectiveness of international human rights law as law will turn on the degree to which states can agree on the application of these general principles to specific practices. While numerous supranational and international supervisory bodies[6] have significantly refined human rights standards,[7] most lack the institutional capacity to resolve important interpretive controversies decisively.[8] The further legalization of international human rights institutions will require:

(1) The elaboration of increasingly precise norms that unambiguously define the conduct required.

(2) The clarification and acceptance of the obligatory character of these norms.

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[1] Paul Gordon Lauren, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN , 3RD ed, 1998.
[2] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.
[3] Philip Alston, PROMOTION OF HUMAN RIGHTS THROUGH BILLS OF RIGHTS, 1999.
[4] UNITED STATES DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1999.
[5] Laurence R. Heifer, Concretizing Human Rights Law, 29 COLUM. HUM. RTS. L. REV. 533, 1998
[6] Human rights courts and tribunals are described as "supranational" tribunals because they adjudicate claims brought by individuals, groups, and other private parties against national governments. "International" tribunals, in contrast, adjudicate only claims between nation-states.
[7] Dominic Mcgoldrick, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1991, pp50-51.
[8] Andrew Z. Drzemczewski, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW, 1983.

As per the Indian Constitution, Article 22 makes the minimum procedural requirements which must be included in any law enacted by legislature in accordance of which a person is deprived of his personal liberty.

Invariably preventive detention laws provide that detention order may be executed at any place in India in any manner provided for the execution of warrants of arrest under the Criminal Procedure Code (Cr.P.C). Further Article 22 of the Constitution is the relevant provision in this regard for arrest of a person which provides as under:-

Article 22 clause (1) and (2) provide certain safeguards to arrested persons. But clause (3) provides exception to them. To elaborate protection against arrested persons include :

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

Clause (3) provides exception to the above safeguards. The above safeguards are not available to a person who for the time being is an enemy alien; or to any person who is arrested or detained under any law providing for preventive detention. The detention may be of two kinds- punitive and preventive. Here a brief sketch of the two is presented. The language of Article 22(1) & (2) indicates that the word "arrest" has to be distinguished from "detention". The former relates to preventive detention and the later deals with preventive detention. It is clear from Section 41 of the Cr.P.C. which provides that police may arrest without warrant, this includes both punitive detention as well as preventive detention. Section 46 of Cr.P.C. provides how "arrest" can be made. According to which the essential elements to constitute an arrest are that there must be an intent to arrest under authority of, accompanied by a seizure or detention of the person in the manner known to law, which is so understood by the person arrested. Arrest consists of actual seizure or touching of a person's body with a

view to his detention. The pronouncing of words of arrest is not an arrest, unless the person sought to be arrested submits to the process and goes with the arresting officer. In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action. An arrest by mere oral declaration is insufficient. However, there is a vital distinction between 'preventive detention' and 'punitive detention' Hon'ble Bhagwati, J. observed in *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi:* "Punitive detention is intended to inflict punishment on a person, who is found by the judicial process to have committed an offence while preventive detention is not by way of punishment at all, but it is intended to prevent a person from indulging in conduct injurious to the society. The power of preventive detention has been recognized as a necessary evil and is tolerated in a free society in the larger interest of security of the State and maintenance of public order. It is drastic power to detain a person without trial and there are many countries where it is not allowed to be exercised except in time of war or aggression." Preventive detention is qualitatively different from punitive detention and their purposes are different. In case of punitive detention, the person concerned is detained by way of punishment after he is found guilty of wrong doing as a result of a trial where he has the fullest opportunity to defend himself, while in case of preventive detention, he is detained merely on suspicion with a view to preventing him from doing harm in future and the opportunity that he has for contesting the action of the executive is very limited. Having regard to this distinctive character of preventive detention, this aims not at punishing an individual for a wrong done by him, but at curtailing his liberty with a view to preventing his injurious activities in future. It has been laid down by this Court in *Sampat Prakash v. State of Jammu and Kashmir*, that the restrictions placed on a person preventively detained must, consistently with the effectiveness of detention, be minimal. Similarly Ray C.J. observed in 5- judges bench decision of the Supreme Court that the essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it. The basis of detention is the satisfaction of the executive of a reasonable probability of the likelihood of the detainee acting in a manner similar to his past acts and preventing him by detention from doing the same. A criminal conviction on the other hand is for an act already done which can only be possible by a trial and legal evidence. There is no parallel between prosecution in a

Court of law and a detention order under the Act. One is punitive action and the other is a preventive act. In one case a person is punished to prove his guilt and the standard is proof beyond reasonable doubt whereas in preventive detention a man is prevented from doing something which it is necessary for reasons mentioned in various statutes on preventive detention. Thus, it is to be noted here that preventive detention is not the same as punitive detention in India. In preventive detention no fault is committed, unlike the case of punitive detention. But in special circumstances of India the framers themselves visualized the need of such detention though from perspective of democratic practice it is not very much approvable. They gave constitutional basis to the preventive detention laws making parliament and state legislatures competent to pass, enact laws permitting preventive detention. Such provisions are to be found in Entry 9, List I which reads "Preventive detention for reasons connected with Defence, Foreign Affairs or the Security of India; persons subjected to such detention". Likewise both Parliament and State legislatures are competent to enact Preventive detetion laws under Entry 3, List III which reads "Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; person subjected to such detention".

This preventive detention is quite objectionable in a democratic set up because it is against the principle of liability. The general principle of liability is- no liability without fault. Thus, a person can be held liable only if he has committed some act which is in violation of some law making the act crime. Since no act is done and in order to prevent a person from committing certain apprehended act he is detained, certain safeguards are necessary to protect the right of detainees. The first safeguard is that Parliament and State legislatures can allow detention by enacting law only on those matters which are enumerated in Entry 9 of the Union List and Entry 3 of the Concurrent List. Secondly, Clause (4) to (7) of Article 22 provides a number of safeguards to a person detained preventively. The constitutional provisions of clause (4) to (7) of Article 22 read as follows:

Clause (4)-No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless- (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as,

Judges of a High Court has reported before the expiration of the said period of three months that three is in its opinion sufficient cause for such detention: Provide that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or (b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as maybe, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe- (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4); (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and (c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

With the above detailed description the present study will pursue the law and its application providing for safeguards to persons detained preventively.

1.1 STATEMENT OF PROBLEM

The constitution provides a basis to justify preventive detention both in Article 22 and 7th schedule that is List I Entry 9 and List III entry 3. But the constitutional safeguards do not appear to be up-to mark and up-to the standard of required safeguards in cases of Preventive Detention on the international plane.

The challenge is to mediate international legal standards with local social, political, and economic conditions.[9] International human rights law, therefore, must be simultaneously universalized and particularized.

The administration of any rights regime necessitates adjudicating the accommodation between natural rights and other public interests. For example, limitations on rights protections may be necessary to achieve important societal objectives such as the health, safety, and welfare of the citizenry; the maintenance of public order; or national security.

This kind of problem is of little consequence in an institutional environment unregulated by precise, obligatory norms.

In India Article 22(7) gives discriminatory power to the Parliament by authorizing it to prescribe by law - (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention.

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (2) of clause (4).

This clearly shows the wide discriminatory power that has been entrusted with the legislature to frame laws as per their will without any broad guidelines to be followed while framing the preventive detention laws. It is because the detention will be based on their subjective satisfaction as to the maximum period of detention.

International lawyers must, therefore, satisfactorily answer two related questions. First, to what degree may states invoke contextual circumstances to justify specific domestic policy choices? Second, to what degree may states invoke contextual factors to justify rights restrictions?

[9] John H. Jackson ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, 3rd ed., 1995, p 983-86.

Despite the obvious importance of these questions, there are at present few international legal concepts with the potential to provide satisfactory answers. Consider two representative examples: situations which define the degree to which states may suspend rights protections in formal states of emergency; and situations which authorize restrictive interpretations of human rights norms when necessary to promote important national interests. These situations[10] determine the degree to which international law authorizes departures from established international rules in certain specified circumstances; that is, they permit rights violations in certain identified "states of exception." In this sense, these situations do not in any way mediate substantive disagreements concerning the content of primary rules neither do they violate the primary rules. For example, a rule establishing that arbitrary detention may, assuming certain elements are satisfied, be utilized in a formal state of emergency does not provide any assistance in determining the meaning of "arbitrary." Moreover, these secondary rules do not provide a framework for adjudicating disputes concerning the circumstances in which the principles themselves are applicable. For example, the "state of emergency" exception does not provide adequate jurisprudential resources for defining the "margin of discretion" that states should enjoy in determining the existence of an emergency or the legal measures necessitated by this emergency. The "context as justification" problem is, therefore, far more complex than these concepts implies. Many states suggest, for example, that contextual factors support idiosyncratic interpretations of human rights standards. Indeed, this is one way to understand the so-called "Asian values" controversy. Furthermore, some states assert that domestic policy preferences cannot be constrained by international human rights law because the former provides the context within which the latter is defined.[11] The emerging tension between internationalism and constitutionalism threatens to compromise the ability of either approach to accomplish its central objective: the realization of humane and effective governance. Elaborating and promoting universal norms requires the accommodation of the particular constitutive features of each nation, culture, and society. International human rights law must, therefore, fashion coherent "accommodation principles" that define more clearly the relationship between international and domestic law. In a

[10] Stephen P. Croley & John H. Jackson, WTO DISPUTE PROCEDURES, STANDARD OF REVIEW, AND DEFERENCE TO NATIONAL GOVERNMENTS, 90 AM. J. INT'L, 1996,p. 193-194.

[11] Philip Alston, PROMOTION OF HUMAN RIGHTS THROUGH BILLS OF RIGHTS, 1999.

nutshell, the objective of the study is how far the safeguards provided under Article 22 in cases of preventive detention are in consonance with the international standard.

1.2 AIM OF THE STUDY

The main aim of the study would be an analysis of the present preventive detention laws in India and suggest changes in the legislative framework so that it does not violate the due procedure clause to protect personal liberty as envisioned in the Indian Constitution.

1.3 OBJECTIVES OF THE STUDY:

1. To study the trend of preventive detention laws in India-its applicability and legality.
2. To study the preventive detention laws in India and analyze its compatibility with international standards of personal liberty.
3. To study the creative role of the judiciary in India to render justice to the detainees under preventive detention laws in India.

1.4 SCOPE AND LIMITATION

As the name of the topic suggests, the study shall be based on Indian scenario. But to understand the level of protection of safeguard to the detainees in India, reference shall be made to the various international conventions and standards to help suggest better measures.

1.5 LITERATURE REVIEW

1. CHALLENGES TO CIVIL RIGHTS GUARANTEES IN INDIA (2012), By A. G. Noorani, South Asia Human Rights Documentation Centre, Oxford University Press

The book challenges to Civil Rights Guarantees in India. Inspirations for the contents of the book have been derived from articles by the eminent constitutional law lawyer A. G. Noorani published in issues of the Economic and Political Weekly and Sunday

magazine over the years. However, it is the SAHRDC, which provided the flesh and blood for the book based on the collaborative discussions with A. G. Noorani.

The book, as the title suggests, maps some of the major challenges for the civil rights in the country. It focuses on both traditional and emerging challenges. The major challenges, the book maps are: (i) Preventive detention, (ii) Extra-judicial killings, (iii) Counter-terrorism laws, (iv) Death penalty, (v) Narcoanalysis, (vi) Under trials and videoconferencing, (vii) Anti-conversion laws, (viii) Impunity, and (ix) Armed Forces (Special Powers) Act. The book consists of nine incisive essays examining each of these challenges separately.

The first essay is on Preventive Detention. It narrates history of preventive detention laws in India during the British period and how provisions providing for preventive detention and safeguards against such detentions came to be incorporated into the Constitution of India. It also provides an account of preventive detention laws enacted by the states and the centre after the adoption of the Constitution of India. The essay explains inadequacy of safeguards available against such detention and how judicial attempts to strengthen and expand them have failed. Critical analysis of the constitutional and legal regime on preventive detention in India in the light of international human rights law is the most important component of the essay. It is contended that increasing use of preventive detention laws and lack of adequate safeguards are the major challenge to civil liberties in the country. In order to provide adequate protection for civil liberties, in the opinion of the author, significant reforms need to be introduced to the existing preventive detention regime and safeguards to prevent abuse and careless use of preventive detention laws need to be strengthened.

In the second essay on Extra - judicial Killings, the focus is on encounter killings in India. It provides an historical overview of extra - judicial killings in India. It attributes wide-spread prevalence of encounter killings to the official and unofficial policies adopted by the police, the government and even the judiciary in dealing with such cases. The essay highlights certain factors within the judicial system that allow and have the potential to encourage such killings. After examining the legality of encounter killings in the light of both domestic and international law, the essay concludes thus:

The longstanding practice of encounter killings in India marks a clear violation of international law, fundamental human rights, and the most basic conception of justice.

Another major challenge to the protection of civil rights in India is the prevalence of counter - terrorism laws. It is dealt with in essay three. The essay presents a brief overview of India's experience with terrorism since independence. There is a detailed analysis of legislative measures undertaken in response and their enforcement. It focuses on the problems generated by such legislations. Another major challenge to the protection of civil liberties is the practice of detaining people undergoing trials in prisons for longer periods as undertrial prisoners.

Such detentions curtail their civil liberties without complete justifications. It is shocking to note that around 70 per cent of India's prison population are undertrials. The sixth essay explains the magnitude of undertrials' problems in the country and the legislative and judicial shortcomings in addressing such problems. It critically examines the proposal to introduce videoconferencing for holding trials as part of the solution to the undertrial problem. It explains how adoption of any such methods violates the right to fair trial. Judicial delineation on videoconferencing has also been discussed in comparative perspective.

The discussions in the chapter bring out how pro - majoritarian biases are inbuilt in the legislations enacted by some states. Necessity of having anti-conversion laws in India, legislative competence to enact such laws and judicial approach have also been examined in the light of provisions in the Constitution and the international human rights instruments. The essay discusses in some detail the legislative provisions that grant police, security forces and other government officials with widespread powers and then provide safeguard against their prosecution for abuse of such powers by making it mandatory to obtain prior sanction from the government for the same. It basically covers provisions under the Code of Criminal Procedure, 1973 and other national security, counter insurgency and counter terrorism laws that provide immunity.

Further, discussions on law relating to sovereign immunity highlight the failure of the Supreme Court's jurisprudence to create an effective remedy against constitutional torts. In conclusion it is asserted that:

The current state of the law in India continues to allow impunity for even the most serious human rights violations. The combination of the relative silence of the Constitution, various legal provisions granting official and sovereign immunity, Supreme Courts judgements. endorsement of such provisions, and multiple practical impediments to justice all combine to create a system of impunity.

The current system of impunity in India, it was contended, 'both perpetuates human rights abuses and runs afoul of international human rights standards'.

The ninth essay deals with the Armed Forces (Special Powers) Act (hereinafter AFSPA). It emphasises on the urgent need to review not only AFSPA but also decision of the apex court rendered in *Naga People's Movement of Human Rights v. Union of India*, wherein the constitutional validity of AFSPA was upheld notwithstanding the draconian provisions it contains. What is more shocking is that the apex court did not even invoke article 21 of the Constitution of India while examining the validity of AFSPA though it authorizes, under section 4, 'extra-judicial execution'., which is described in the book as a license to kill. By referring to various judicial decisions, it is demonstrated that section 4 of AFSPA is manifestly violative of article 21 of the Constitution.

Thus, the author suggests two important changes to be brought to AFSPA:

(i) Drastic amendment of section 4. (ii) Setting up of an independent appellate body to entertain complaints against armed forces or the police when they operate under AFSPA.

No doubt, the changes suggested by the author to the AFSPA are highly desirable but one fails to understand the need for reviewing the judgment of the apex court, when the Act itself is reviewed and necessary changes are introduced.

On the whole, essays in the book highlight prevailing imbalances between individual rights and state power. Maintaining a fine balance between the two is one of the hardest tasks. How to reconcile the individual rights with the state power required to maintain safety and security of the nation is, perhaps, one of the eternal problems of

governments all over the world. Edmund Burke has finely articulated the problem in the following words:

To make a government requires no great prudence, settle the seat of power, teach obedience, and the work is done. But to form a free government, that is, to temper together these opposite elements of liberty and restraint in one consistent work, requires much thought and deep reflection.

Essays in the book convincingly establish that a fine balance between individual rights and state power has not been maintained in the constitutional and legal frameworks in India. The failure to strike a proper balance between the two can equally be attributed to the book under review as well. On a careful reading of various essays, it is somewhat evident that the issues relating to state expediency have not been given adequate consideration in comparison to the emphasis in the book on the need to accord greater protection to individual rights. Balance is slightly tilted towards individual rights by focusing more on their violations and threat of violations under the laws than on the necessity to have such laws. This, in fact, shows that the task of striking a proper balance requires much greater thought and deeper reflection. The book certainly throws light on issues relating to civil rights guarantees in India and contributes greatly to understand the problems in proper perspective.

The book is a value addition to the existing literature. It is rich in information and highly thought provoking. It undoubtedly makes the reader to understand the wide gap between highly advanced discourses on different generations of human rights and the living realities. The challenges to civil rights it identifies and addresses are only illustrative and not exhaustive.

2. PREVENTIVE DETENTION LAWS OF INDIA (1991), By B.V. Kumar, Konark Publishers Pvt. Ltd., Delhi.

The Law relating to preventive detention in India has never experienced a smooth sailing. It was always clouded under the atmosphere of distrust and mistrust and generated heat both inside and outside Parliament. The judges and academics treated it as a Draconian law\ 'black Jaw\ *"a* black spot on the Indian Constitution', 'lawless law' and so on. In view of the stiff opposition to the preventive detention measures,

this field attracted scholars to ponder over the state of affairs of the Indian preventive detention law. The British period saw treatise on the Defence of India Act and rules framed thereunder. During the first two decades of the Indian Independence, the law of preventive detention saw many publications. The period from 1972 to 1975 witnessed maximum literatureon the Indian preventive detention law. This was because the preventive detention law was celebrating its silver jubilee and the judiciary had handed down important rulings. Thereafter, the publications concentrated on particular aspects of preventive detention law which included: The conservation of foreign exchange and prevention of smuggling activities; prevention of black-marketing and maintenance of supplies of essential commodities; prevention of illicit traffic in narcotic drugs and psychotropic substances etc. In this expanding area, Kumar's *Preventive Detention Laws of India* makes an attempt to put in one place various preventive detention laws and the judgements of the Supreme Court of India. This is the bulkiest treatise on the preventive detention law of India. It runs into one thousand two hundred and sixty one pages. The book is divided into two parts: Part 1 deals with the common scheme of the enactments and the law laid down by the Supreme Court of India from time to time. Part 2 incorporates appendices which contains central and state preventive detention legislations and constitutional and international law provisions. Part 1 opens with introduction devoting six pages only to the history of preventive detention laws in India. Kumar simply gives the names of various enactments passed before the Preventive Detention Act 1950. The author could have given the changing dimension of the preventive detention law to better appreciate the law in retrospect. The debates in the Constituent Assembly and the discussions in Parliament on the Preventive Detention Bill 1950 and the successive Bills to extend the life of the Act throw important light on the politics of preventive detention law in India, This aspect has been totally neglected by the author. A comparative treatment of laws of other countries is necessary to evaluate and reform the Indian position. This should have been given a place in the present work. The 'general principles chapter undertakes the study of source of power. It simply enumerates list I, entry 9 and list III, entry 3 and does not go in depth with their provisions. One may raise the following questions: Can the legislature enact a law on the ground other than mentioned therein? There are matters like food adulteration, smuggling activity, drug traffic, etc. Can the existing provisions allow the preventive detention measure in the above areas? Can the residuary legislative power operate in

the above matters? Further, there are in all six grounds on which the legislative power may be activised. Of these four grounds deal with serious acts involving the interest of the country; two grounds deal with matters not so serious. There are grounds which become operative in war time and others in the time of peace only. Can Parliament be permitted to club all the grounds under one legislation? Questions like these should have been highlighted in the present book.

Chapter 5 dealing with 'constitutional rights' runs into four hundred pages.

The first two hundred pages deal with general discussion of the right to equality (articles 14,15 and 16), the citizen's freedoms (articles 19 (1) (a), (c), (d) and (e), certain constitutional protections (articles 20 (2) and (3), the right to personal liberty (article 21), protection against arrest (articles 22 (1), (2) and (3), constitutional remedies (article 32), and miscellaneous matters (articles 123, 134, 136, 137, 141, 162, 226, 239, 245, 246, 256, 356, 359, 367, 368 and 370). Any textbook on the Constitution of India contains such general discourses. A treatise on preventive detention should have only relevant aspects otherwise it would be seen as padding of irrelevant materials to increase the size of the publication. This chapter also devotes nearly one hundred fifty pages on constitutional protection against preventive detention (articles 22 (4) to (7)). These discussions could have been accommodated under the relevant heads under chapters 6-18 which deal with the general scheme of the preventive detention laws. This way the reader could maintain a continuous link of the discussions.

The common scheme of various preventive detention laws runs into five hundred pages. It starts with the 'basis for detention'. The Seven Schedule, to the Constitution of India in list I, entry 9 and list III, entry 3 provides six grounds on which the preventive detention measure could be activated. The 'maintenance of public order' has been the most commonly used ground in the exercise of preventive detention power. And Kumar exclusively deals with the above grounds as the basis of detention. The author has highlighted the distinction between 'public order' and 'law and order' and has narrated Hidayatullah, J.'s (as he then was) often supported tri-circular concept: 'security of state'', 'public order' and 'law and order'. The learned judge, in order to make the distinction crystal clear, gives an example which the present author

has quoted. This opinion is sufficient to understand the ground of 'public order' and the repeated discussions on the distinction between the above concepts in the present work do not cut any new ground. It would have been better if the author had classified cases of public order and other cases to give the reader an idea as to whether the Supreme Court, while handling preventive detention cases, has interpreted the ground of public order in a pedantic manner or carved out some space for the detenu to get protection against preventive detention.

The judicial review of subjective satisfaction of the detaining authority is another contribution of the judiciary in the area of preventive detention. Kumar traces the development from 1950 down to 1990 and tries to give the gist of the judgements of the Supreme Court. In this historical development, the *Debu Mahto's* contribution do not find a place which provides a break in the line of thought advocated by the Supreme Court in the previous decisions.

Chapter 8 deals with 'grounds of detention'. This is another area where the judiciary expanded the scope of protection against preventive detention. Kumar mainly confines to three areas - relevancy, vagueness and defects in grounds of detention. These are the normal pleas taken by the detainee to upset the order of detention.

In the treatment of preventive detention in the present work, the 'detention order' has the lengthiest discussion. Kumar covers the major areas of attack under different laws relating to preventive detention and, in particular, the Maintenance of Internal Security Act 1971. The present discussion is followed by case law on the 'communication of grounds', representation to appropriate authority. In these areas of protection, one cannot miss the problem of delay and the casual approach of the detaining authority. There was delay ranging from 4-5 days to two months. And most of the delay cases came from the State of West Bengal. In these cases, the Supreme Court tried to develop the doctrine of 'reasonable' or 'undue' delay. It set aside the order of detention where the authority dealt the case with 'too leisurely' attitude. Neither the highest court of the country took notice of the casual approach nor the appropriate authorities learnt any lesson from the cases they lost. Kumar does not highlight this issue. One of the important branches of secrecy jurisprudence, in the present field, is the process before the advisory board. Who are the members of the

advisory board in an individual case? What report the board submits? To what extent is the board required to follow the principle of natural justice? These are some of the questions which nobody is entitled to know. The discussions in Parliament and the judgements throw some light on this no-entry area. Kumar does not give any information on this count. The cases relating to review, confirmation and revocation of detention, procedural aspects, and detention of foreigners are discussed before the close of the present publication. Finally part 1 ends with certain guidelines for the sponsoring and detaining authority. This is an area which does not find any place in the existing literature on the law relating to preventive detention. But when one reads the guidelines, they are nothing but repetition of what has been already stated in the previous chapters. And thus the guidelines do not bring out any new point. It may be mentioned that the present information enterprise, devotes no place for the conditions to be observed during detention of the detainee, the role of proclamation of emergency on preventive detention, the specimen case of detention order and the relevant documents used in detaining a person. There were important cases which were on the one hand affirmed, cited, approved, supported and relied upon, and the others which were distinguished and dissented from.

There were separate, concurring and dissenting opinions in this branch of law. In this current and cross-current, one can even examine the approach of the individual judges and their philosophies. And to this extent Kumar's part 1 is only a digest of the Supreme Court cases on preventive detention.

Kumar has dealt with the judicial approach under various preventive detention laws but the discussion remains incomplete as no reference is made to the legislative approach under the different laws. Moreover, there were amendments to the preventive detention laws and the directions of the changes could have been an interesting study.

Now coming to part 2, which instead of giving further analytical treatment to the subject, simply contains appendices. This part is divided into two: Central Acts and State Acts. The first group finds nine parliamentary legislations and the second ten state enactments. The relevant provisions of the Constitution of India, the Defence of India Act and rules framed thereunder and the universal declaration of human rights are given at the end of the appendices. Kumar puts all the important preventive

detention laws at one place and serves the need of an encyclopedia of the Indian preventive detention laws. The appendices run into two hundred thirty eight pages. These materials are available in any statute book, and therefore, in view of the Indian economy, cost of publication and the paying capacity of the Indian readers, the author could have avoided the addition of part 2. To conclude, Kumar makes an attempt to fulfil the constitutional duty to educate the people and also to make available to the citizens of India the right to know and the right to information relating to preventive detention. And in this regard anybody interested in the study of preventive detention laws will find detailed information in the present treatise. The present work once again focuses the attention of the readers on the highhandedness of the authorities in the exercise of preventive detention measures.

1.6 HYPOTHESES

1. The misuse of preventive detention laws in India tantamounts to violation of the right to life and personal liberty as well as principles of human rights enshrined in the Constitution of India.
2. The judiciary has played a constructive role to provide safeguards against the misuse of preventive detention laws to detainees.

1.7 RESEARCH METHODOLOGY

The doctrinal form of research methodology shall be used. Doctrinal form of methodology is that form in which there is intensive study of books, journals, articles and other literary sources and forming a combined and a wider view of the topic. The researcher has used newspaper article analysis technique to bring in the current thriving scenario. Resort has also been made to various govt. facts and figures and literatures based thereon.

1.8 RESEARCH DESIGN

CHAPTER 1

This chapter is basically introductory in nature. It introduces various concepts of the study and the tools that has been adopted to structure the research. It is mostly descriptive in nature.

CHAPTER 2

This chapter deals with the descriptive study of the numerous pre and post preventive detention laws in India. The chapter helps present an idea about the arbitrary laws that were in force and are still in force violating basic norms of personal liberty

CHAPTER 3

This chapter basically deals with the categories of Prevntive detention laws in force in India. Preventive detention laws in India are classified into three categories according to its nature of offence. They are national security, economic interest and public order. And the chapter also makes an attempt to study the judicial response to such laws and the public reaction evoked in response to such laws.

CHAPTER 4

This chapter deals with the issue of legitimizing the preventive detention laws except in situations of emergency. It analyses various indian constitutional provisions which allowed such laws to thrive in India. It then brings in the role of fundamental rights enshrined in the constitution that balances the application of such laws.

CHAPTER 5

This chapter deals with a comparative study of whether Indian safeguards provided to detainees under preventive detention are in consonance with the international standard of human rights protection or not, a brief sketch of comparison of international human right standard and Indian counterpart has been presented in this chapter.

CHAPTER 6

This chapter puts up the conclusion of the study and suggest measures based on the study.

CHAPTER 2

PREVENTIVE DETENTION LAWS IN INDIA: AN ILLUSTRATIVE STUDY

In India, in one form or the other, preventive detention laws have had their history. In this chapter, an attempt will be made to give the brief account of preventive detention laws during the Pre-constitution and post-constitution era.

2.1 DURING BRITISH REGIME IN INDIA

During the British regime, Indians particularly freedom fighters have been imprisoned or detained or restrained by its heartless colonial masters have been result of losing their lives within the peril. The British Government has behaved in a disgraceful manner in regard to the imprisonment without trail which is popularly known as preventive detention. It derogates the personal liberty of human being.

Nothing is more serious than an infraction of personal liberty of a person under any law or where person is detained without any formal trial or where a normal method which is open to a person charged with the commission of an offence to disprove the charge or to prove his innocence at the trial is forbidden. Such hard dictum is found under the law of preventive detention since the formal method of trial process is not available to a person preventively detained.

The law of preventive detention was properly codified in the British era. It can be traced from the legislative experience of East India Company which got accent from British Government through 1600 Charter Act. The above historical background is sketched to show the foreign occupation which automatically curtails the liberties of son of the soil for developing their uninterrupted trade. A broad list of Rules, Ordinances and Acts on the subject has been made and classified into five categories and reproduced herein below. The first one was East India Company period which had very minimal experience of preventive detention laws because of its establishing nature. The second one was during between 1773 to 1832, by this period the East India Company Act of 1784 and East India Company Act of 1793 were enacted. The next important developments were Bengal State Prisoner's Regulation of 1818,

Madras Regulation XI of 1819 and Bombay Regulation XXV of 1827. The third was estimated on 1833 to 1856 which pushed the British Government in generating aggravated form on preventive detention laws because of first war on independence wagged against it. The fourth one was calculated on 1857 to 1918, in this time, State Prisoners' Act of 1858 for Madras and Bombay, State Prisoners' Act of 1859 for Bengal and Defence of India (Criminal Law Amendment) Act of 1915. The last category was started from 1919 and ended with Draft Constitution of 1949. Above said period in Indian legislative history was very crucial for enacting several preventive detention laws in pre-constitutional era because of combating the freedom struggle. The following laws were mostly against the freedom fighters of British India. They were

a) Earlier Statutes;

b) East India Company Acts of 1784 & 1793;

c) The Bengal State Offences Regulation of 1804;

d) The Foreign Immigrants Regulation of 1812;

e) Bengal Prisoner's Regulation of 1818;

f) Indian Penal Code of 1860;

g) The Criminal Procedure Code of 1898;

h) Foreigners Ordinance of 1914;

i) The Defence of India Act of 1915;

j) Defence of India (Criminal Law Amendment) of 1915;

k) Anarchical and Revolutionary Crimes Act of 1919 (Rowlett Act);

l) The Government of India Act of 1919;

m) The Government of India Act of 1935;

n) Defence of India Act of 1939 and Ordinance XIV of 1943;

o) Armed Force (Special Powers) Ordinance of 1942;

p) Restriction and Detention Ordinance of 1944 and

q) Bombay Public Security Measures Act of 1947.

The above said legislations are reflecting the preventive detention character in Indian sub-continent. The preventive detention laws are repugnant to human rights regime. England was enacting these legislations as a capacity of colonial master. Even in England preventive detention was resorted to only during wartime not in peace time.

2.2 THE POSITION OF PREVENTIVE DETENTION LAWS IN INDIA DURING THE POST INDEPENDENCE AND PRE-REPUBLIC ERA

After independence, the preventive detention was continued to be applied in India considering the country's situations in national security, economic interest and public order. The post-independence era was classified into two heads. They are Pre-Constitutional Era and Post-Constitutional Era.

2.2.1 *Statutes in Pre-Constitutional Era*

The preventive detention laws had been traced in pre-constitutional period which was from 1947 -1950. In the normal course of things, the preventive detention laws should have lapsed. But, perhaps as the Republic of India had its birth amidst the ravages of civil commotion involving loss of personal liberty. The framers of Constitution of India decided to retain preventive detention as a means to curb pre-judicial activities against State.

Continuances of Preventive Detention immediately after Independence: When India become independent and opportunity to taste freedom came, it was but natural phenomenon of enjoyment of liberties and rights, which were denied to people for long time by British rulers. It was widely expected that the elected new Government would not resort to detention without trial. The period before the Constitution came into force. The new established Indian Governments in the provinces had repealed several preventive detention statutes, but from the independence until the Constitution's inauguration, the new ruled parties in some provinces of Independent

India enacted 'Public Order' and 'Public Safety' enactments in the nature of preventive detention. Most of them empowered Government to regulate person's personal liberty and his movements and to prevent any act 'prejudicial to the public safety or maintenance of public order'. But these legislations utilized for the purpose of political vendetta. It is charged that the Government had jailed fifty thousand of its political opponents between 1947 and 1950[12]. After independence, in order to deal with disorder in certain parts of India on account of the partition of the country in 1947, the Government of India issued four ordinances. They are:

i. Bengal Disturbed Areas (Special Powers of Armed Forces) Ordinance (11 of 1947);

ii. Assam Disturbed Areas (Special Powers of Armed Forces) Ordinance (14 of 1947);

iii. Delhi Disturbed Areas (Special Powers of Armed Forces) Ordinance (17 of 1947) and

iv. United Provinces Disturbed Areas (Special Powers of Armed Forces) Ordinance (22 of 1947).

These ordinances were based on the Armed Force (Special Powers) Ordinance, 1942 (Ordinance No.XLI of 1942). It must be noted that these ordinances came into effect only after the Government declared a State, or parts of it, as disturbed. In effect, these meant that in the disturbed area, the normal functioning of the Government had broken down. Hence Army was brought in order to restore normalcy in the name of maintaining public order on par with national integrity. It was amounted huge violation of personal liberty. These kind of legislations with preventive detention nature were existed and continued in different parts of independent India, namely: The Punjab Disturbed Areas Act of 1947; Assam Maintenance of Public Order Act of 1947; Bihar Maintenance of Public Order Act of 1947; Bombay Public Security Measures Act of 1947; U.P. Communal Disturbance Prevention Act of 1947; U.P. Maintenance of Public Order (Temporary) Act of 1947; West Bengal Disturbed Areas Act of 1947; United Provinces Act (No. IV) of 1947; C.P. and Berar Public Safety Act of 1948; Madras Suppression of Disturbances Act of 1948; West Bengal Security

[12] Granville Austin, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE, Oxford University Press, New Delhi, 2008.

Act of 1948; Orissa Maintenance of Public Order Act of 1948; Public Safety Ordinance of 1948; and Bihar Maintenance of Public Order Act of 1948.

Some of them are discussed below:

a) C.P. and Berar Public Safety Act of 1948: The C.P. and Berar Public Safety Act, 1948, may be regarded as typical of these provincial Acts. Section 2(1)(a), the operative Sections of this Act, provided: "2(1) The Provincial Government if satisfied that any person is acting or is likely to act in a manner prejudicial to public safety, order or tranquillity, or is inciting strikes with intent to cause or prolong unrest among any group or groups of employees may, if it considers such order necessary, make an order; (2) directing that he be detained; . . . ."

The Act also provided for communication to the detained person of the grounds on which the order of detention was made and for affording him an opportunity to make a representation to the Government against the order of detention.

b) West Bengal Security Act of 1948: The West Bengal Security Act, 1948, provided for deprivation of personal liberty of a person, "with a view to preventing him from doing any subversive act."

c) Public Safety Ordinance of 1948: The Public Safety Ordinance of 1948, provided for special measures to ensure the public safety and interest and to prevent any grave menace to the security of India. The Governor-General had already declared a State of grave emergency under Section 102 of the Government of India Act, 1935. Under the Ordinance provision for "the apprehension and detention and custody of any person" was made. The Government could frame the rules and empower an authority to apprehended and detain any person, when it "suspects on grounds appearing to such authority to be reasonable, or having acted, acting, being about to act, or being likely to act in a manner prejudicial to the Public Safety or interest, the maintenance or public order .... relations with foreign powers or the maintenance of peaceful conditions in any tribal area, or with respect to whom such authority is satisfied that his apprehension and detention are necessary for the purpose of preventing him from acting in any such prejudicial manner."

d) Armed Forces (Special Powers) Act of 1948: The Four Ordinances of 1947 were replaced by the Armed Forces (Special Powers) Act of 1948 (Act 3 of 1948). It was a temporary statute, enacted for a period of one year, though it continued till it was repealed by Act 36 of 1957, only tobe resurrected a year later in 1958. The reason for the introduction of the Act of 1958 was the deteriorating situation with respect to internal security in the 'unified Assam'.

e) Madras Suppression of Disturbances Act, 1948: In the normal course of things preventive detention laws should have lapsed after India attained Independence; but perhaps as the Republic of India had its birth amidst the ravages of civil commotion involving huge loss of lives and property, the framers of our Constitution decided to retain preventive detention as a means to curb anti-national activities. One of the first Acts of independent India was the Madras Suppression of Disturbances Act (1948) that authorized the use of military power its own citizen in Telengana. The peasant struggle in Telengana which began in 1946, was against forced labour, exploitations, evictions by feudal landlords and oppression by village patels, among other things and later developed into an agrarian liberation struggle to get rid of feudal landlordism and the Nizam`s dynastic rule in the state. The struggle continued even after the Nizam`s rule ended with the entry of Indian troops in September, 1948 and the merger of the Hyderabad state into the Indian Union. Similarly in Nalgonda, Warangal and Khammam the landlords were driven away from the villages, their lands seized and one million acres of land were redistributed among the peasants. In this as many as 4,000 communist and sympathizers were put behind the bars. In subsequent years, large number of similar "draconian laws" were passed, all of which provided legal cover for terrorizing the populace.

f) Madhya Bharat Maintenance of Public Order Act of 1949: The new established Indian Governments in the provinces had repealed several preventive detention statutes, but from the independence until the Constitution's inauguration, the new ruled parties in some provinces enacted 'Public Order' and 'Public Safety' laws.

2.2.2 *Statutes in the Post-Constitutional Era*

The Constituent assembly of India retained the preventive detention laws in the Fundamental Rights part of the Constitution. It enables the Government of India and

the State legislature to enact the preventive detention laws. Such laws are studied in the research work under three broad categories namely: National security laws, National Economic interest laws and Public Order. These categories taken together are varied according to the constitutional implications in times of emergency. It is analyzed under three periods as follows:

a) Pre-emergency period;

b) Emergency period; and

c) Post-emergency period.

The preventive detention and the emergency are two sides of the same coin. Three types of emergency are national emergency on external aggression and armed rebellion under Article 352; State emergency under Article 356 and financial emergency under Article 360. India has no experience of financial emergency. If emergency was declared, the fundamental rights under part III was automatically suspended under Article 359. But, after the emergency dark impact, Articles 20 and 21 of the Constitution of India was exception to this suspension. Hence personal liberty also has the exception. The preventive detention curtails the personal liberty.

In Indian sub-continental experience in emergency period, the personal liberty put in peril and detained in gloomy because of the emergency provisions of the Constitution of India for protecting the national security, economic interest and public order. Hence, from the initial years of preventive detention was based on these three important aspects mostly in single legislations. But, the trend was gradually changed in the mid of the emergency. The above said three categories got the separate legislations. Emergency was focal point for finding this trend. The constitution also validated the preventive detention legislations through enumerating the legislative powers under seventh schedule. They are Entry 9, List I “Preventive detention for reasons connected with Defence, Foreign Affairs or the Security of India; persons subjected to such detention”; Entry 3, List III “Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention”.

a) Pre emergency period

Initially the first preventive detention legislation in Republic India where the constitution was come into force at once enacted by the Parliament after long debate and heated discussions by the legal luminaries and the representatives of the people. Sardar Vallabbhai Patel spent his two sleepless nights for enact this legislation. That first enactment was Preventive Detention Act, 1950. It had given power to the executive authorities to detain the persons even under the three categories namely national security, economic interest and public order.

(i) The Preventive Detention Act, 1950: The Preventive Detention Act, 1950 was the first preventive detention law passed by parliament in 1950. It was initially enacted for the period of only one year, but periodically it was extended up to the year of 1969. Its Constitutional validity was tested on the anvil of Constitution of India for the first time in the signpost judgement of *A.K Gopalan's* case and the same was upheld by the Constitutional Bench of the Supreme Court. The Preventive Detention Act (Act IV of 1950) has been passed by the Parliament of India. In the Seventh Schedule of the Constitution, List I contains entries specifying items in respect of which the Parliament has exclusive legislative powers. Entry 9 is in these terms: Preventive detention for reasons connected with Defence, Foreign Affairs or the Security of India; persons subjected to such detention. "List III of that Schedule enumerates topics on which both the Union and the States have concurrent legislative powers. Entry 3 of that List is in these terms: "Preventive detention for reasons connected with the security of a State, the maintenance of public order or the maintenance of supplies and services essential to the community; persons subjected to such detention." It is not disputed that Act IV of 1950 is covered by these two Entries in List I and List III of the Seventh Schedule.

This legislation abridges or infringes the rights given by Articles 19 and 21 and is also not in accordance with the permissive legislation on Preventive Detention allowed under Articles 22(4) and (7) and in particular is an infringement of the provisions of Article 22(5).

(ii) Armed Forces (Special Powers) Act of 1958: The armed attacks from rebel and Army intensified the widespread violence in the Naga Hills. The State administration

could not handle the situation effectively and it asked for the central assistance. In response the Central government sent the army to quell the rebellion and restore normalcy in the region. The president of India promulgated the Armed Forces (Assam and Manipur) Special Powers Ordinance on 22 May 1958 to confer special powers on the armed forces, as well as provide them with a legal frame work to function within the disturbed areas of Assam and the Union Territory of Manipur. Finally the 1942 Ordinance was reincarnated in the name of the Armed Forces (Special Powers) Act of 1958.

b) Emergency Period

The period of emergency was classified into three different periods for different purpose. The first one was started from 26.10.1962 to 10.01.1968 during Indo-China War. The second one commenced from 03.12.1971 to 21.03.1977, originally proclaimed during the Indo Pakistan war and later extended along with the third proclamation of emergency in the name of internal disturbance from 25.06.1975 to 21.03.1977. When a proclamation of emergency is in operation within the territory of India, the President of India has the power to declare that the right to move any court for the enforcement of such of the rights conferred by Part III of the Constitution of India as may be mentioned in the order and all proceedings pending in any Court for the enforcement of the rights so mentioned shall remain suspended.

This suspension of fundamental rights leads to arbitrariness on the part of authorities of the Government who easily misused their powers in the name of the emergency. The Preventive Detention Act, 1950 was repeated with more stringent provisions in the Maintenance of Internal Security Act, 1971 (MISA) because MISA had become a hated word during the Emergency.

(i) Defence of India Act (Central Act No 51 of 1962): The Defence of India Act and rules were enacted in the first national emergency, due to the Indo-China war. The president has declared by proclamation under Article 352 of the Constitution that a grave emergency exists whereby the security of India is threatened by external aggression. It is necessary to provide for special measures to ensure the public safety and interest, the defence of India and civil defence and for the trial of certain offences and there for matters connected therewith. It was enacted by Indian parliament in the

thirteenth year of the Republic India. It was extended to whole India in respect of the regulation and discipline of the naval, military and air forces or any other forces of the Union. It was preventing and prohibiting anything likely to assist the enemy or to prejudice the successful conduct of military operations or civil defences. Hence Preventive Detention was allowed for the protection of national security.

(ii) Maintenance of Internal Security Act, 1971 (MISA): The Maintenance of Internal Security Act was a controversial law passed by the Indian parliament under the prime Minister Indira Gandhi and Indian law enforcement agencies super powers on indefinite preventive detention of individuals, super strength, search and seizure of property without warrants, flying, telephone and wiretapping XRay vision-in the quelling of civil and political disorder in India, as well as countering foreign inspired sabotage, terrorism, subterfuge and threats to national security. The legislation gained infamy for its disregard of legal and constitutional safeguards of civil rights, especially when 'going all the way down' on the competition, and during the period of national emergency (1975-77) as thousands of innocent people were believed to have been arbitrarily arrested, tortured and in some cadres, forcibly sterilized. The legislation was enacted to justify the arrest of Indira Gandhi`s political opponents, including the leaders and activists of the opposition Janata Party. The 39th Amendment to the Constitution of India placed MISA in the 9th Schedule to the Constitution, there making it totally immune from any judicial review; even on the grounds that it contravened the Fundamental Rights which are guaranteed the Constitution, or violated the Basic Structure. The law was repealed in 1977 following the election of a Janata party-led Government; the 44th Amendment Act of 1978 similarly removed MISA from the Ninth schedule.

(iii) COFEPOSA 1974: The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (herein after called as COFEPOSA) was passed by the Parliament on 13th December 1974, giving wide powers to the executive to detain individuals on the apprehension of their involvement in smuggling activities. It has been effective since 19th December, 1974. The Act is based on the concept of Preventive Detention, which apart from being a colonial legacy, and laws exist under Article 22 for the same for reasons related to security of the state and maintenance of

public order. The COFEPOSA provides for detention in the name of prevention of smuggling activities and matters connected.

The important Sections of the COFEPOSA are as under:- Section 3: power to make orders for detention

Section 3(1): Empowering Section- orders to detain (including foreigners), by Central Government, State Government, joint secretary of Central Government and secretary of State Government, in case of- Smuggling, Abetting, smuggling Transport, concealing, storing, harbouring persons involved in smuggling, dealing in smuggled good.

Section 3 (2): any order by State Government- report to be forwarded to Central Government within 10 days.

Section 3(3): with respect to Article 22(5) of Constitution, grounds for detention to be communicated within 5 days to detainee.

Section 4: Execution of detention order The order can be executed anywhere in India similar to arrest warrants under the Code of Criminal Procedure, 197.

Section 5A: Grounds of detention severable, the detention order is deemed to have been made separately on each of the grounds under Section 3 (1).

Section 7: Case of Absconding Persons Section 7 (1) (a): written report given to Metropolitan Magistrate of that jurisdiction to invoke Sections 82, 83, 84, 85 of Cr.P.C. Section 7 (1) (b): order is notified in the official gazette directing the person to give an appearance whenever asked, else he can be punished by imprisonment up to 1 year or fine or both.

Section 8: Advisory Board [under constitutional safeguards under Article 22 (4)] Section 8(b): Government should within 5 weeks of date of detention, make a reference to the Advisory Board Section 8(c): Advisory Board to report within 11 weeks of detention order. If satisfied, detention period can extend to one year Section 8f- If, in the opinion of the Advisory Board, there is insufficient cause for detention, the order of detention used to revoked and person released from the clutches of the preventive detention. Section 9: Detention for more than 3 months without the

opinion of the Advisory Board(normal period of detention is 90 days from the date of detention).

There is no prescribed period to deal with the representation. Under Article 22 (5) of the Constitution of India, it should be done 'as soon as may be'.

Section 12: Temporary release of detained persons (parole)

Section 12 (1): directed by the Central Government to release the person for a specified period with or without conditions. It is liable to cancellation at any time. Section 12 (2): the Government may require the person to enter into a bond with sureties for due observance of conditions specified in the direction. Section 12 (3): released person to surrender at the time and place and to the case of non-surrender without sufficient reasons, the person is liable for imprisonment of up to 2 years with or without fine. Section 12 (5): in case the conditions imposed on the person are not fulfilled, the bond will be declared forfeit and the person shall be liable to pay penalty. Section 12 (6): no bail release for a person detained under this Act unless released temporarily under this section.

Challenges: It is extremely difficult to procure direct evidence against financers and organizers of smuggling, as per the norms of the Evidence Act. Even they use the latest technology to operate from any part of the world without leaving a viable trace. The Act was conceptualized to avoid interference by courts. But unfortunately, judicial intervention is rampant. As per statistics, 70-80% detainees have been released by the High Courts due to procedural or technical grounds.

c) Post Emergency Period

The geo-political situation of India was changed after the emergency. The new Government tried to restore the Constitution of its original spirit. Hence, it made many changes in the Amended Constitution which was amended earlier by former regime. The suspension of fundamental rights has the exceptions. One of the important exceptions is preserve the personal liberty under Article 21 of the Constitution. The post emergency period was begun from 1977. The Constitution protects the personal liberty and fundamental rights in both the peace and emergency

situations. A person can be detained under judicial custody for two reasons. One is that he has committed a crime. Another is that he is potential to commit a crime in future. The custody arising out of the later is preventive detention and in this, a person is deemed likely to commit a crime. Thus Preventive Detention is done before the crime has been committed. Preventive detention is not against the constitutional safeguards. The Preventive Detention laws are repugnant to modern democratic constitutions. They are not found like India in any of the democratic countries. In England, the preventive detention law was resorted to only during the time of war. India is a country having multi-ethnic, mutli-religious and multilingual society.

Caste and communal violence is very common in India. Apart from that the circumstances at the time, when our constitution came in force demanded such provisions. This is evident from following statement of Dr. Bhimrao Ambedkar:

"....in the present circumstances of the country, it may be necessary for the executive to detain a person who is tempering either with the public order or with the defense services of the country. In such case, I don't think that the exigency of the liberty of an individual shall be above the interests of the state".

Historical background of Preventive Detention in India has a long history. India is one of the few countries in the world whose Constitution allows for preventive detention during peacetime. The opponents to this law say that these provisions are without any safeguards that elsewhere are understood to be basic requirements for protecting fundamental human rights. For example, the European Court of Human Rights has long held that preventive detention is unlawful under the European Convention on Human Rights regardless of the safeguards embodied in the law. South

Asia Human Rights Documentation Centre (SAHRDC), recommended in its submission to the National Commission to Review the Working of the Constitution (NCRWC) in August 2000, to remove the provisions of the Constitution of India that explicitly permit preventive detention. It obviates the Article 4 of the ICCPR which permits that rights can only be limited "in time of public emergency which threatens the life of the nation" because it allows detention in peacetime as well. It does not provide any procedural protections such as to reduce detainees' vulnerability to torture and discriminatory treatment; and to prevent officials' misusing preventive

detention for subversive activities. The Power of states to form similar legislations has been misused. Before a preventive detention case is brought before the High Court, a three member Advisory Board headed by a sitting High Court Judge is constituted by the Government to examine whether the detention is justified or not. But, the proceedings of the Board are confidential except for that part of the report which expresses the opinion of the Board. Opponents' view to Preventive Detention The constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of State's security; public order, disruption of national economic discipline, etc. are envisaged as a necessary evil to be administered under strict constitutional restrictions.

(i) NSA: National Security Act, 1980 (NSA) is an Act of Indian Parliament which empowers Central Government and State Government to detain a person from acting in manner prejudicial to the security of India, relations of India with foreign countries, maintenance of services and supplies essential to the community if it is necessary to do so. This act came into force in the year 1980 which extends to the whole of India except the state of Jammu and Kashmir. A person can be detained for a maximum period of three months in the first instance but State Government can extend such period from time to time not exceeding three months at a time. The Central or State Government if satisfied that to prevent any person from doing any act it is necessary to do so, it can make an order for detention of the person. If any foreigner violates the act, he can be expelled from country. On the satisfaction of the State Government, District Magistrate or Commissioner of Police can also make orders for the detention of person. If any officer makes such orders, he shall send his report to the State Government. If report is not approved by the Government in 15 days, the order shall not remain in force. State Government will send its report along with grounds of detention and all relevant materials to the Central Government within 7 days from the date of detention or from the date of approval. A person can be detained for a maximum period of three months in the first instance. State Government can extend such period from time to time not exceeding three months at one time after the detention order confirmed by the Advisory Board. The detention order is treated and executed in the same manner as a warrant of arrest under the Criminal Procedure Code. The maximum period for detention of a person is 12 months from his date of detention. The Central or State Government constitutes an Advisory Board for the

purpose of this Act, whenever necessary. The board consists of three members as serving or retired Judges of High Court. In all the cases where a detention is made under this Act, the State Government shall put his detailed report regarding detention of the person within three weeks of his detention or on representation by the affected person. The Advisory Board, after proper verification of facts and circumstances, submits its report to the Government within 7 weeks from date of detention. If Advisory Board agrees with the report of Government, only then person is kept under detention otherwise the Government shall revoke his orders and the person concerned will be released.

(ii) PBMMSECA 1980: The Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (herein after referred as PBMMSECA) was enacted on 12th February, 1980 and enforced on 5th October, 1979 through ordinance. The Act aims to prevent un-ethical trade practices which include black-marketing and hoarding of essential commodities, the Act lays provisions for punishment against such persons who commit either of these. The Act empowers State Government or Central Government or an officer not below the rank of Joint secretary representing Centre or State Government in case has a reason to believe that a person is committing an offence against provisions of the Act shall make an order for detaining such person. Act shall directly apply to such person committing, aiding or abetting an offence under provisions of the Essential Commodities Act, 1955 or any other law dealing with distribution, production or supply of essential commodities; any person who make profits by defeating provisions of the act. The Act also gives similar power of taking action to District Magistrates and Commissioner of Police. An order made by an officer under sub section (2) of section 3 shall be brought into the notice of Government along with relevant details; the order shall remain into force for not more than twelve days after making it within which State Government shall approve the order. The State Government shall within seven days report to Central Government along with grounds of detention along with all relevant documents; where-after detention order under sub section (2) of section 3 shall be carried. No order of detention shall be invalid merely on the ground that detention was carried outside territorial jurisdiction of the government making order. Section 4 of the Act relates to absconding persons, once a person is found to avoid order of detention or is absconding, the Government or officer shall draft a report in

writing to Metropolitan Magistrate or Judicial Magistrate first Class who shall order against such person under Sections 82, 83, 84 and 85 of Code of Criminal Procedure which shall apply against the person and his property. Provisions of Section 4 are also applicable once the authorities have an apprehension of absconding of person against whom orders of detention have been made.

In case a person is notified to present himself before court of law he shall do so on the date and time specified in case of failure to make an appearance such person shall be punished with imprisonment extending one year and with fine or both. Offences under the Act shall be cognizable. Person detained shall be made aware of the grounds of detention and shall be given an opportunity of fair representation. Section 9 of the Act deals with appointment of an Advisory Board consisting of three persons who is, are qualified or had been Judge of a High Court, along with one another member who is, or has been Judge of High Court. The State Government is imposed with a duty to refer the detained person before advisory board along with the representation of grounds of detention; where after the advisory board shall look into all aspects of the matter brought in front of it. The advisory board after giving an opportunity to person detained shall draft a report which shall be acted upon by the Government. The report shall either ask the Government to revoke detention orders or shall further continue the detention.

Maximum period of detention shall be six months from the date of detention. The order of detention may be revoked under provisions of Section 21 of the General Clauses Act, 1897[13] only after confirmation from State or Central Government. Person detained may be temporarily released after imposing necessary conditions on release of such person one such condition may be filing of bond along with sureties. In case a person breaches conditions of release his bond shall be forfeited. The Act protects all acts and actions taken in good faith under the provisions of the Act. Thus the Act is an effort to bring into hold of law person who in order to suffice there greed keep essential commodities out of the reach for other people.

[13] This Act is popularly known as legislative dictionary of India.

(iii) TADA 1985: In 1992 after the assassination of Rajiv Gandhi, the Parliament enacted Terrorism and Disruptive Activities (Prevention) Act (TADA) to replace the MISA and TADA was lapsed in 1995.

After 1980, the Parliament enacted the Terrorist and Disruptive Activities (Prevention) Act, 1985 with following objects and reasons, that, Terrorists had been indulging in wanton killings, arson, looting of properties and other heinous crimes mostly in Punjab and Chandigarh. This Act was amended several times and ultimately in 1995 the Act of 1985 was repealed. The word 'Terrorism' was not defined under this law. The judiciary has stated that it is not possible to give a precise definition of terrorism, but that what distinguished terrorism from other forms of violence was the deliberate and systematic use of coercive intimidation. From 1984 onwards, approximately 75,000 people were detained under TADA; of these, at least 73,000 cases were subsequently withdrawn for lack of evidence.[14] The conviction rate under the TADA was less than one percent, indicating that more than 99% cases booked under the law was not backed by substantive evidence. After the 11th September attack on the WTC tower in US, the Parliament enacted Prevention of Terrorist Activities Act, 2002 (POTA) to strike against terror in India.

(iv) PITNDPS Act 1988: The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (herein after referred as PITNDPS Act) (No. 46 of 1988) provide for detention in certain cases for the purpose of preventing illicit traffic in narcotic drugs and psychotropic substances and for matters connected therewith. Whereas illicit traffic in narcotic drugs and psychotropic substances poses a serious threat to the health and welfare of the people and the activities of persons engaged in such illicit traffic have a deleterious effect on the national economy; And whereas having regard to the persons by whom and the manner in which such activities are organized and carried on, and having regard to the fact that in certain areas which are highly vulnerable to the illicit traffic in narcotic drugs and psychotropic substances, such activities of a considerable magnitude are clandestinely organised and carried on, it is necessary for the effective prevention of such activities to provide for detention of persons concerned in any manner therewith. Be it enacted by Parliament in the Thirty-ninth Year of the Republic of India.

[14] Available at, http://nhrc.nic.in/documents/publications/HRActEngpdf (20th May, 2018)

Section 3 which is Power to make orders detaining certain persons: The Central Government or a State Government, or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of a State Government not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner) that, with a view to preventing him from engaging in illicit traffic in narcotic drugs and psychotropic substances, it is necessary so to do, make an order directing that such person be detained.

Section 7 which is Detention orders not to be invalid or inoperative on certain grounds: No detention order shall be invalid or inoperative merely by reason (a) that the person to be detained there under is outside the limits of the territorial jurisdiction of the Government or the officer making the order of detention; or (b) that the place of detention of such person is outside the limits. Thus the Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances and for matters connected therewith) NHRC Report (1994-95): National Human Rights Commission, New Delhi. Report submitted by its Chairperson Justice Ranganath Mishra and other members.[15] The commission unanimously recommended for not to continue the draconian TADA legislation which was not renewed when its life expired on 23.05.1995 on the grounds that itwas "incompatible with Indian cultural traditions, legal history and treaty obligations." The NHRC had given the said recommendation under section 12(f) of National Human Rights Commission Act. After considerable huge number of complaints received by the victims under TADA Act and representations from Domestic and of the Indian Parliament.[16]

(vi) LCI Report No. 173: Law Commission of India Report No. 173 was on "Prevention of Terrorism Bill of 2000" in the year of 2000. The Ministry of Home

[15] Available at, http://nhrc.nic.in/documents/publications/HRActEngpdf,(20th May, 2018) .
[16] Justice Ranganath Mishra, National Human Rights Commission: Annual Report 1994-95, (New Delhi: National Human Rights Commission, 1995).

Affairs, Government of India requested the Commission to undertake a fresh examination of the issue of a suitable legislation for combating terrorism and other antinational activities in view of the fact that security environment has changed drastically since 1972 when the Law Commission had sent its 43rd Report on offences against the national security. The Government emphasised that the subject was of utmost urgency because the erstwhile Terrorist and Disruptive Activities (Prevention) Act had lapsed and no other law had been enacted to fill the vacuum arising there from. The Commission was asked to take a holistic view on the need for a comprehensive antiterrorism law in the country. The Commission circulated a working paper to all the concerned authorities, organisations and individuals for eliciting their views with respect to the proposals contained therein. The Commission was thoroughly revised the Criminal Law Amendment Bill and have suggested a new Bill "Prevention of Terrorism Bill" for it. For the sake of convenience, the Bill entitled "Prevention of Terrorism Bill of 2000" as modified by the Law Commission was annexed with the same Report.[17]

vii) LCR Report No. 177: Law Commission of India Report No. 177 was on "The Law Relating to Arrest" in the year of 2001. This subject was taken up by the Law Commission suo motu with a view to clearly delineate and regulate the power of arrest without warrant vested in the Police by section 41 and other provisions of the Criminal Procedure Code. With a view to ascertain the exact situation, the commission had requested the NHRC to collect the data from all the States with respect to the number of arrests in a given year, the number of arrests for bailable offences, the number of arrests under preventive provisions and other relevant particulars. Accordingly, the NHRC wrote to Director Generals of Police of all the States, who were good enough to send the material as required by us. On the basis of material so forwarded, we had prepared an extract, which is now annexed to this Report as Annexure II. They establish that, overall, the arrests under the preventive provisions were more in number than the arrests for substantive offences and further that a large number of arrests were in respect of bailable offences which more often happen to be non-cognizable offences (wherein no arrest can be made without a warrant or order from a magistrate). The Law Commission accordingly prepared a

[17] Justice B.P.Jeevan Reddy (2000), Law Commission of India Report No.177 submitted before the Ministry of Law and Justice, Government of India.

Consultation Paper setting out its provisional views and issued a questionnaire to all concerned. The theme of the Report was to maintain a balance between the liberty of the citizens (the most precious of all fundamental rights) and the societal interest in maintenance of peace and law and order. This was no doubt a difficult balance but it has to be attempted, and achieved to the extent possible.

viii) POTA 2002: The Ministry of Home Affairs justified the Act by claiming that "an upsurge of terrorist activities, intensification of cross border terrorism, and insurgent groups in different parts of the country". Most of the provisions contained in the POTA can be found in other statutes.[18] The POTA allowed the detention of a suspect for up to 180 days without the filing of charges in Court. It also allowed law enforcement agencies to withhold the identities of witnesses and treats a confession made to the police as an admission of guilt. Under Indian law, a person can deny such confessions in court, but not under POTA. Some statistics: According to the Union Ministry, some 800 people have been arrested and jailed under the POTA. Some 4,000 people from across country were also booked under the Act.[19]

ix) UAPA, 1967: Amendments to Unlawful Activities (Prevention) Act (herein after referred as UAPA), 1967: The United Progressive Alliance (herein after UPA) Government had repeatedly said that India already has a number of stringent laws such as the NSA and the UAPA, and hence there was no necessity to enact another specific anti-terror law. However, when it repealed the POTA in 2004, it brought about amendments to the UAPA. These included increased punishment for committing acts of terrorism, enhanced police powers of seizure, communication intercepts made admissible as evidence and extended periods of detention without charges to 90 days from the original 30 days. In the backdrop of terrorist attacks in Mumbai in November 2008, the UPA Government introduced anti-terrorism

[18] The provisions of POTA are found in other statutes such as the National Security Act, 1980; The Armed Forces Special Powers Act, 1958; the Disturbed Areas Act ,1990; The Unlawful Activities (prevention) Act, 1967; The prevention of seditious Meetings Act, 1911; The Anti-Hijacking Act, 1982 No.65 of 1982; The Suppression of Unlawful Acts against Safety of civil Aviation Act, 1982, No.66 of 1982; The Disturbed Areas Special Court Act, 1976; The Foreign Exchange Management Act, 1999; The prevention of Blank-marketing and Maintenance of Supplies of Essential Commodities Act, 1980; The prevention of lllicit Traffic in Narcotic Drugs and psychotropic substances Act,1988; The Indian Telegraph Act, 1885 or The Information Technology Act, 2000. Furthermore, preventions that are not covered by the above Acts violate the Indian penal Code, the Criminal procedure code, the Indian Evidence Act, and fundamental rights chapter of the Indian Constitution.

[19] Crimes in India, annual report published by NCRB, Home Ministry of India, New Delhi , 2010.

provisions by bringing about further amendments to the UAPA. Detention without bail for up to 180 days for Indians, indefinite detention without bail for foreigners and reversing the burden of proof in many instances are some of the amendments brought about.

x) State Legislations: Besides the above mentioned Central enactments there are some other Acts enacted by various State Legislatures for curtailing personal liberty. To name a few legislations:

1. Andhra Pradesh Preventive Detention Act, 1970 (Act 1 of 1970);

2. Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land-Grabbers Act, 1986;

3. Assam Preventive Detention Act, 1980;

4. Bihar Control of Crimes Act, 1981;

5. Gujarat Prevention of Anti-Social Activities Act, 1985;

6. Jammu and Kashmir Preventive Detention Act, 1964;

7. Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988;

8. Jammu and Kashmir Preventive Detention Act, 2011;

9. Karnataka Prevention of Dangerous Activities of Boot Leggers, Drug-offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum-Grabbers Act, 1985;

10. Maharashtra Prevention of Communal Anti-Social And Other Dangerous Activities Act, 1980;

11. Maharashtra Prevention of Dangerous Activities of Slum-Lords, Boot-Leggers and Drug-Offenders Act, 1981;

12. Maharashtra Preventive Detention Act, 1970;

13. Orissa Preventive Detention Act, 1970;

14. Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Cyber law offenders, Drug-offenders, Forest offenders, Goondas, Immoral traffic offenders, Sand-offenders, Sexual-offenders, Slum grabbers, and Video pirates Act,1982 (Tamilnadu Act No.14 of 1982);

15. Madhya Pradesh Rajya Suraksha Tatha Lok Vyavastha Adhiniyam, 1980;

16. Meghalaya Preventive Detention Act, 1995;

17. West-Bengal (Prevention of Violent Activities) Act, 1970;

The state legislatures have also enacted Orders and Rules under above mentioned Acts regarding conditions of detention of the detenu under relevant Act.

CHAPTER 3

AN ANALYSIS OF THE STATE PRACTICE OF THE PREVETIVE DETENTION LAWS IN INDIA

Categorization in Preventive Detention Legislations: Preventive detention laws in India are classified into three categories according to its nature of offence. They are national security, economic interest and public order. The initial preventive detention legislations in republic India was PD Act of 1950 During emergency, the classifying trend was started and developed full-fledged after emergency.

The major categorical legislations are National Security Act, 1980 came under national security category; Conservation of Foreign Exchange and Prevention of Smuggling Act, 1974 and Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980 came under economic interest category; The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 came under public order category.

The Constitution of India explicitly empowers the Parliament to enact laws providing for preventive detention for reasons connected with, "the security of a State, maintenance of public order, or maintenance of supplies and services essential to the community.[20] The Constitution also provides that these laws need not comply with fundamental procedural rights guarantees[21]."Preventive detention," as understood in such laws, involves detention without criminal trial.[22] That is, no criminal offense is proven, nor any charge formulated.[23] Clearly deviating from typical criminal procedure, preventive detention laws establish "special powers" allowing for the detention of persons without trial on the suspicion that the detainee poses a threat to “public order” or “national security”.

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[20] The central government has enacted several preventive detention laws.
[21] INDIA CONST. art. 22 (3).
[22] *See id.* art 22 (5).
[23] Indian courts emphasize the importance of the distinction between *punitive* and *preventive* detention regimes. On this view, rights recognized in constitutional criminal procedure are inapplicable to the preventive detention process because *preventive* detention does not involve the adjudication of criminal charges. *See, e.g.*, *State of Bombay v. Atma Ram* (1951) S.C.J. 208, 212; *Ashok v. Delhi Admn.* (1982) 2 S.C.C. 403, Para. 14.

3.1 CONSTITUTIONALIZING PREVENTIVE DETENTION LAWS IN POSTCOLONIAL INDIA

Preventive detention laws have a long and politically-charged history in South Asia. Indeed, preventive detention was a common feature of the colonial legal system in India. In the nineteenth century, a dense network of regulations provided for detention and arrest without trial in certain cases, and detainees were denied the right to petition courts for writs of habeas corpus[24].

During both World War I and World War II, England enacted emergency legislation providing for preventive detention.[25] The Defence of the Realm Act and the Emergency Powers (Defence) Act[26] authorized the government to detain any individual without trial in the interest of public safety and security. These acts expired at the end of the respective wars. In India, the Defence of India Act provided for similar measures to secure the security and safety of British India.[27] Although this Act expired at the close of World War I, it was soon replaced by peacetime preventive detention laws such as the Rowlatt Act[28] and the Bengal Criminal Law Amendment Ordinance. The Defence of India Act and the Defence of India Rules were enacted after the outbreak of World War II.[29] These provisions authorized the government to detain any person thought to be a threat to public order, national security, or the maintenance of supplies and services essential to the community. The postcolonial Constitution of India was ratified by the Constituent Assembly in 1949.[30] India's new constitution explicitly vested the state and federal legislatures with the power to enact

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[24] Burma Code 209, Bengal Regulation III (Apr. 7, 1818) (Gov't of Burma 1943). The history of this regulation is quite complex, and its extension and amendment is outlined in 2 Frederic G. Wigley, Chronological Tables and Index of the India Statutes 775- 77 (Calcutta 1897).

[25] A.W. Brian Simpson, IN THE HIGHEST DEGREE ODIOUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN (1992).

[26] Emergency Powers (Defence) Act, 1939.

[27] Defence of India (Criminal Law Amendment) Act, 1915 (Act No. 4) (Ind.).

[28] Anarchical and Revolutionary Crimes Act, 1919 (Act No. 11).

[29] Defence of India Rules 1939, *reprinted in* B. MALIK ET AL., I ENCYCLOPAEDIA OF STATUTORY RULES UNDER CENTRAL ACTS 513 (1963). These rules were passed under the Defence of India Ordinance, 1939 (No. V of 1939) under powers preserved by § 21 of the Defence of India Act, No. XXXV (1939).

[30] PANCHANAND MISRA, THE MAKING OF INDIA'S REPUBLIC: SOME ASPECTS OF INDIA'S CONSTITUTION IN THE MAKING 23 (1966).

The draft Constitution prepared by the Constituent Assembly's drafting committee borrowed substantiallyfrom the British and U.S. models.

laws providing for preventive detention.[31] Specifically, the Parliament and state legislatures could enact laws providing for "preventive detention for reasons connected with Defence, Foreign Affairs, or the Security of India.[32]

Preventive detention laws are, however, subject to the restrictions outlined in Article 22 of the Chapter on Fundamental Rights. Clauses (3) to (7) of Article 22 detail the procedural safeguards required for any preventive detention law to be constitutionally valid.[33]

Article 22 provides that no preventive detention law shall authorize the detention of a person for a period longer than three months without the approval of an Advisory Board-a special tribunal constituted specifically for this purpose. These Advisory Boards are to consist of persons who "are, or have been, or are qualified to be appointed as, Judges of a High Court.[34] Clause (5) of Article 22 requires the detaining authority to communicate to the detainee the grounds upon which the detention order is based "as soon as can be, and to afford the detainee an opportunity to make a representation against the order. These procedural safeguards are qualified in that the detaining authority may withhold any information the disclosure of which is thought to be against the public interest. Parliament may by law prescribe the "class or classes of cases" in which a person could be detained for a period longer than three months without the approval of the Advisory Board. The Constitution also authorizes Parliament to prescribe the procedure to be followed by the Advisory Board proceedings.

Although Article 22 (3) to (7) specifies the minimum procedural safeguards for all preventive detention laws, these provisions are best read as restrictions on fundamental freedoms. Clause (3) of Article 22 states that the progressive protections accorded by Clauses (1) and (2) of the same Article do not extend to any person arrested or detained under any law providing for preventive detention." Under 22 (1), all persons arrested have the right to consult, and be defended by, a legal practitioner

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[31] INDIA CONST., Sched. 7, List I, Entry 9 (Central Government Powers); *id.*, List III, Entry 3 (Concurrent Powers).
[32] INDIA CONST., Sched. 7, List I, Entry 9 (Central Government powers); *id.* List III, Entry 3 (Concurrent Powers).
[33] INDIA CONST., art. 22, cl.3- 7.
[34] *Id.* art. 22, cl4.

of their choice. According to Article 22 (2), all such persons shall be produced before the nearest magistrate within twenty-four hours of arrest and detention shall not extend beyond this period without the approval of a magistrate. As such, the denial of the protections afforded under Article 22 (1) and (2) to persons detained under preventive detention laws constitutes a significant departure from the Constitution's procedural rights regime.

3.2 THE PREVENTIVE DETENTION ACT AND ITS PROGENY

Pursuant to this constitutional authorization, India's provisional Parliament enacted the Preventive Detention Act (PDA) in 1950.[35] The PDA empowered the government to detain persons without charge or trial in the name of public safety and security.[36] In the first case brought before the Supreme Court of India in *A.K. Gopalan v. State of Madras, the* Court upheld the constitutionality of the PDA.[37] Specifically, the Court held that Article 22 of the Constitution provides an exhaustive code of the procedural safeguards required of preventive detention laws. Although the PDA was challenged on the ground that it violated several fundamental rights provisions-Articles 14, 19, and 21 the Court found no constitutional infirmity because the explicit provisions of Article 22 (5) were satisfied.[38]

Although the PDA lapsed in 1969, the Parliament enacted the Maintenance of Internal Security Act (MISA) only two years later. The provisions of the MISA were virtually identical to the provisions of the Preventive Detention Act. Following the infamous emergency of the mid-1970s in which preventive detention was widely used as a political weapon , the MISA was also allowed to expire in 1978. Two years later, upon Indira Gandhi's return to power, a new preventive detention law was enacted-the National Security Act (NSA)- which remains in effect today.

In short, with the exception of two brief periods, Indian law has provided for preventive detention since independence. Not surprisingly, preventive detention has insinuated itself into the institutional matrix of Indian law enforcement. The details of India's "peace-time" preventive detention regime demonstrate both the nature and the

[35] Preventive Detention Act, No. 4 (1950).
[36] R.K. AGRAWAL, THE NATIONAL SECURITY ACT , 2nd ed., 1993.
[37] *A.K. Goplan v. State of Madras,* A.I.R. 1950 S.C. 27.
[38] *A. K. Gopalan v. State of Madras,* A.I.R. 1950 S.C. 30-42.

prevailing modes of justifying this extraordinary practice. The remainder of this Part addresses these issues.

3.3 UNDERSTANDING THE INSTITUTION OF PREVENTIVE DETENTION IN CONTEMPORARY INDIA: THE NATIONAL SECURITY ACT

Thirty-seven years after its enactment, the National Security Act's (NSA) preventive detention regime has become a convenient tool to obscure the flaws in the Indian criminal justice system and deprive individuals of their constitutional and statutory rights. Preventive detention is the extra-judicial confinement of an individual without charge – for up to one year under the NSA – purportedly to prevent a potential future crime. It violates nearly all due process rights, including most notably the presumption of innocence. Proponents in India and internationally have justified the practice as necessary to, for instance, prevent terrorist attacks or respond to existential national crises because the seriousness of the threat supposedly excuses the limitations on fundamental rights. While most proponents internationally do not conceive of the use of preventive detention other than as an extraordinary measure in exceptional circumstances, India regularly uses preventive detention to respond to ordinary criminal matters. Such use cannot be justified in a democratic, constitutional order such as exists in India.

The NSA was introduced by Indira Gandhi after she came to power in 1980. The Act replaced the National Security Ordinance which too had been promulgated by the Indira Gandhi government three months earlier. The NSA was amended in 1984, 1985 and 1988 to consolidate some of the government's powers, besides increasing the possible periods of detention in Punjab and Chandigarh. With the exception of the state of Jammu and Kashmir, the Act is applicable to the rest of the country. Jammu and Kashmir has a law similar to the NSA – the Jammu & Kashmir Public Safety Act (1978), which too has been grossly misused.

No separate figures are currently available for detentions under NSA. The 177th Law Commission Report of 2001 however provides figures for persons arrested under preventive provisions in India – which stands at a whopping 14,57,779 (fourteen lakh, fifty seven thousand seven hundred and seventy nine). This excludes Jammu and Kashmir.

The imposition of the NSA by the Uttar Pradesh government allows the authorities to keep Chandrashekhar of the Bhim Army, a Dalit mass organisation under preventive detention. Chandrashekhar's sole offence is to reclaim democratic rights against a casteist, ultra-right wing governmental machinery.

The irony is that NSA can be invoked against those who imperil the defence of the state, relation of the state with foreign powers, security of the state, public order; and maintenance of essential supplies and services. These are serious offences and several sections of the Indian Penal Code can be leveraged against such offenders. The NSA however allows the government to keep such serious offenders in custody without charging them for any of these serious offences. This is convenient for the government and police because it allows them to escape the strictures of the Criminal Procedure Code and the courts of the land.

The National Security Act and the constitution : In the normal course of the criminal law, a person accused of a crime is guaranteed the rights to a legal counsel, to be informed of charges as soon as possible, to appear before a magistrate within 24 hours, to cross-examine any witnesses and question any evidence presented and to be presumed innocent until proven guilty beyond a reasonable doubt in a court of law. The NSA, however, does not apply any of these rights to preventive detention cases. It permits the extra-judicial detention of individuals if the government is subjectively "satisfied" that an individual is a threat to foreign relations, national security, India's defence, state security, public order, or the maintenance of essential supplies and services.

A detainee may be held for up to ten days without being informed as to the reasons for the detention. Even then, the government may withhold the information supporting the detention, although not the grounds, if necessary for the public interest. Detenus are permitted to make "representations" as to why extra-judicial detention is inappropriate, but not to question their accusers or necessarily the evidence in support of detention. Nor are they permitted a lawyer at any point in the process, even while making such representations. A detenu may be held for up to three months and in certain circumstances six months, without any review. A three person Advisory Board made up of high court judges or persons qualified to

be high court judges determines the legitimacy of any order made for longer than three months. If approved, a person may be held extra-judicially for up to 12 months.

India's constitution expressly permits preventive measures in ordinary times and with few safeguards. The Supreme Court has consistently ruled that preventive detention measures such as those in the NSA are wholly constitutional. These rulings however, do not respond to the trend of abusing preventive detention to hide the flaws in the criminal justice system and to avoid the constitutional and statutory rights afforded to the criminally accused.

The Indian government has exploited the NSA by regularly detaining individuals, using the plea of preventing future disturbances of public order. But in reality, it is as a punishment for the current alleged crimes. A South Asian Human Rights Documentation (SAHRDC) internal review of *habeas corpus* petitions showed that the police often rely on the NSA when they are unwilling or unable to make an appropriate criminal case under the strictures of constitutional and statutory law. It found that there is a regular pattern of using preventive detention, for instance, to address the current activities of recidivists and organised crime; to bypass a trial when witnesses were unwilling to testify; and to prevent release on bail. Essentially, the police appear to regularly use preventive detention in more difficult criminal law cases when inefficiency or ineptitude might make law enforcement difficult.

The government's overreliance on preventive detention in ordinary criminal cases appears to misconstrue two fundamental aspects of the intended regime: (1) preventive detention is intended to stop future crimes; and (2) it is not meant to respond to ordinary law and order violations. In many of the cases reviewed, the detenu stood accused of a crime, for which they were criminally charged, that then justified immediate preventive detention.

The government characterised the current crime as evidence of a willingness to commit a future crime and supported this claim with any known past criminal activities. Accordingly, the government argued that the current and past activities show a propensity to commit crimes that can be prevented only through extra-

judicial detention. The courts then determined the future threat based on a close examination of the current crime, without examining whether there is any evidence of an intention or plan to commit a future crime. This type of examination suggests that preventive detention under the NSA is a punitive rather than preventive measure.

Additionally, the courts never questioned and the government never explained why criminal prosecution alone was an insufficient response to the current crime. If the accused is considered to be a serious threat to public order to justify preventive detention, then there seems little reason why the government cannot successfully oppose bail.

Further, it is the government's responsibility to protect witnesses to ensure their testimony. Relying on preventive detention to deal with these common criminal legal offences relieves the criminal justice system of its burden to prove guilt beyond a reasonable doubt and denies the detenu the presumption of innocence. It allows for the incarceration of a criminally accused without judicial oversight, a right to legal counsel or a right to challenge evidence against him/her.

This pattern suggests and promotes prosecutorial or police laziness as it insures detention without the need to prove a case as charged. Ultimately, such inappropriate use of preventive detention highlights the fundamental weakness of the criminal justice system when dealing with repeat offenders, organised crime, accused who threaten witnesses and prosecutorial failure when opposing bail.

The second apparent misconception of the government is that preventive detention is an appropriate response to most crimes. The decisions noted above indicate that the government continually uses the vague language of the NSA, which permits detention when public order is threatened, to respond to straightforward matters of law and order.

A test laid out by the Supreme Court for whether a future criminal act is likely to disrupt public order is whether it will "lead to a disturbance of the even tempo of the life of the community so as to amount to a disturbance of the public order, or affect merely an individual without affecting the tranquillity of society."

The government appears to believe that nearly any crime disrupts public order, including mugging, counterfeiting, sexual assault, murder and other crimes not directed at the public. It supports detention if the threatened act could cause a commotion or obstruct traffic, or if anyone other than the immediate victim suffered from fear, even if it arises from reading media reports of a criminal incident.

Courts often determine whether a threat to public order exists by analysing whether a current or past crime disrupted public order, again purportedly looking for propensity. This type of analysis underscores that preventive detention is being used as a punitive, rather than preventive, measure.

The National Security Act (NSA) authorizes the central government and the state governments to utilize preventive detention in certain cases.[39] The central and state governments, as well as district magistrates and police commissioners, are empowered to detain any individual "with a view to preventing him from acting in any manner prejudicial to" various state objectives including national security and public order. Because the NSA raises numerous vexing jurisprudential questions, it has generated a rich, dizzyingly complex body of case law interpreting nearly every phrase of the act. This law arguably deviates from international human rights standards in several respects. For the purposes of my argument, however, only the central components of the regime are important. To understand, in general, the nature and justification of preventive detention laws in India, four issues merit detailed explication: (1) the grounds upon which detention orders may be issued, (2) the "subjective satisfaction" of the detaining authority as the basis for valid detention orders, (3) the quasi-judicial nature of the executive review process, and (4) the procedural rights guaranteed detainees.

3.3.1 *The Grounds Justifying Detention: Defining "Public Order" And "National Security*"

Even in the absence of any alleged wrongdoing, Indian law allows detention of individuals in order to prevent acts threatening "public order" and "national security."

[39] Section 3 of the NSA Act confers this authority.

Neither the Constitution nor current preventive detention legislation attempts, however, to define either the range of acts considered threatening to "public order" and "national security" or the range of acts (or associations) supporting the inference that an individual is likely to commit such acts. Of course, the lack of any clear prohibitions precludes individuals from adjusting their behaviour to conform to the prevailing regime's behavioral expectations.

This deficiency poses a fundamental challenge to the legality of preventive detention. Mindful of this difficulty, courts have scrutinized executive assertions of threats to the "public order" or "national security" justifying particular detention orders. Unfortunately, courts have been unable to establish a consistent jurisprudence providing substantive content to these concepts. In *Ram Manohar Lohia v. State of Bihar,* the Supreme Court attempted to distinguish between the concepts "security of state," "public order," and "law and order."[40] In an astoundingly oft-quoted passage, Justice Hidayatullah underscored that only the most severe of acts could justify preventive detention:

"One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of state. It is then easy to see that an act may affect law and order but not public order just as an act might affect public order but not security of state."

The Court concluded that acts affecting only "law and order" without one of the other two categories cannot be a sufficient justification on which to base a detention order.[41] Of course, this analysis, its heuristic benefits aside, provides little clarification of the contested concepts, as it suggests only that courts may examine the executive's assessments of threats to public security.

The courts do not in general question executive determinations that alleged acts would or do threaten national security.[42] As a consequence, jurisprudence has centered on

[40] *Ram Manohar Lohia v. State of Bihar,* A.I.R. 1966 S.C. 740.
[41] ibid
[42] *Masood Alam v. Union of India,* A.I.R. 1973 S.C. 897, 905 (sustaining detention order issued to preserve national security based on executive's determination that detainee had and would continue to "stimulate[] anti-Indian feelings"). In fact, the courts have ratified subtle but important extensions of the concept of "national security." For instance,
the Supreme Court has held that "national security" threats include internal

the distinction between acts contrary to "public order" and acts contrary to "law and order." Attempts to elaborate and refine the *Ram Manohar Lohia* Court's formulation in this regard have made little progress. In *Arun Ghosh v. State of West Bengal,* for example, the Court attempted to specify further the meaning of "public order" by describing the nature of acts contravening the "public order."[43] The Court reasoned that:

"Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity affect the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order".

These vague formulations signal the Court's unwillingness to fashion concrete, justiciable standards.[44] Indeed, the Court repeatedly emphasizes that "public order" determinations are extraordinarily fact sensitive and must be made on a case-by-case basis. These development shave led one commentator to conclude that the expressions "law and order" and "public order" in Indian preventive detention laws "do not admit of any precise definition. The Courts have given such varying interpretations that even after a lapse of so many years it cannot be said with certainty as to which activity of a criminal will fall within the ambit of the expression 'public order.'

As a consequence of this muddled jurisprudence, the courts have endorsed a very broad interpretation of "acts prejudicial to the maintenance of public order. For example, courts have upheld detention orders based upon the contention that the detainee had: committed robbery[45], associated with a "notorious gang ofdacoits,"[46] brandished and fired a weapon in a public place, hurled stones at the car of his

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disturbances and need not involve a threat to the entire country or even a whole state.

[43] *Arun Ghosh v. State of West Bengal,* A.I.R. 1970 S.C. 1228.

[44] *Mustakmiya Jabbarmiya Shaikh v. M.M. Mehta, Commissioner of Police and Others*, 1995(3) SCC 237. The Court has, however, subsequently reasoned that any act "prejudicial to the maintenance of public order" is beyond the regulatory capacity of the ordinary law.

[45] *Gora v. State of West Bengal*, A.I.R. 1975 S.C. 473.

[46] *Rajendra Kumar v. Superintendent, District Jail of Agra,* 1985 Cr. L.J.999, 1004.

political opponents,[47] set fire to a school building, threatened violence to coerce a contractor to provide him employment, and fired at police officers.[48]

3.3.2. *The "Subjective Satisfaction" Of The Detaining Authority*

The NSA empowers executive officials to issue detention orders if satisfied with respect to any person that such an order is necessary.

Clearly, this provision authorizes preventive detention if, and only if, the detaining authority is satisfied that the detention is necessary to prevent threats to public order or national security. Furthermore, according to the prevailing view in the courts, the "subjective satisfaction" of the detaining authority is the statutory prerequisite for the exercise of this power. In *Anil Dey v. State of West Bengal,* the Supreme Court held that the "veil of subjective satisfaction of the detaining authority cannot be lifted by the courts with a view to appreciate its objective sufficiency. Although the courts "cannot substitute [their] own opinion for that of the detaining authority by applying an objective test to decide the necessity of detention for a specified purpose," they do review whether the satisfaction is "honest and real, and not fanciful and imaginary."[49] The executive is, therefore, required by the courts to "apply his mind" to the decision to issue a detention order. Although this standard accords the executive remarkably wide discretion, the courts have vitiated detention orders under this standard because the detaining authority: failed to consider all the relevant materials, failed to consider the circumstances of the detainee, or improperly considered irrelevant factors.[50]

An important amendment to the NSA limited the scope of the "non-application of mind" standard by directing courts to consider the identified "grounds" of detention as severable. Therefore, a detention order must be sustained so long as one valid ground is specified. The amendment came as a response to several court rulings in which detention orders were set aside because one or more of the stated grounds of detention was vague, non-existent, irrelevant, or invalid. Such detention orders were held invalid because the subjective satisfaction of the detaining authority was *ex facie* based on the grounds offered in the order as a whole. Prior to the amendment, courts

[47] *Kali Charan Mal v. State of West Bengal,* A.I.R. 1975 S.C. 999.
[48] *Kanu Biswas v. State of West Bengal*, A.I.R. 1972 S.C. 1656.
[49] *Anil Dey v. State of West Bengal*, A.I.R. 1974 S.C. 832.
[50] *Piyush Kantilal Mehta v. Commissioner of Police,* A.I.R. 1989, S.C. 491.

refused to speculate as to whether the detention order resulted from the cumulative effect of the grounds listed in the order or whether each ground mentioned was thought to be independently viable grounds for detention. The amendment insulates orders from review on this ground; leaving no room for the courts to maneuver on the issue. This lack of flexibility to review detention orders on a case-by-case basis has produced numerous confounding rulings. In *Gayathri v. Commissioner of Police, Madras,* for example, the Supreme Court upheld a detention order despite the fact that the court found one of the grounds of the order invalid. This is not a surprising outcome given section 5-A, except that in this case the District Magistrate issuing the detention order signed an affidavit stating that he had made the order cumulatively on all four grounds identified in it.[51]

In short, the nature and scope of judicial review is difficult to define with any precision in preventive detention cases. In most cases, the courts do, however, closely scrutinize whether detention orders comply with minimal constitutional and statutory requirements. As previously discussed, India's constitution clearly authorizes the use of preventive detention and specifies the full complement of fundamental rights applicable in such cases. Given the substantive and procedural commitments of the constitution and statutory law, Indian courts have little opportunity to constrain the use of preventive detention in meaningful ways.

3.3.3. *The Executive Review Process: Advisory Boards And Quasi-Judicial Review*

Although preventive detention is a form of administrative detention and is, therefore, extra-judicial, Indian law does provide for an executive review process. This review scheme includes rules regulating the issuance and confirmation of detention orders, as well as legislation establishing special executive Advisory Boards that conduct a sort of quasi-judicial review of detention orders. The procedures observed in the Advisory Board hearings are particularly important because consideration by the Board of the matters and material used against the detenu is the only opportunity available to him for a fair and objective appraisal of his case."[52] In this Section, I outline this executive review process in some detail. The nature of this process supports two important conclusions. First, the issuance and confirmation of preventive detention orders are

[51] *Ram Bahadur Rai v. State of Bihar,* A.I.R. 1975 S.C. 223.
[52] *A.K. Roy v. Union of India,* A.I.R. 1982, S.C. 710, 743.

not wholly arbitrary in that all detention orders are subjected to a rationalized and institutionalized review process.

Second, this process does not, however, involve a trial or hearing in the formal sense.

The NSA prescribes the procedure to be followed in the issuance and execution of detention orders. Under the Act, detention orders are to be executed in the same manner as normal warrants of arrest as specified in the Code of Criminal Procedure. Therefore, detention orders must be in writing, signed by the officer of the court issuing the warrant. The police officer executing the order must notify the person to be arrested of the substance of the order, and if requested, show the detainee the order. The officer making the arrest is also required to bring the detainee before a magistrate without unnecessary delay, and under no circumstance should this delay exceed twenty-four hours.[53]

Under Article 22 (4) of the Constitution, no law providing for preventive detention can authorize the detention of a person for a period longer than three months unless an Advisory Board, constituted under the law, reports that there is, in its opinion, sufficient cause for such detention. The NSA provides for the constitution of Advisory Boards that are to consist of three persons who are, or have been, or are qualified to be appointed as High Court Judges**.** At least one member of the Advisory Board must be a High Court Judge, who serves as Chairman of the Board.[54]

Under the Act, the governmental entity issuing the detention order must refer all cases to an Advisory Board within three weeks of the date of the detention order. The government must also forward to the Board any representation prepared by the detainee and the report of the detaining authority.

Furthermore, the procedure of the hearings before the Advisory Boards is outlined in the NSA. The Advisory Board must consider all materials placed before it by the detainee and the detaining authority.

[53] INDIA CONST. art. 22 (4).
[54] Section9, National Security Act, 1980.

After reviewing these materials, the Advisory Board must submit a report to the detaining authority within seven weeks of the date the detention order was executed. This report must include the opinion of the Advisory Board as to whether there is sufficient cause to detain the individual in question. The proceedings of the Advisory Board are closed to the public and its final report is confidential. The detaining authority must release the detainee immediately if in the opinion of the

Advisory Board there is not sufficient cause to maintain the order.[55] The issuance and confirmation of preventive detention orders are not inherently arbitrary in the sense that the structure and procedure of a reasonably elaborate executive review process is clearly established in law. The Advisory Board proceedings are not, however, formal judicial hearings or criminal trials in any sense. Neither the nature of the Board's inquiry nor its procedures resemble judicial proceedings. The Board does not make factual findings in any formal sense,[56] and there are no rules of evidence. In addition, detainees do not have the right to counsel, compulsory process, or confrontation.[57] Furthermore, because the government carries a minimal burden of proof, little evidence is typically presented to the Board.[58]

3.3.4. Procedural Safeguards: The Detainee's Rights

The Indian Constitution establishes a convoluted regime of procedural rights in preventive detention cases. Article 21 provides that no person may be deprived of their personal liberty except according to a "procedure established by law". Article 22 provides that all persons arrested or detained must be (1) immediately informed of the grounds for their arrest; (2) allowed to consult and be defended by a lawyer; and (3) produced before a magistrate within twenty-four hours. This progressive procedural rights regime, however, is not applicable in preventive detention cases. Indeed, the Constitution makes clear that the rights identified in Articles 21 and 22 (1)-(2) do not

[55] INDIA CONST. art. 22(5)-(7).
[56] R.K. Agrawal, former Secretary of the Home Ministry, summarizes the nature ofthe Board's administrative task:
In proceedings before the Advisory Board, the question for consideration of the Board is not whether the detenu is guilty of any charge but whether there is sufficient cause for the detention of the person concerned. The detention, it must be remembered, is based not on the facts proved either by applying the test of preponderance of the probabilities or of reasonable doubt. The detention is based on the subjective satisfaction of the detaining authority that it is necessary to detain a particular person in order to prevent him from acting in a manner prejudicial to certain stated object.
[57] INDIA CONST. art. 22, cl.3 -7.
[58] R.K. AGRAWAL, THE NATIONAL SECURITY ACT 5-9 (2nd ed. 1993).

constrain the Parliament's power to fashion preventive detention laws. Such laws must, nevertheless, incorporate certain minimal procedural safeguards.

Specifically, the detaining authority is required by Article 22 (5) of the Constitution to communicate to the detainee the grounds of the detention order.

Accordingly, the NSA requires disclosure of the grounds of detention to the detainee as soon as possible, but ordinarily no later than five days from the time of arrest. The NSA also requires, in consonance with Article 22 (5) of the Constitution,[59] that the detainee be given the earliest opportunity to make a representation against the order. The act does not, however, require the detaining authority to disclose any information that it considers against the public interest to release.[60]

The Supreme Court has also reasoned that the rights enumerated in Article 22 (5) imply certain other procedural protections. For example, in *Wasi Uddin Ahmed v. District Magistrate, Aligarh,* the Court ruled that the provision of Article 22 requiring the government to "afford" the detainee the opportunity to make a representation implies the right of the detainee to be informed of his or her rights under this article.

The Court has refused, however, to recognize the right to counsel in preventive detention cases. In the landmark judgment of *A. K. Roy v. Union of India,* the Supreme Court was asked to determine the constitutionality of the NSA. The NSA was challenged on numerous grounds.

Among these was the charge that the NSA unconstitutionally denied detainees their fundamental right to representation by legal counsel in hearings before the Advisory Board. Despite recognizing that "consideration by the Advisory Board of the matters and material used against the detenu is the only opportunity available to him for a fair and objective appraisal of his case, the Court held that detainees do not have the right to representation in these hearings.

The Court's reasoning in *AK. Roy* reveals both the structural tension created by preventive detention in Indian law and the resultant complexity of India's procedural

[59] INDIA CONST., Art. 22, cl. 5.
[60] INDIA CONST., Art. 22, cl. 6.

rights regime. The Court first acknowledged that the rights invoked in the petition "undoubtedly constitute the core of just process because without them, it would be difficult for any person to disprove the allegations made against him and to establish the truth. Therefore, the Court reasoned that "if Article 22 were silent on the question of the right of legal representation, it would have been possible, indeed right and proper, to hold that the detainee cannot be denied the right of legal representation in the proceedings before the Advisory Boards. Of course, Article 22 (3) specifies that the rights articulated in clauses (1) and (2) do not apply to preventive detention cases. 14 The Court therefore reluctantly concluded: "It is unfortunate that Courts have been deprived of that choice by the express language of Article 22 (3) (b) read with Article 22 (1).

Preventive detention law does, therefore, guarantee a limited regime of procedural rights. These guarantees, however, arguably fall well short of established international human rights standards. Given this brief outline of preventive detention legislation, it is easy to understand why critics of these laws suggest that they constitute an institutionalized derogation regime[61]. Governments employing this practice do not, however share the unstated assumption of these critiques that preventive detention violates established international human rights law. In the next section, I survey the justificatory practices of the Indian government with a view towards understanding the practice of preventive detention in its best light.

India's parliament and judiciary must revisit the NSA to close any loopholes that permit law enforcement to abuse constitutional and statutory rights. They must deprive the police of this convenient tool for punishing alleged criminals without having to uphold accused persons' fundamental rights. They also must force the criminal justice system to directly and appropriately address its weaknesses. It is time for India to catch up with the international community and recognise that preventive detention must not be used as an ordinary and regular law and order measure.

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[61] *AK. Roy v. Union of India*, A.I.R. 1982, at 745. The Court qualified the holding in *A. K. Roy* in one important respect. In view of the requirements of Article 14 (equal protection), if the Government is represented by legal counsel the detenu must also be extended the same privilege. *See id.* at 747 ("Permitting the detaining authority or the Government to appear before the Advisory Board with the aid of a legal practitioner **...** would be in breach of Article 14, if a similar facility is denied to the detenu.").

CHAPTER 4

LEGITIMATING PREVENTIVE DETENTION LAWS OUTSIDE THE EMERGENCY CONTEXT IN INDIA

The ambiguous legal status of preventive detention is underscored by the complex ways in which the practice is justified. The most important point here is that preventive detention is not justified simply as a permissible derogation from human rights standards necessitated by emergency conditions. Rather, preventive detention is often justified as a practice that is consistent with fundamental principles of justice and international human rights standards.

In order to evaluate this practice in its best light, human rights scholars and advocates must understand the nature of these justifications as well as the ways in which they relate to and build upon the concrete institutional arrangements that define preventive detention.

In the case of India, the political and legal history of preventive detention substantiates these points. The National Security Ordinance was promulgated in September 1980 and was subsequently replaced by the NSA in December of the same year.[62] The Home Ministry outlined the objectives and necessity of these extraordinary measures in the following statement released upon the signing of the ordinance:

In the prevailing situation of communal disharmony, social tensions, extremist activities, industrial unrest and increasing tendency on the part of various interested parties to engineer agitation on different issues, it was considered necessary that the law and order situation in the country is tackled in a most determined and effective way. The anti-social and anti-national elements including secessionist communal and pro-caste elements and also other elements who adversely influence and affect the services essential to the community pose a grave challenge to the lawful authority and sometimes even hold the society to ransom. Considering the complexity and nature of the problems, particularly in respect of defence, security, public order, and services

[62] R.K. AGRAWAL, THE NATIONAL SECURITY ACT 5-9 (2nd ed. 1993).

essential to the community, it is the considered view of the Government that the administration would be greatly handicapped in dealing effectively with the same in the absence of powers of preventive detention. The National Security Ordinance, 1980 was, therefore, promulgated by the President.[63]

There are two ways to interpret this standard justification. To be sure, it could be understood as an informal declaration of emergency conditions requiring the temporary suspension of fundamental rights.

On the other hand, the rationale could be understood as a description of India's long-term socio-political predicament, in light of which the scope of fundamental rights should be defined. Preventive detention, as a regular feature of domestic law, could be justified as a necessary practice in societies afflicted with persistent and severe order maintenance problems. Thus, these conditions could constitute in some fundamental sense the substantive content of rights. That is, the very notions of "arbitrary" and "due process," it could be argued, would be shaped by prevailing socio-political conditions. The question, in short, is whether public order problems are understood as an *excuse* or a *justification* for preventive detention laws. The latter interpretation of India's defence of the NSA is, I contend, supported by considerable evidence including: (1) the structure and history of emergency law in India, (2) the fundamental rights provisions in India's Constitution, and (3) the justificatory strategies employed by government officials when defending the legality of preventive detention laws in international fora.

4.1 EMERGENCY LAW AND PERSONAL LIBERTY IN INDIA

Preventive detention laws often are not, as a formal matter, part of a "state of emergency." This is certainly true in India where the Constitution provides for preventive detention outside the emergency context.[64] Some evidence certainly suggests that preventive detention laws, as contemplated by the framers of the Constitution of India, were meant to function only as emergency legislation. As a consequence, this evidence suggests that preventive detention laws are the result of a

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[63] *id*

[64] INDIA CONST., Sched. 7, List I, Entry 9 (Central government powers); *id.* List III, Entry 3 (Concurrent Powers).

de facto "state of emergency." Closer inspection reveals, however, that the conception of "emergency" utilized in preventive detention debates differs significantly from the notion of "emergency" associated with human rights derogation regimes.

The Constituent Assembly and the parliamentary debates on preventive detention reveal the conditions under which the utilization of this power was considered proper. The Statement of Sardar Patel, Minister of Home Affairs, upon introducing the Preventive Detention Bill reflects the perspective of the framers:

"*I shall not weary the House by telling it how exactly the communists in India, who have been by far the largest number of detenus, constitute a danger to the existence and security of the State which has been brought into being by the sacrifices and sufferings of millions of our people. It would be a poor return for those sacrifices and sufferings if we fail to preserve the liberties which we have won after so much struggle and surrender them to the merciless and ruthless tactics of a comparatively small number of persons whose inspiration, methods and culture are all of a foreign stamp and who are as the history of so many countries shows linked financially, strategically, structurally, and tactically with foreign organizations .... I should like to say here that our fight is not with communism or with those who believe in the theory of communism, but with those whose avowed object is to create disruption, dislocation, and tamper with communications, to suborn loyalty, and make it impossible for normal Government based on law to function. Obviously, we cannot deal with these people in terms of ordinary law. Obedience to law should be the fundamental duty of a citizen. When the law is flouted and offences committed, ordinarily there is the criminal law which is put into force. But where the very basis of law is caught to be undermined and attempts are made to create a state of affairs in which, to borrow the words of a distinguished patriot, the father of our Prime Minister, "men would not be men and law would not be law," we feel justified in invoking emergent and extraordinary laws.*"[65]

This statement suggests that proponents of preventive detention favoured empowering the government to deal with extraordinary situations, while remaining silent on the necessity of such laws as a component of the ordinary law. The Minister of Home

[65] INDIA PARL. DEB., VOL. II, Pt. II, p. 874-76 (Feb. 25, 1950).

Affairs also emphasized that preventive detention was necessary and that such laws would contravene the fundamental rights protections recognized in the Constitution: "I am sure the House would like us to be fully armed and equipped with the means of dealing with any emergency that might arise.

I shall only plead with the House that during consideration of this measure it fully takes into account the dangers which happily we have so far avoided, the dangers which unhappily still threaten us and the explosive possibilities of the situation with which we are faced at present. When we think of civil liberties of the extremely small number of persons concerned, let the House also think of the liberties of the millions of people threatened by the activities of individuals whose civil liberties we have curtailed."

As such, preventive detention was justified as a "necessary evil." Addressing the Constituent Assembly, Alladi Krishnaswami Ayyar summarized the prevailing sentiment:

" It is agreed on all hands that the security of the State is as important as the liberty of the individual. Having guaranteed personal liberty, having guaranteed that a person should not be detained or arrested for more than 24 hours, the problem necessarily had to be faced as to detention, because detention has become a necessary evil under the existing conditions of India.

Even the most enthusiastic advocate of liberty says there are people in this land at the present day who are determined to undermine the Constitution and the State, and if we are to flourish, and if liberty of person and property is to be secured, unless that particular evil is removed or the State is invested with sufficient power to guard against that evil there will be no guarantee even for that individual liberty of which we are all desirous."[66] These statements certainly suggest that preventive detention is justified by reference to an undeclared state of emergency. There is good reason to

[66] IX CONSTITUENT ASSEMBLY DEBATES 1536 (1949). Many members of parliament also emphasized the idea that preventive detention was a "necessary evil" in debates on the Preventive Detention Act. M.P. Masani of Bombay, for example, provides a representative quote:
"I think the fullest expression needs to be given to the very widespread feeling in this House that it is enacting this measure with the greatest reluctance and the greatest regret. This Parliament will lay itself open to the most serious misconstruction if that sense of reluctance and disquiet is not given adequate expression".

suspect, however, that India's framers had something more in mind. First of all, India's Constitution contains express provisions regulating the declaration of emergency and the range of rights that could be suspended in the event of such a declaration. The Constituent Assembly debates on Articles 352-359 also suggest that these provisions closely track prevailing international law.

R.K. Chaudhuri highlighted this argument in the Parliamentary Debates on the Preventive Detention Act: "Maintenance of public order is an ordinary function of the police and the magistracy. No war has been declared up till now. No state of emergency has been declared. Even then we need not require this piece of legislation 'to maintain public order' in this country.[67]

Furthermore, the "emergency conditions" referenced in the preventive detention debates do not serve as an adequate justification for "public order" detentions. The National Security Act allows for the detention of individuals who might "prejudice the maintenance of public order"and as such contemplates governmental powers that extend far beyond those justified by "national security" rhetoric.

In addition, courts do not construe preventive detention laws as "emergency legislation." As is the case in most jurisdictions, emergency legislation in India is interpreted differently than ordinary legislation.

There is a fundamental difference in the matter of interpretation of Emergency and peace time legislation. To meet a grave pressing national emergency in which the very existence of the

State is at stake, laws are enacted rather hastily and such legislation should be construed more liberally in favor of the State than peace time legislation.[68] On several occasions, however, the Supreme Court of India has made clear that preventive detention legislation is to be strictly construed. In *Magan Cope v. State of West Bengal,* the Supreme Court emphasized this well-settled view:

[67] INDIA PARL. DEB., VOL. II, Pt. II, p. 901 (Feb. 25, 1950).
[68] *Union of India v. Bhanu Das Krishna Gavde,* A.I.R. 1977 S.C. 1027.

"Times out of number, it has been emphasized by this Court that since the Act, here the reference is to the Maintenance of Internal Security Act gives extraordinary powers to the executive todetain a person without trial, meticulous compliance with the letter and requirements of the law is essential for the validity of an order of detention ... "[69]

In *A.K. Roy v. Union of India*, the Court held that the National Security Act was constitutional but insisted that the extraordinary power of preventive detention be narrowly constructed: "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 community.[70]

The Court has also suggested that the Constitution's restrictions on personal liberty should be interpreted not as necessary derogations but rather as inherent limitations on the scope of fundamental rights:

"In the national interest an obligation is cast on the State even to curtail the most sacred of the human rights, viz., his personal liberty. The source of power to curtail this flows from Article 22 of the Constitution of India within the limitation as provided therein. Every right in our Constitution within its widest amplitude is clipped with reasonable restrictions **....** The protection of life and personal liberty enshrined in Article 21 itself contains the restriction which can be curtailed through the procedure established by law, which of course has to be reasonable fair and just. Article 22 confers power to deprive of the very sacrosanct individual right of liberty under very restricted conditions. Sub-clauses (1) and (2) confer right to arrest within the limitations prescribed therein. Sub-clause (3) even erases this residual protective right under sub-clauses (2) and (3) by conferring right on the authority to detain a man without trial under the preventive detention law. This drastic clipping of right is for a national purpose and for the security of the State."[71] Finally, India's political history also supports the conclusion that preventive detention is not understood or justified as emergency legislation.

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[69] *Magan Cope v. State of WB.*, A.I.R. 1975 S.C. 953, 954-55.
[70] *Vijay Narain Singh v. Bihar*, A.I.R. 1984 SC 1334, 1336.
[71] *Ahamed Nassar v. State of Tamil Nadu*, 1999 S.O.L. Case No. 631, 32.

In India, the status of the rule of law in states of emergency takes on special significance. Former Prime Minister Indira Gandhi, pursuant to Article 352 of the Indian Constitution,[72] declared a state of emergency on 26 June 1975 on the pretext that the survival of the country. The Constitution was amended in the aftermath of the 1975 Emergency so as to limit the ability of the President to suspend fundamental freedoms under Article 359. The Forty-Fourth Amendment Act of 1978 amended Article 359 by proscribing the suspension of Articles 20 and 21 of the Constitution even under a declared state of emergency. Thus, the fundamental freedoms guaranteed by Articles 20 and 21-the fair trial and personal liberty provisions of the Constitution-are recognized as non-derogable by the amendment. Article 20 prohibits ex post facto laws, double jeopardy, and involuntary self-incrimination. Article 21 ensures that no person shall be deprived of life or personal liberty except according to procedure established by law. Under the amendment, these rights cannot under any circumstances be suspended in the name of national security, public safety, or other forms of emergency.

One might expect that this amendment would have occasioned a radical overhaul of preventive detention law. Indeed, this initially appears to be a reasonable expectation. After all, preventive detention laws were seemingly justified as necessary derogations from procedural due process and fair trial rights. That is, the social, political, and economic situation in India arguably necessitated an institutionalized "state of emergency" legitimating otherwise arbitrary detentions in the name of the public good. The logic of the amendment, on the other hand, suggests that all preventive detention legislation must, at a minimum, protect the rights enumerated in Articles 20 and 21 of the Constitution because these rights are, according to the amendment, not amenable to limitation in times of national crisis. No legislator, court, or, commentator has suggested that the non-derogable rights amendment would have any discernible effect on preventive detention legislation or jurisprudence.[73]

4.2 FUNDAMENTAL RIGHTS PROVISIONS IN THE INDIAN CONSTITUTION

The judiciary has played very active role in extending the safeguards given to detainees in consonance with modern standards by establishing a proper link between

[72] INDIA CONST., Art. 352.
[73] *A.K. Roy v. India,* A.I.R. 1982 S.C. 710.

right to life and personal liberty and preventive detention,i.e. Article 22 interpreting in light of Article 21.

The fundamental rights provisions of the Indian Constitution provide further evidence against the derogation thesis. Specifically, the Constitution's framers defined the contours of personal liberty in light of the necessity of preventive detention. That is, the framers thought that preventive detention necessitated a certain sort of procedural rights regime.

As previously discussed, India's Constitution empowers the government to enact preventive detention laws[74] and specifies the only rights applicable in cases involving these laws. Moreover, the drafting and subsequent development of Article 21 demonstrates that support for preventive detention shaped the scope of personal liberty in general, including areas not involving preventive detention. Specifically, the Constituent Assembly voted against including a "due process" clause in the personal liberty provision of Article 21 primarily because such a provision might authorize the judiciary to invalidate preventive detention legislation.[75] Challenged by the Assembly to draft the fundamental rights provisions of the Constitution, the Advisory Committee on Fundamental Rights substituted the phrase "except according to procedure established by law.[76] The deletion of "due process" from the personal liberty provision generated considerable controversy.[77] This controversy also gave rise to Article 22, including the restrictive clauses for preventive detention cases.' Therefore, it was thought that the support for preventive detention necessitated eliminating "due process of law" from Article 21.[78] Fearful that this omission gave the legislature unrestrained power to deprive individuals of their personal liberty, the

[74] INDIA CONST., Sched. 7, List I, Entry 9 (Central government powers); *id.* List III (Concurrent Powers), Entry 3.

[75] CONSTITUENT ASSEMBLY DEBATES, 1535 (statement of Alladi Krishnaswami Ayyar) ("[T]he main reason why 'due process' has been omitted was that if that expression remained there, it will prevent the State from having any detention laws .... ").

[76] IX CONSTITUENT ASSEMBLY DEBATES 1525-35 (1946).

[77] For example, Syed Karimuddin argued that, under the amendment, judges would be reduced to mere "spectator[s]," and that "it would not be open to him to examine whether the law is capricious or unjust." IX CONSTITUENT ASSEMBLY DEBATES (1946). Thakurdas Bhargava contended that the "procedure established by law" clause was a '"black law' which would permit thousands to be jailed despite which court shall be helpless."

[78] This fear was perhaps overblown. Indeed, eventually the Supreme Court held that the phrase "procedure established by law" necessarily implied something similar to "due process of law." *See Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597. The Court held that a section of the Passports Act violated Article 21 because it "d[id] not prescribe a 'procedure' within the meaning of that article and if it is held that procedures have been prescribed, it is arbitrary and unreasonable.

Committee felt obligated to insert a separate provision specifying the minimum procedural rights that must accompany deprivations of personal liberty.[79] To avoid circumscribing the legislature's power to enact preventive detention laws, however, this new provision included a proviso specifically indicating that the rights recognized therein did not extend to preventive detention cases. Fear that this proviso would enable the legislature to enact draconian preventive detention legislation, in turn, necessitated that Article 22 also include a specific list of procedural rights applicable in preventive detention cases. The Drafting Committee Chairman, Dr. Ambedkar, suggested that, "on the whole, the proposed article sufficiently protected individual personal liberty." In anticipation of opposition to the preventive detention proviso, he specifically mentioned that the safeguards enumerated in the provision adequately protected personal liberty in these cases as well. The scope of personal liberty protections in the Indian Constitution reflects a carefully (and laboriously) negotiated settlement between those who favored a more robust role for the judiciary and those who favored something close to unbridled parliamentary discretion. The driving force in this progression of events was the widely shared commitment to preventive detention in the Constituent Assembly.[80] As historian Granville Austin put it, "the story of due process and liberty in the Constituent Assembly was the story of preventive detention." In short, preventive detention is too deeply implicated in the Constitution's very definition of personal freedom to conceive of the practice as simply a "derogation" or "exception" to otherwise well-established rights.

[79] Constituent Assembly Debates 1497 (statement of Dr. Ambedkar).
[80] Even the most ardent advocates of personal liberty supported preventive detention.

CHAPTER 5

PREVENTIVE DETENTION IN INDIA AND COMPARING IT WITH INTERNATIONAL HUMAN RIGHTS STANDARD

With a view to give a clear picture whether Indian safeguards provided to detainees under preventive detention are in consonance with the international standard of human rights protection or not, a brief sketch of comparison of international human right standard and Indian counterpart has been presented in this chapter.

Central to the idea of the rule of law is the principle that governments cannot arbitrarily deprive individuals of their personal liberty. First recognized in the *Magna Carta Libertatum* in 1215[81] this basic human right has in no small measure defined the proper juridical relationship between citizens and their governments. Indeed, this principle is now explicitly recognized in most national constitutions[82] and several international human rights treaties, declarations, and resolutions.[83]

Despite this apparent consensus denouncing the arbitrary deprivation of liberty, patterns of actual state practice suggest widespread disagreementas to the meaning of "arbitrary."[84] Unlike the absolute rights recognized in various human rights regimes,[85]

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[81] Chapter 39 of the Magna Carta sets forth that "[no] free man shall be taken, imprisoned, dismissed, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 43 (1964).

[82] M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections In National Constitutions,* 3 DUKE J. COMP. & INT'L L. 235 (1993) (collecting provisions). In many countries, rules now considered part of constitutional criminal procedure may be found neither in constitutions nor judicial decisions, but in statutes.

[83] *Basic Principles on the Role of Lawyers, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders,* U.N. Doc. A/CONF. 144/28/Rev. I at 189 (1990); *Guidelines on the Role of Prosecutors, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders,* U.N. Doc. A/CONF.144/28/Rev.I at 189 (1990).

[84] The degree of convergence has been remarkable. *See, e.g.,* Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules,* 14 MICH. J. INT'L L. 171 (1993);

[85] Many rights are designated as "non-derogable," and, as such, these rights may not be suspended even in times of grave national emergency. Article 4 of the ICCPR provides that in situations threatening the life of the nation, a Government may issue a formal declaration suspending most human rights as long as (1)th e exigencies of the situation strictly require such a suspension, (2) the suspension does not conflict with the nation's other international obligations, and (3) the Government informs the United Nations Secretary-General immediately.

the right to personal liberty is not, of course, an unqualified right.[86] Personal liberty thus gives way to compelling community interests in certain circumstances, prompting international human rights treaties to recognize that such public policy considerations will define and delimit the scope of personal liberty in emergency situations. In this Part, I first summarize the notion of "states of exception" in international human rights law. And then I analyze the utility of these concepts in evaluating preventive detention legislation.

5.1 "STATES OF EXCEPTION" IN INTERNATIONAL HUMAN RIGHTS LAW

Because human rights treaties attempt to create a balance between the rights of the individual and the rights of a state, it is necessary "for improved human rights to be matched by accommodations in favor of the reasonable needs of the State to perform its public duties for the common good."[87] International human rights treaties, therefore, explicitly authorize states to restrict or suspend some rights, subject to several requirements, for an identified set of important public policy objectives.[88] These "states of exception" strike a balance between universal human rights norms and national interests by specifying the circumstances in which derogations may be enacted lawfully. This legal concept is central because states often justify rights restrictions **by** appeal to emergency conditions.[89] International human rights treaties recognize two sorts of exceptional regimes: "states of emergency" and general public policy "limitations." Derogation clauses permit the suspension of certain rights in times of war or public emergency. In contrast, limitation clauses permit rights restrictions for a number of important public policy reasons.

5.1.1 States of Emergency

Furthermore, India does not invoke "emergency conditions" to justify preventive detention laws before international human rights institutions. Consider two salient

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[86] The ICCPR established the United Nations Human Rights Committee (HRC or Committee) to monitor States parties' compliance with the treaty. *See, e.g.,* International Covenant on Civil and Political Rights, Dec. 16, 1966, arts. 9, 14, & 15, 999 U.N.T.S. 171 [hereinafter ICCPR].

[87] Rosalyn Higgins, *Derogations Under Human Rights Treaties,* 48 BRIT. Y.B. INT'L L. 281, 281 (1976-77).

[88] JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY (1994)

[89] *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant,* U.N. Human Rights Committee, 4th Sess., U.N. Doc. CCPR/C/l/Add.25 (1978) (discussing report filed by Chile Under Article 40 of Covenant)

examples: (1) India's reservation to the International Covenant on Civil and Political Rights, and (2) India's statements before the U.N. Human Rights Committee in the face of forceful criticism. Both examples illustrate that India vigorously defends the legality of preventive detention, and, contrary to the conventional view, does not base its authority to do so on appeals to emergency powers.

India's Reservation to Article 9 of the ICCPR

First, the government of India has formally sought to clarify its human rights treaty obligations to insulate preventive detention from international scrutiny. Specifically, India entered a package of reservations upon accession to the ICCPR including the following:

With reference to article 9 which confers the right to personal liberty, the Government of the Republic of India takes the position that the provisions of the article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of Article 22 of the Constitution of India. This "interpretive reservation" does not assert the right to derogate from the right to personal liberty. Rather, India's reservation seeks only to put the other States' Parties on notice that India's interpretation of Article 9 is consistent with and reflected in its Constitution[90]. That is, the Indian government made clear that the preventive detention laws, as envisioned in Article 22 of the Constitution, do not involve "arbitrary" or "unlawful" deprivations of liberty. India's Statements before the U.N. Human Rights Committee India's formal defense of preventive detention in other international fora further substantiates this point. In its most recent submission to the Human Rights Committee, the government of India made clear that preventive detention legislation is not understood as a derogation from international human rights protections:

At the time India's second periodic report was considered, reference was made to legislation, such as, the National Security Act as being inconsistent with some of the

[90] The actual legal effect of the reservation is, however, less clear. First, the effect of the declaration is to remove the autonomous meaning of the Covenant obligations under Article 9. The Human Rights Committee has suggested that such reservations are incompatible with the ICCPR. *See* General Comment No. 24 (52) 1, E/1995/49, 13 April 1995 ("Nor should interpretive declarations or reservations seek to remove an autonomous meaning to covenant obligations, by pronouncing them to be identical, or to be accepted only in so far as they are identical, with existing provisions of domestic law.").

rights recognized in the Covenant and therefore constituting derogations from India's commitment under the Covenant. While there was appreciation of the special circumstances that had necessitated such legislation, the Committee had sought clarification on why India had not sought to notify the Committee of these derogations, as stipulated in article 4 of the Covenant:

"Terrorism, insurgency, and other public order problems necessitated special statutes to combat terrorism and protect the life and property of ordinary citizens. It may be emphasized that such statutes were enacted by a democratically elected Parliament, their duration was subject to periodic review, and not only could their validity be tested by judicial review, but also any action taken thereunder could be challenged before the High Courts and the Supreme Court. It may also be mentioned that safeguards had been built into such legislation to ensure that fundamental human rights were not violated. These safeguards have been further strengthened as a result of judicial review. It may be emphasized that liberty cannot be suspended even during emergency. Moreover, if individual and isolated aberrations have occurred, there are judicial remedies available, including procedures for apprehension and punishment for such perpetrators of human rights violations."[91]

In response to the Human Rights Committee's concerns about preventive detention laws, the Indian government maintained that such laws are not inconsistent with the ICCPR because they include sufficient safeguards to protect fundamental human rights.[92] In addition, the government emphasized that no "state of emergency" within the meaning of Article 4 of the ICCPR exists in India and that the scope of personal liberty protections recognized in the Constitution could not be restricted even if such an emergency were declared. In short, the Indian government asserted that preventive detention laws, as administered in India, fully comply with the procedural dictates of international human rights law:

Liberty is one of the pillars on which the Indian democracy rests, as enshrined in the preamble to the Indian Constitution itself. As has been reported earlier, all the

[91] U.N. Human Rights Committee, *Third Periodic Reports of States' Parties due in 1992: India,* ***U*** 49-50, CCPR/C/76/Add. 6 (1996).
[92] The government outlined in great detail the procedural safeguards applicable in preventive detention cases. *See id.* at 55.

prescriptions of article 9 of the Covenant are enshrined in the Indian Constitution and are observed in India in accordance with the Constitution.[93]

Interestingly, India's written submission did not reference the government's reservation to the ICCPR, despite the Committee's emphasis on preventive detention laws and other security legislation in its evaluation of India's previous periodic report.[94]

The Indian case demonstrates that preventive detention is not defended only as a justifiable derogation from international human rights standards. Moreover, many governments attempt to legitimate preventive detention legislation on similar grounds.'" As previously discussed, these legitimation strategies coupled with the constitutive features of preventive detention regimes resist simplistic classification and evaluation under international human rights law.

International human rights treaties allow the suspension of some rights in public emergencies. Article 4 of the ICCPR, for example, is representative in that it provides that in situations threatening the life of the nation, a government may issue a formal declaration suspending certain human rights guarantees as long as: (1) a state of emergency that threatens the life of the nation exists, (2) the exigencies of the situation "strictly require" such a suspension,[95] (3) the suspension does not conflict with the nation's other international obligations,[96] (4) the emergency measures are applied in a non-discriminatory fashion,[97] and (5) the government notifies the United Nations Secretary-General immediately. Certain rights are not subject to suspension even in such situations; these are specified in Article 4 as protected from derogation.[98]

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[93] The government's submission made clear that the NSA, specifically, complied with human rights standards.

[94] However, in its oral presentation to the HRC in Geneva, after two days of vigorous questioning from Committee members, the Indian delegation flatly suggested thatthe government's reservation to Article 9 placed preventive detention legislation beyond the competence of the Committee. *See* Author's Personal Notes, Human Rights Committee, India's Third Periodic Report to the Human Rights Committee, August 1997 at 3.

[95] This requirement incorporates the principle of proportionality into derogation regimes. This principle requires that the restrictive measures must be proportional in duration, severity, and scope. Implicit in this requirement is that ordinary measures must be inadequate; and the emergency measures must assist in the management of the crisis.

[96] ANNA-LENA SVENSSON-MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION (1998);at 624-39.

[97] *See id.* at 640-682.

[98] ICCPR, *supra* note 206, Art. 4(2) (prohibiting derogation from Articles 6 (right to life), 7 (prohibition on torture), 8 (prohibition of slavery and servitude), 11 (imprisonment for failure to fulfill

The ICCPR specifically identifies several non-derogable obligations including the rights to be free from arbitrary killing;[99] torture or other cruel, inhuman or degrading treatment or punishment;[100] and slavery.[101] Although the rights to fair trial and personal liberty arederogable provisions, the Human Rights Committee has suggested that many restrictions of these rights are inappropriate even in times of emergency.[102] The Committee, following the lead of the Inter-American

Court of Human Rights,[103] strongly suggested that the right to habeas corpus is non derogable.[104]

5.1.2 General Limitations

International human rights treaties also authorize states to restrict certain rights even in the absence of a formal state of emergency. Many provisions in these instruments incorporate language that permits governments to limit, on a permanent basis, the scope of rights protection to further certain specified public values.[105] These "limitations clauses" developed out of Article 29(2) of the Universal Declaration of Human Rights, which provides:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society.

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contractual obligation), 15 (prohibition on retrospective criminal offence), 16 (protection and guarantee of legal personality), and 18 (freedom of thought, conscience and religion); ECHR, *supra* note 215, Art. 15(2), (prohibiting derogation from Articles 2 (right to life), 3 (freedom from torture), 4 (freedom from slavery), and 7 (retrospective effect of penal legislation))

[99] ICCPR, *supra* note 97, art. 6.

[100] *Id.* at Art. 7.

[101] *Id.* at Art. 8.

[102] *Annual Report of the Human Rights Committee,* U.N. G.A.O.R., 49th Sess., Supp. No. 40, at 120, U.N. Doc. A/49/40, $ 2 (1994).

[103] I/A Court H.R., *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-13/87 of 1987, Series A No.8 at 33.

[104] Annual Report of the Human Rights Committee, U.N. G.A.O.R., 49th Sess., Supp. No. 40, at 120, U.N. Doc. A/49/40, 2 (1994).

[105] Alexander Charles Kiss, *Permissible Limitations on Rights in the International Bill of Rights: The Covenant on Civil and Political Rights, in* THE INTERNATIONAL BILL OF RIGHTS 290 (Louis Henkin ed., 1981).

Although this provision is clearly the inspiration for the limitations clauses in subsequent human rights treaties, the Universal Declaration remains the only instrument that concentrates the permissible limitations on rights in a single provision. Again the ICCPR serves as a useful model. In the ICCPR limitations clauses are "scattered" and pertain only to select rights. These clauses specify the permissible grounds for limitations including: national security ,public safety, public order , public health, and public morals. These provisions also typically require that limitations be provided by law and be "necessary" or “necessary in a democratic society”.

Derogation regimes and limitations clauses do accommodate, to some extent, the interests of states within a general rights framework. The concepts delimiting the scope of permissible limitations, for example, are "difficult to define and imply a measure of relativity in that they may be understood differently in different countries, in different circumstances, at different times. All of them relate to a particular conception of the interests of society.

These accommodation principles, however, do not offer any meaningful contribution to debates over the substance of international human rights norms. The case of preventive detention in India illustrates that the disagreements at issue are often more fundamental. Both "states of exception" permit national governments to restrict or suspend, in certain specified circumstances, otherwise valid rights protections.[106] In other words, interpreting and defining these "states of exception" become relevant only if there is agreement on the invalidity of the underlying contested practice absent some legally recognized excuse. The "states of exception" dimension of accommodation does not, therefore, provide a conceptual vocabulary for mediating substantive disagreements.

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[106] This is clearly true for derogation regimes that permit the suspension of rights in states of emergency. It is also true for general limitations clauses insofar as these clauses do not authorize the redefinition of the rights in question. That is, the limitations clauses do not alter the substantive scope of the rights in question. Anna-Lena Svensson-McCarthy points out that:
The purpose of the ordinary limitations is to provide some boundaries to the exercise of individual rights and freedoms in favor of the rights and freedoms of others or some other specific public or general interest. Whilst limitations of this kind can be in force on a permanent basis, they are still not, in principle, allowed to encroach upon the *substance*, *per se,* of the rights to which they are linked: they are, in other words, merely aimed at regulating the exercise thereof so as to avoid excesses or abuses that would impede others effectively to enjoy the same rights.

5.2 PREVENTIVE DETENTION, PERSONAL LIBERTY, AND "STATES OF EXCEPTION"

International human rights treaties accord national governments broad powers to suspend rights protections in certain exceptional circumstances.

Many governments arguably abuse this prerogative through the routine invocation of "special powers" or "national security" legislation providing for administrative detention with limited, if any, judicial review.[107] Throughout the world, the notion of a "permanent public order crisis" has justified the use of such special powers not only in states of emergency but as part of the ordinary criminal law.[108] In "preventive detention" despite the colonial legacy of draconian laws of this sort. Preventive detention, although seemingly irreconcilable with international human rights law, is widely practiced as a formal component of many nations' order-maintenance strategies.

Critics of these laws often assert that "administrative detention" or "preventive detention," as defined in these laws, is inconsistent with well-settled international human rights standards. International human rights scholars and activists typically characterize these practices as "de facto states of emergency" that fail to comply with established international standards regulating the declaration and administration of 21 emergency regimes.[109] In short, these critics analyze preventive detention as the product of illegitimate, undeclared states of emergency; the resultant rights limitations are therefore analyzed as impermissible derogations from established international human rights standards.

These critics are certainly right to point out that the international rules pertaining to "states of emergency" provide the exclusive basis for derogating from international legal obligations. Furthermore, very few, if any, of the states invoking emergency or exceptional conditions to justify preventive detention have satisfied the substantive

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[107] PREVENTIVE DETENTION: A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE (Stanislaw Frankowski & Dinah Shelton eds. 1992) (providing a useful comparative study of pre-trial detention practices while illustrating the terminological confusion).

[108] Many governments have formally enacted legislation providing for preventive detention including *India*, *see supra* Part II; *China*, State Security Law of the People's Republic of China (1993).

[109] IMTIAZ OMAR, RIGHTS, EMERGENCIES, AND JUDICIAL REVIEW (1995).

and procedural rules regulating derogations.[110] On the surface, this analysis of preventive detention laws is obviously sound. As I have discussed in some detail, the actual legislative and justificatory practices utilized in India demonstrate, however, that the standard account is lacking. The "special connection between states of emergency and the practice of administrative detention"[111] gives rise to three kinds of problems. First, the invocation of emergency conditions is often little more than a rhetorical strategy aimed at insulating domestic practices from international scrutiny; that is, states abuse the international legal concepts of "emergency," "national security," and "public order" in an effort to legitimize widespread arbitrary detention.[112] Second, even in bona fide states of emergency, states often institute powers of administrative detention without establishing any reasonable connection between these extraordinary powers and the exigencies of the emergency.

Third, the suspension of due process and fair trial rights often precludes individuals from enforcing non derogable rights, while creating institutional conditions that contribute to violations of these non-derogable rights. These interconnected problems present both practical and conceptual difficulties for the regulation of states of emergency. Indeed, as one commentator noted, "one of the most serious defects in existing international standards governing states of emergency is the absence of precise and agreed limits on the derogability of the right to personal liberty. In an effort to close these regulatory gaps, sustained reform efforts have focused on changing the rules regulating emergency regimes". For example, experts and activists advocate adding the right to a fair trial to the list of nonderogable rights in the ICCPR.[113] In addition, many suggest that international supervisory institutions should

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[110] *See* ECHR, Art. 15(1); ICCPR, *supra* note 206, Art. 4(1).

[111] FITZPATRICK, *supra* note 102.

[112] Adamantia Pollis, *Cultural Relativism Revisited: Through a State Prism*, 18 HUM. RTS. Q. 316 (1996); John Quigley, *Israel's Forty-Five Year Emergency: Are There Time Limits to Derogation From Human Rights Obligations?*, 15 MICH. J. INT'L L. 491, 492-93 (1994).

[113] *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political*.
Rights, reprinted in 7 HuM. RTs. Q. 3, 12-13 (1985). Proposed drafts of Article 4 of the Covenant on Civil and Political Rights submitted by French and U.S. representatives would have made the prohibition on arbitrary arrest, the right to prompt notice of charges, and the right to fair and prompt trial non-derogable. Both proposals, however, would have made derogable the right to take prompt judicial proceedings to challenge the lawfulness of detention. U.N. Doc. E/CN.4/324 (1949) (French draft); U.N. Doc. E/CN.4/325 (1949) (U.S. Draft). The representative of the U.K. argued that the prohibition against arbitrary arrest and the right to a fair trial might be impossible to respect during wartime or other grave emergency. U.N. Doc. E/CN.4/SR.126, at 4-5 (1949). The U.K. view prevailed when the list of non-derogable rights was agreed to provisionally in 1950. *See* Joan Hartman, *Working*

exercise independent review of the necessity and reasonableness of rights-restricting measurestaken in states of emergency, as well as the existence of conditions justifying the declaration of an emergency in the first place. Although such reforms would unquestionably advance the cause of human rights, this mode of analysing preventive detention fails to address sufficiently the more fundamental legal question: Does such detention conform with prevailing international human rights standards? The standard critiques build upon the unexamined assumption that all such detention laws are inconsistent with international norms. On the surface, this seems a reasonable assumption in that detention without trial or charge would, by definition, abrogate fair trial guarantees. All forms of extra-judicial detention would also seemingly constitute "arbitrary detention" in violation of the right to liberty of person.[114]

Furthermore, governments often seemingly justify these laws not by asserting their legality but rather by emphasizing their necessity for public order or national security.[115]

The Indian case, therefore, suggests that these assessments require some qualification. First, the legal status of administrative detention in general and preventive detention in particular is unclear insofar as international norms do not explicitly prohibit the practice. Second, proponents of preventive detention laws may employ an equally plausible surface-level defense of the practice's legality. On this view, preventive detention laws do not require trials per se because these laws are not punitive in nature and do not require the determination of a criminal charge. Furthermore, preventive detention laws are not inherently arbitrary, according to this view, in that they provide for specific procedural safeguards including judicial or quasi-judicial confirmation of the detention order, a fixed maximum period of detention[116] and dismissal of unlawful detention orders on habeas corpus review. Finally, authoritative

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Paper for the Committee of Experts on the Article 4 Derogation Provision, 7 HuM. RTS. Q. 89, 115-18 (1985).

[114] ICCPR, *supra* note 206, art. 9 (1) (providing that no person shall be subject to arbitrary detention).

[115] *supra* note 111 (collecting similar statements made on behalf of other governments).

[116] See INDIA CONST., Art. 22(7)(a) (requiring Parliament to specify the maximum period of detention); NSA § 13 (establishing one year as the maximum period of detention).

international institutions have repeatedly refused to condemn the practice in unequivocal terms.[117]

The unique structural features of preventive detention complicate evaluation under international human rights standards. The morass of procedural irregularities and legitimation strategies accompanying these laws reinforce the ambiguity that typifies current debates about the legality of the practice. Moreover, the defense of these laws enjoys a surface plausibility. Although it is beyond the scope of my argument to assess the validity of these claims, I do maintain that this surface plausibility makes preventive detention remarkably resistant to standard applications of human rights law; and that this institutional resilience reveals a structural weakness in international human rights law (and international law generally) which is the lack of coherent principles of accommodation.

Sound evaluation of preventive detention under international human rights law turns on the plausibility of three related claims. Proponents of preventive detention maintain that: (1) detainees are not entitled to full trials or hearings because the validity of preventive detention orders does not turn on the proper determination of a criminal charge; (2) the procedural safeguards in these laws ensure that the issuance and execution of preventive detention orders is not arbitrary within the meaning of international human rights standards; and (3) the nature of order maintenance problems in the developing world necessitates that individual liberties be defined in light of these socio-political realties **.**

As previously discussed, international human rights law misunderstands claim (3); and virtually ignores claims (1) and (2). The first claim, if established, would insulate preventive detention from challenge under the "fair trial" rights recognized in international human rights law. The second would establish that preventive detention is a reasonable restriction in the right to personal liberty. Finally, the third claim, I argue, must be understood as a claim concerning the proper scope of these rights; and, if unchallenged, this claim represents a fundamental challenge to civil and political rights.

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[117] Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\I\Rev.1 at 8 (1994).

As discussed in Part I, the further legalization of international human rights institutions will substantially increase the salience of contradictory impulses in world society; that is, the tension between the universal and the particular. The question is how to pursue universal justice while maintaining domestic authority to solve concrete problems in ways that are sensitive to local conditions and priorities. Interior to the pursuit of universal justice is the recognition, negotiation, and accommodation of national interests.

Moreover, the practice of preventive detention demonstrates the inability of these modalities to arbitrate substantive disagreements; and the tendency to analyse controversial practices in terms that implicitly presume the illegality of these practices.

The Indian case, therefore, suggests two important refinements to the prevailing modes of analysis. First, international institutions should directly engage the justificatory practices employed by states to legitimate controversial practices. I point out, for example, that preventive detention is not defended only as a justifiable derogation from human rights norms. Detailed exposition of the institutional and juridical matrix supporting preventive detention laws reveals a complex array of legitimation strategies that resists facile evaluation under international human rights standards. Because critics have not grappled with the dynamic justificatory practices employed to legitimize these "national security laws," they have failed to articulate meaningful limits on the legitimate exercise of special powers in exceptional circumstances. Second, international human rights law lacks effective "accommodation principles" which would generate a jurisprudence of bounded national discretion.

CHAPTER 6

CONCLUSION AND SUGGESTIONS

CONCLUSION

The study started with submission of the idea that Life, Liberty, Equality and Dignity are the basic tenets of the human rights everywhere including India. From this the 'liberty' is sacrosanct and it cannot be deprived without the procedure established by law; otherwise it would be the violation of the fundamental rights. It is extended to any persons including the prisoners in India. Such safeguards are conferred under Article 20, 21 and 22 of the Constitution. However, Article 22 (3) says that the safeguards of Article 22(1) and Article 22 (2) are not available to the following:

First if the person is at the time being an enemy alien;

Secondly, if the person is arrested under certain law made for the purpose of Preventive Detention.

The first condition above is justified, because when India is in war, the citizen of the enemy country may be arrested. But the second clause was not easy to justify. Because a person detained under the preventive detention law is "he is potential to commit a crime in future". The custody arising out of this is preventive detention and in this, a person is deemed likely to commit a crime. Thus Preventive Detention is done before the crime has been committed.

The preventive detention laws are repugnant to modern democratic constitutions. It is declared as unlawful in some countries. But India is the only country retaining the preventive detention laws even during the peace time. It is because of diversities persist in religious level, linguistic level and ethnicity level. Caste and communal violence is very common in India. Apart from that the circumstances at the time, when our constitution came in force demanded such provisions. This is evident from following statement of Dr. B.R. Ambedkar:

"....in the present circumstances of the country, it may be necessary for the executive to detain a person who is tempering either with the public order or with the defense

services of the country. In such case, I don't think that the exigency of the liberty of an individual shall be above the interests of the state".

The idealistic view supports the curtailment of liberty under preventive detention laws for the purpose of State's security, disruption of national economic interests and public order. India is a large country facing several challenges against, strict law is required to counter the subversive activities. The number of persons detained in these acts is very large. Having such kind of acts has a restraining influence on the anti-social and subversive elements. The state should have very effective powers to deal with the acts in which the citizens involve in hostile activities, espionage, coercion, terrorism, etc. The citizens of India have enjoyed the personal liberty for a long period since independence except 1967 to 1969.

In the post-independence period the first Preventive Detention Act was passed in the year 1950. The validity of this act was challenged in the Supreme Court in the *A.K. Gopalan v. State of Madras* case. The Supreme Court held this act constitutionally valid except some provisions. This Act expired in 1969, and before it expired, it was amended for 7 times, each expansion was to make it valid for 3 more years and this it was extended till 31 December 1969. In 1971, the Maintenance of Internal Security Act (MISA) was passed. MISA was basically a modified version of the PDA Act. It was abolished in 1978.

Another law, Conservation of Foreign exchange and Prevention of Smuggling Activities (COFEPOSA) was enacted in 1974 and it continued. In the heat of the terrorism in Punjab the Terrorist & Disruptive Activities (Prevention) Act or infamous TADA was enacted in 1985. It was renewed in 1989, 1991 and 1993 and lapsed in 1995 due to increasing unpopularity due to widespread allegations of abuse. The main abuse was that a confession before a police officer, even though being given under torture, was admissible as evidence in court. It was criticized as 'draconian law'. Another similar act Prevention of Terrorism Ordinance (POTO) of 2001 came into force. Both the TADA & POTO were later succeeded by another controversial Prevention of Terrorist Activities Act (POTA) during 2002-04. This Act was supported by the NDA Government but later was scrapped by the UPA government.

After the Bombay attacks of November 26, 2008, Parliament enacted another anti-terror law known as Unlawful Activities (Prevention) Act.

Preventive Detention as "evil" of Article 22 Constitution of India has several flaws and Article 22 is the worst flaw in that. Under Article 22, preventive detention may be implemented any time and the Constitution expressly allows an individual to be detained without charge or trial so it is a devastating blow to personal liberties of the citizens of the country.

The concept of 'personal liberty' was examined by the Supreme Court as the first time in *A.K. Gopalan case* before the emergency period. It was argued that the expression 'personal liberty' and 'personal freedom' have a wider meaning and also a narrower meaning. In the wider sense they include not only immunity from arrest and detention, but also freedom of speech, expression, movement etc. In the narrower sense they mean immunity from arrest and detention. But it was rejected by the Supreme Court.

Austin in his work The Indian Constitution: Cornerstone of a Nation (1966) described the position of 'personal liberty' during emergency as follows:

"The authority thus given to the Government of India (for preventive detention) is a potential danger to liberty. It has been used with restraint, however an no one has ever proved the charge that the executive has used it for partisan purposes...Those who wish India well can only hope that the Union Government will constitute, despite the extreme provocation of such events as the border war with Chine, its past policy of treating the Preventive Detention Act as primarily a psychological deterrent in the fight against subversive activities throughout India, and will not use it to bring about ideological conformity and the downfall of liberty."

Austin's fear has been realized during emergency, when the preventive detention laws became "potential threat to liberty". Since the proclamation of emergency the ordinary laymen, lawyers asking the question "Is preventive detention necessary in times of peace?" According to Austin, *"During emergency, it was fashionable for Union and State ministries to characterize provisions for securing the freedom of the individual, the purity of elections, judicial review and the independence of the*

judiciary as 'colonial legacies'." Ironically, the ministries failed to note, that their favourite weapon 'preventive detention' was the one colonial legacy which, unfortunately, our founding fathers accepted.

The current mechanisms for executive accountability allowed by Indian security laws are weak and after the fact. Criminal prosecution of government officials who were acting under security powers has to be explicitly authorized by the national government, and in any event cannot be driven by victims of rights violations. While the Supreme Court sets great store by the corrective and preventive powers of judicial review, this remedy is practically inaccessible to most people. Few can afford to approach the High Court in the state capital, or the Supreme Court in New Delhi, paying legal fees as the matter inches its way through the delays routine in Indian courts. If the executive's decisions are subject to scrutiny at an earlier stage, this can serve both to prevent and correct abuse. For example, if a judge rejects the government's decision to preventively detain someone because the evidence is dubious, this rejection prevents loss of liberty. If all preventive detention had to be routinely reported to the legislature, the government would almost certainly be questioned if the number of detainees increased suddenly, or if many detainees were from a particular religious or ethnic group.

The checks and balances would improve existing arrangements because they would be built into particular decisions, and regulate the exercise of specific powers as a matter of routine. Parliamentary debate and judicial review veer towards the cursory when an entire law is at issue. It is a big step to vote against or strike down a law, or even particular provisions of a law. However, while judges and legislators have demonstrably hesitated to excise sweeping executive powers from security laws, they are likely to be bolder when scrutinizing discrete decisions made using these statutory powers. The specificity of these decisions would make it easier to discern if they are hasty, biased, or likely to foster abuse. Judges and legislators would be more likely to grasp the interests, vulnerabilities and rights of individuals affected by a particular exercise of security powers, rather than treating affected individuals as an abstract hypothetical. The granular, limited nature of decisions would make it easier to disagree with the government. Legislative scrutiny and decision making based on the suggestions above would be unlikely to attract whips or block voting by political

parties in the legislature, which would create room for small interest groups and individual conscience to have an influence. Because mechanisms for regular scrutiny of security powers lower the stakes of disagreeing with the executive, they are more likely to harness debate and negotiation, both principled and strategic, within the legislature and between different branches of the state.

Reform of India's security laws—whether substantive or procedural—will not be easy to push through, given that certain core security provisions have recurred in different generations of laws. However, building support for reforms to better regulate executive power will be easier than reforms that remove certain powers entirely.

Once reforms of this nature are legislated, they have reasonably good odds of gaining leverage. The Supreme Court's jurisprudence indicates that, while it may be deferential to the executive, it is reluctant to cede jurisdiction over security laws. When reviewing security laws, the Court has disregarded arguments by the government that would have ousted its jurisdiction over particular executive powers. Political competition inherent in a democratic electoral system is likely to similarly incline the legislature to retain review and scrutiny powers for itself. Once these powers are in place, political parties in the opposition are unlikely to welcome amendments that strip them of authority, even if they are sanguine about provisions that limit individual rights.

Building granular checks and balances into security laws will not remove the problematic, rights limiting features. But it will ameliorate their capacity to facilitate human rights abuse. Security laws in India present a troubling situation. They establish extraordinary regulation and place sweeping limits on rights, but are so deeply entrenched as to be, in any meaningful sense, ordinary. These laws have created long running exceptions to constitutional checks and balances that leave individuals vulnerable to abuse. While the government's far reaching powers under security laws have expanded over time, the other branches of the state have retreated, leaving the executive overly dominant. Moreover, national security is an arena where governments can too easily dismiss non-state critics, however cogent, by citing their ignorance of classified information or questioning their patriotism

Multiple, routine, regular checks and balances stitched into the executive's exercise of security powers will compel public deliberation and, as a result, encourage reasoned decision making. This in turn, will push against the steady diminution of constitutional constraints that has allowed Indian security laws to operate as charters for abuse.

The study started with two hypotheses. Both hypotheses have been proved. The Constitutional safeguards provided to detainees under preventive detention are not very up-to mark so as to be equated with international standard. In some cases laws of exceptional nature like preventive detention have been misused for purposes not intended by the framers of the Constitution. To be specific prominently during 1975 emergency and negligibly in some other cases, preventive detention laws have been used as a weapon for political vendetta. However, judiciary has played a constructive role and has made all efforts to make the preventive detention least painful as far as possible. The strict compliance of statutory provisions and providing of modern amenities to detainees are some of the examples.

SUGGESTIONS

India is one of the countries in the world where preventive detention laws are applicable even during the peace time. It is also inferred that these provisions have been misused by the Government for its own purposes. It is submitted that their misuse is more probable because of their draconian nature, discussed earlier. In this regard reference may be reiterated to the concept of "Subjective Satisfaction" of the detaining authority in passing such kind of detention orders. Not only this, the conflicting judicial attitude towards the preventive detention law, depending upon the perspective of respective judges has made such a law more draconian and on that basis itself the same needs to be erased from the statute books. However, the law may be retained during the war time or during the external aggression or eminent threat of war or external aggression with some changes/amendments in Article 22(4) to (7) of the Constitution. It is notable that Article 22(4) and Article 22(7) of the Constitution has been favourably amended in 44th Constitutional Amendment but that has not yet been notified by the government. Some suggestions are as follows:

a. The proviso could be added that no person can be preventively detained except during an emergency created by war or external aggression or imminent danger of war or external aggression;

b. The preventive detention authorizes the detention of a person for a longer period than three months under Article 22(4). It should be reduced into 1 month, preferably. Because it is unreasonable that a person should be preventively detained without his case referred to an Advisory Committee. The argument of administrative inconvenience ought not to prevail against the grave infraction of the right to personal liberty where a detainee is denied the rights available even to a person charged with the crime. The 44th constitutional amendment of Article 22(4) and Article 22(7) should be notified as early as possible by the government.

c. Under Article 22(4)(a) prescribes that "persons who have been or are qualified to be appointed as judges of a High Court" ought to be deleted with the result that the Board will consist of judges who are judges of the High Court. This change is necessary because an Advocate of 10 years standing who may have little or no practice is qualified to be a High Court Judge and would be eligible for appointment on the Committee. It is undesirable that power should be given to the executive government to appoint Advocates who may not be efficient enough to handle the position. As regards retired judges, it is wrong, in principle that the hope of any office should be held out to them when they are on the Bench. Hence this calls for a better structuration of appointment of persons to the advisory board with varied experience in the field of public administration along with the members from legal fraternity.

d. Article 22 (7)(a) should be deleted because no person should be detained without having the right to make a representation to an Advisory Board.

e. The power not to disclose facts which such authority considers to be against the public interest to disclosure under Article 22(6) must be made justiciable, which claim could then be examined by a Judge, by himself, to see whether the disclosure would in fact be injurious to public interest.

f. A provision is necessary that judicial review of preventive detention orders shall not be excluded in an emergency created by war or external aggression, either directly or

indirectly, as for example by the trick of converting the record of the detainee into affairs of State which the Court is precluded from examining.

BIBLIOGRAPHY

- **BOOKS**

A.G. Noorani, CHALLENGES TO CIVIL RIGHTS GUARANTEES IN INDIA, South Asia Human Rights Documentation Centre, 2012, Oxford University Press.

A.E. Dickhoward, MAGNA CARTA: TEXT AND COMMENTARY , 1964, University of Virginia Press.

Andrew Z. Drzemczewski, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW, 1983, Oxford Clarendon Press.

A.W. Brian Simpson, IN THE HIGHEST DEGREE ODIOUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN, 1992, Oxford University Press.

B. MALIK ET AL., ENCYCLOPAEDIA OF STATUTORY RULES UNDER CENTRAL ACTS , 1963.

B.V. Kumar, PREVENTIVE DETENTION LAWS OF INDIA, 1991, By Konark Publishers Pvt. Ltd., Delhi.

Dominic Mcgoldrick, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1991, Oxford Clarendon Press.

Granville Austin, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE, Oxford University Press, New Delhi, 2008.

Joan Fitzpatrick, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY, 1994, University of Pennsylvania Press, Philadelphia.

John H. Jackson ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, 3rd ed., 1995, West Publication Company.

Panchanand Misra, THE MAKING OF INDIA'S REPUBLIC: SOME ASPECTS OF INDIA'S CONSTITUTION IN THE MAKING , 1966, Scientific Book Agency, Calcutta.

Paul Gordon Lauren, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN , 3RD edition, 1998, Pennsylvania Studies in Human Rights.

Philip Alston, PROMOTION OF HUMAN RIGHTS THROUGH BILLS OF RIGHTS, 1999 Oxford University Press.

P.M. Wald, "Convention on the Prevention and Punishment of the Crime of Genocide", (1948), 102 Stat. 3045, 78 U.N.T.S. 277.

R.K. Agrawal, THE NATIONAL SECURITY ACT, 2nd ed., 1993.

V. N. Shukla, CONSTITUTION OF INDIA, 13TH edition, 2017, Eastern Book Company.

- **JOURNALS**

Adamantia Pollis, "Cultural Relativism Revisited: Through a State Prism", 18 HUM. RTS. Q. 316, (1996).

Alexander Charles Kiss, "Permissible Limitations on Rights in the International Bill of Rights: The Covenant on Civil and Political Rights", in THE INTERNATIONAL BILL OF RIGHTS 290 (Louis Henkin ed., 1981).

Craig M. Bradley, "The Emerging International Consensus as to Criminal Procedure Rules", 14 MICH. J. INT'L L. 171 ,1993.

Joan Hartman, "Working Paper for the Committee of Experts on the Article 4 Derogation Provision", 7 HuM. RTS. Q. 89, 115-18, 1985.

John Quigley, "Israel's Forty-Five Year Emergency: Are There Time Limits to Derogation From Human Rights Obligations?", 15 MICH. J. INT'L L., 1994.

M. Cherif Bassiouni, “Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections In National Constitutions”, 3 DUKE J. COMP. & INT'L L. 235,1993.

Stephen P. Croley & John H. Jackson, “WTO Dispute Procedures, Standard Of Review, And Deference To National Government”s, *Volume* 90 Issue 2 AM. J. INT'L, 1996

Rosalyn Higgins, “Derogations Under Human Rights Treaties”, 48 BRIT. Y.B. INT'L L. 281, 281, 1976-77.

- **REPORTS AND DOCUMENTS**

Annual Report of the Human Rights Committee, U.N. G.A.O.R., 49th Sess., Supp. No. 40, at 120, U.N. Doc. A/49/40, $ 2 (1994).

Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\I\Rev.1 at 8, (1994).

Crimes in India, annual report published by NCRB, Home Ministry of India, New Delhi , 2010 Burma Code 209, Bengal Regulation III (Apr. 7, 1818) (Gov't of Burma 1943).

I/A Court H.R., Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-13/87 of 1987, Series A No.8 at 33.

Law Commission of India Report No. 173.

Law Commission of India Report No. 177.

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.

U.N. Doc. A/CONF. 144/28/Rev. I , Basic Principles on the Role of Lawyers, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, 1990.

United States Dep't Of State, Country Reports On Human Rights Practices For, 1999.

- **CONSTITUTIONAL LAW DEBATES AND PARLIAMENTARY DEBATES**

CONSTITUENT ASSEMBLY DEBATES

INDIA PARL. DEB., VOL. II, Pt. II, p. 874-76 (Feb. 25, 1950).

INDIA PARL. DEB., VOL. II, Pt. II, p. 901 (Feb. 25, 1950).