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Preventive Detention Laws in India - The Emergent Need to be Seen in the Light of Article 22 of the Constitution of India

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ABSTRACT

Preventive Detention intends to keep an individual so that to keep that individual from remarking on any conceivable wrongdoing or all in all preventive detainment is an activity taken by the organization on the grounds of the doubt that some off-base activities might be finished by the individual concerned which will be biased to the state. Preventive Detention is the most combative piece of the plan major rights in the Indian constitutions Article 22(3) gives that if the individual who has been captured or kept under preventive confinement laws then the assurance against capture and detainment gave under article 22 (1) and 22 (2) will not be accessible to that individual.

Keyword: Article 22, Constitution, State, Right, FR

I. INTRODUCTION

The Constitution of India has Fundamental Rights no longer just for normal citizens however also for prisoners and the accused who've been charged for some offence. Article 22 is one such Fundamental Right which safeguards the rights of individuals who have been arrested and detained for committing an offence. Fundamental Rights can be determined under Part III of the Constitution of India.

Definition

Sub clause (1) of Article 22 says that “No person who is arrested will be detained in custody without being informed, as quickly as can be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by way of, a prison practitioner of his preference.”

This manner that if a person has been arrested cannot be detained without understanding his grounds of arrest, he shall not be denied the right to seek advice from and be defended via a lawyer/prison practitioner of his/her preference. Sub Clause (2) of Article 22 says that “Every

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character who's arrested and detained in custody shall be produced before the closest Justice of the Peace within a duration of twenty-four hours of such arrest except the time necessary for the adventure from the location of arrest to the court of the magistrate and no such individual shall be detained in custody past the stated period without the authority of a magistrate." This way that the arrested person who has been detained in custody needs to be produced earlier than the closest Justice of the Peace within the time-body of twenty-four hours of such arrest which excludes the time taken to travel from the jail to the court of the magistrate. No detainee will be stored in custody past this time-body without the approval of the magistrate.²

II. THE RIGHT UNDER ARTICLE 22

As cited within the definition, sub-phase (1) says that a person who has been arrested needs to know the grounds of arrest. So, if a person has been arrested on costs of Murder beneath Section 302 of the Indian Penal Code, then he ought to recognise the cause for his detention. Further, sub clause (1) stipulates that the arrested or the detained character has the right to be consulted and defended via a felony practitioner, i.e., a legal professional of his/her desire. Sub clause (2) of Article 22 says that an arrested or the detained individual needs to be produced before the nearest Justice of the Peace within the time frame of twenty-4 hours of such arrest. This time is exclusive of the time important for the journey from the arrested area to the court. The arrested individual shall not be allowed to be saved in custody beyond the said length without the authority of the Magistrate. This is called the Writ of Habeas Corpus. This writ is issued inside the nature of an order calling upon the person who has detained some other individual to supply the latter before the Court of regulation. This is achieved so that it will permit the court docket to know on what grounds he has been limited and to set him free if there may be no legal justification for the same. However, it's miles to be noted that a writ of habeas corpus cannot be issued to launch someone who has been imprisoned by the courtroom of law on a crook fee.

Preventive Detention Law

The law of "Preventive Detention" method detention of any person without trial. It is different from punitive detention. The item of punitive detention is to punish a character for what he has devoted and after he's attempted by using the courts for the illegal acts dedicated via him/her. Preventive detention, alternatively, prevents the individual from doing

² Rachit Garg, *Preventive Detention Laws in India*, Ipleaders Blog, Nov 12th, 2020, <https://blog.ipleaders.in/preventive-detention-laws-india/>

something and the detention in such instances takes location due to the apprehension of the fact that he is going to do something incorrect which comes in the ambit of the grounds precise through the Constitution of India which includes acts prejudicial to the safety of the State, Public Order, Maintenance of elements and services important to the network, defence and overseas affairs.³

Article 22(3) and Article 22(4) throw mild upon the Preventive Detention Law in India.

Sub-clause (3) of Article 22 says that “Nothing in clauses (1) and (2) shall observe to –(a) to any character who at the moment is an enemy alien or(b) to any individual who is arrested or detained below any law imparting for preventive detention.”

Thus, there are two exceptions right here –

a) a person shall now not be an enemy alien

b) a person shall no longer be arrested or detained beneath any regulation which presents for preventive detention.

These are the exceptions to Article 22(1) and Article 22(2) of the Constitution of India.

Sub-clause (4) of Article 22 says that “No regulation offering for preventive detention shall authorise the detention of someone for an extended period than three months unless (a) an Advisory Board which includes people who are, or were, or are certified to be appointed as, Judges of a High Court has reported before the expiration of the said length of three months that there's in its opinion sufficient cause for such detention.”

III. AMENDMENT TO ARTICLE 22

The Janata Party sought to amend Article 22 with the aid of effecting modifications in Clause (4) and (7) of Article 22 through the 44th Amendment Act of 1978. However, earlier than one of these notifications will be issued, the Janata Party fell, and Indira Gandhi went back to electricity, and her Government refused to issue such notifications. Till nowadays, Article 22 clauses regarding Preventive Detention stands as it's miles.

Rights of an Arrested Person (Article 22(1) and 22(2))

- A man or woman cannot be arrested and detained without being knowledgeable why he is being arrested.
- A man or woman who is arrested can't be denied being defended via a prison practitioner of his preference. This way that the arrested character has the right to hire

³All you need to know about preventive detention?, India Legal, Dec 30th, 2019 <https://www.indialegalive.com/is-that-legal-news/all-you-need-to-know-about-preventive-detention/>

a legal practitioner to guard himself/ herself.

- Every man or woman who has been arrested could be produced earlier than the closest Justice of the Peace inside 24 hours.
- The custody of the detained individual cannot be past the said length through the authority of the magistrate.
- The Article 22(1) and 22(2) make the above provisions. However, Article 22(3) says that the above safeguards are not available to the subsequent:
 - If the individual is at the time being an enemy alien.
 - If the character is arrested below sure law made for the reason of “Preventive Detention “

The first circumstance above is justified, due to the fact when India is in struggle, the citizen of the enemy can be arrested. But the second one clause changed into no longer easy to justify with the aid of the constituent meeting. This became one of the few provisions which resulted in stormy and acrimonious discussions.

IV. PREVENTIVE DETENTION LAWS

An individual can be put in jail / custody for 2 motives. One is that he has committed a criminal offense. Another is his ability to commit a crime in destiny. The custody springing up out of the later is preventive detention and on this, a person is deemed probable to dedicate against the law. Thus, Preventive Detention is performed earlier than the crime has been devoted.⁴

The definition of Preventive detention itself is so puzzling. For example:

- How can you say that someone will do a criminal offense in future?
- What are the consequences of arresting a person while not having dedicated a crime?
- Why Preventive Detention in peacetime. Isn't it towards the safeguards of our personal citizens as provided by means of Article 22?

The preventive detention legal guidelines are repugnant to trendy democratic constitutions. They aren't determined in any of the democratic countries. In England, the preventive detention regulation became resorted to best at some point of the time of conflict. If the provisions of the “Preventive Detention” are illegal in most countries like the USA & UK, then why do we India have such an aspect?

The answer of above query is as follows:

⁴Ibid

India is a country having multi-ethnic, multi-spiritual and multilingual society. Caste and communal violence may be very common in India. Apart from that the circumstances at the time, when our constitution got here in force demanded such provisions. This is evident from following assertion of Dr. Bhimrao Ambedkar:

“.... In the present instances, it is essential for the government to detain someone who is tempering either with the public order or with the defence services of the united states of America. In such case, I don't suppose that the exigency of the freedom of a character will be above the interests of the nation” Dr. B R Ambedkar.

Here is a precis of those provisions:

- Every case of preventive detention should be legal by means of law and no longer at the will of the government.
- The Preventive detention cannot enlarge past a length of 3 months .
- Every case of preventive detention have to be positioned earlier than an Advisory Board composed of Judges of the High Court (or persons certified for Judges of the High Court)
- The case must be supplied before the Advisory Board within three months.
- A detained detention after three months has to be having a “favours of the Advisory Board”.
- The man or woman might be given the opportunity to have the funds for the earliest opportunity to make a representation against preventive detention.
- No character may be detained indefinitely.
- Article 22 (7) affords exception to the above provisions. This Article mandates that:
- When parliament prescribed by law the instances underneath which a person can be stored in detention can be kept in detention past 3 months without the opinion of the advisory board.
- Parliament by means of law also can describe below the equal law, the maximum length of detention.

Historical background of Preventive detention in India

India has an extended record of “Preventive Detention”. India is one of the few nations inside the global whose Constitution allows for preventive detention at some stage in peacetime. The fighters to this law say that those provisions are without any safeguards that some other place are understood to be primary requirements for protecting essential human rights.

- For instance, the European Court of Human Rights has lengthily held that preventive detention is unlawful below the European Convention on Human Rights regardless of the⁵safeguards embodied within the regulation.
- South Asia Human Rights Documentation Centre (SAHRDC), advocated in its submission to the National Commission to Review the Working of the Constitution (NCRWC) in August 2000, to eliminate the provisions of the Constitution of India that explicitly allow preventive detention.

The following are some historical landmarks related to preventive detention in India

- In India the history of preventive detention dates back to the early days of the British rule while under the Bengal Regulation— III of 1818 (the Bengal State Prisoners Regulation) the government was empowered to detain everyone on mere suspicion.
- Rule 26 of the Rules framed below the Defense of India Act 1939 allowed the detention of someone if it was “glad to appreciate to that particular man or woman that such detention becomes vital to save you from performing in any manner prejudicial” to the protection and protection of the country .
- Post Independence, The first Preventive Detention Act became surpassed in 1950. The validity of this act became challenged inside the Supreme Court inside the Gopalan v/s State of Madras Court. The Supreme Court held this act constitutionally legitimate except a few provisions. This act expired in 1969, and earlier than it expired, it became amended for 7 times, every growth became to make it legitimate for three extra years and this was prolonged until 31 December 1969.
- In 1971, the Maintenance of Internal Security Act (MISA) was handed in. MISA changed into basically a changed version of the PDA Act. It was abolished in 1978.
- Another regulation, Conservation of Foreign trade and Prevention of Smuggling Activities (COFEPOSA) was enacted in 1974 and it persisted.
- In the heat of the terrorism in Punjab the Terrorist & Disruptive Activities (Prevention) Act or notorious TADA was enacted in 1985. It became renewed in 1989, 1991 and 1993 and lapsed in 1995 due to growing unpopularity due to massive allegations of abuse. The predominant abuse became that a confession before a police officer, even though being given under torture, turned into admissible as evidence in courtroom.

⁵Shah Ishfaq, *Preventive Detention*, Legal Services India, <http://www.legalserviceindia.com/legal/article-751-preventive-detention.html>

- Another similar act Prevention of Terrorism Ordinance (POTO) of 2001 came into force.
- Both the TADA & POTO had been later succeeded via another arguable Prevention of Terrorist Activities Act (POTA) at some stage in 2002-04. This act became supported by means of the NDA Government but later turned into scrapped through the UPA authorities.
- After the Bombay assaults of November 26, 2008 parliament enacted some other anti terror law known as Unlawful Activities (Prevention) Act.

Preventive Detention as “Evil” of Article 22

- The Constitution of India has numerous flaws and Article 22 is the worst flaw in that.
- Under Article 22, preventive detention can be applied any time and the constitution expressly lets in a man or woman to be detained — without fee or trial so it's miles a devastating blow to personal liberties of the citizens of the usa.
- It obviates the Article 4 of the International Covenant on Civil and Political Rights (ICCPR) which allows that rights can handiest be confined “in time of public emergency which threatens the lifestyles of the nation” because it permits detention in peacetime as nicely.
- It does now not offer any procedural protections together with to lessen detainees’ vulnerability to torture and discriminatory remedy; and to prevent officials’ misusing preventive detention for subversive activities.
- The long period of detaining (three months) poses a hazard of torture.
- The Constitution of India allows the government to skip preventive detention laws against its own residents in the call of countrywide safety and “preservation of public order” as per Entry 9 of List I and Entry three of List III of the Constitution, this is quite implausible.⁶
- In the absence of right safeguards, preventive detention has been misused, particularly against the Dalits and the minorities.
- The Power of states to shape comparable legislation has been misused.
- Before a preventive detention case is delivered before the High Court, a 3 member Advisory Board headed through a sitting High Court Judge is constituted by way of the government to study whether or not the detention is justified or no longer. But, the proceedings of the Board are personal except for that part of the document which expresses the opinion of the Board.

⁶ Wikipedia, *Preventive Detention*, https://en.m.wikipedia.org/wiki/Preventive_detention

V. OPPONENTS' VIEW TO PREVENTIVE DETENTION

- The constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for motives of State's safety; public order, disruption of countrywide financial discipline, etc.
- India is a big country and plenty of separatist dispositions in opposition to the national protection and integrity existed and existing and a strict regulation is needed to counter the subversive sports.⁷
- The variety of humans detained in these acts is not completely large and due interest is made before preventive detention.
- Having such sort of acts has a restraining influence at the anti-social and subversive elements.
- The nation must have very powerful powers to cope with the acts wherein the residents involve in adverse activities, espionage, coercion, terrorism, and so forth.
- The citizens of India have loved private liberty for an extended length for the reason of independence except for years of emergency.
- Such acts are required to deal with the delinquent factors such as terrorist assaults on innocent humans which kill a lot of lives.

In *A K Gopalan V. State of Madras*⁸, petitioner filed a writ of Habeas Corpus towards his detention in Madras Jail. It wondered about the expression 'Personal Liberty'. The difficulty was whether or not Preventive Detention Act 1950 extremely vires Fundamental Rights beneath the Constitution. It was held that the Preventive Detention act changed into intra vires the Constitution of India except Section 14 which is unlawful and extremely vires. It was in addition held that Article 21 is relevant to preventive detention and Preventive Detention Act 1950 allows detention past a duration of three months and excludes the necessity of consulting an advisory board. It is not compulsory on the Parliament to prescribe any maximum duration.

In *Kharak Singh V. State of UP* AIR 1963, SC 1295, the court said that private liberty became now not simplest restrained to physical restraint or enforcement. Kharak Singh became charged in dacoity case however changed into launched considering there has been no proof available against him. However the Police monitored his moves and activities even

⁷ Abhinav Sekhri, *Why it is critical to review preventive detention laws*, Hindustan Times, Feb 24th, 2020 06:15 PM IST, <https://www.hindustantimes.com/analysis/why-it-is-critical-to-review-preventive-detention-laws/story-OuN05iXpk3OZS9nrkSSStUN.html>

⁸ AIR 1950 SC 27

at night. The courtroom laid down that an unauthorised intrusion into a person's domestic and disturbance prompted him thereby violated his right to non-public liberty enshrined in Article 21.

In *Maneka Gandhi v. Union of India* the court expressed 'personal liberty' below Article 21 of the widest amplitude. Protection with regard to Article 19 is also covered unlike inside the case of *Kharak Singh*. The Supreme Court's position of explaining the constitutionality of preventive detention has been considerable and superb. The use of preventive measures from being victimised with unlawful use of preventive detention has been safeguarded hugely by way of Writ Habeas Corpus. Double Jeopardy too stands constant from Petitioner's defence factor.⁹

Habeas Corpus – Article 32 and 226 empowers the Supreme Court and High Court respectively to trouble writs. Habeas Corpus because of this "you could have the frame" is a writ issued calling upon a person with the aid of whom any other character is detained to convey the Detenu earlier than the Court and to permit the court docket to recognize by what authority he has been detained. The writ of Habeas Corpus is a device, requiring examination of the query of unlawful detention. The writ has been described as "an awesome Constitutional privilege of the Citizen " or the first safety of civil liberty"¹⁰

In *Sunil Batra V Delhi Administration*¹¹, a publish card written by means of the Detenu from jail became converted into a writ petition for Habeas Corpus. The writ could lie if the strength of detention has been exercised malafide or for collateral or ulterior cause – because it turned into laid down in *Gopalan V. State of Madras*. Similarly, if the detention is justified beneath the law, the writ might be refused.

VI. CONCLUSION

Human Rights are above all rights. No right can override the basic and fundamental rights of a human being. Article 22, being one of the Fundamental Rights, is extraordinarily important in a country like India, which has a big population and a huge crime rate. Article 22 ensures that each arrested person undergoes trial and is being represented accurately in a felony way. Article 22 did not exist within the Draft Constitution of India. It was delivered after the discussions of the Constituent Assembly. This proper comes underneath "Right to Freedom" and is one of the maximum critical safeguards for the arrested and the detainees of India. In

⁹Rudrasin, *Preventive Detention and Constitution of India- Effect on Human Rights*, Legal Services India, <http://www.legalservicesindia.com/article/1891/Preventive-Detention-and-Constitution-of-India---Effect-on-Human-Rights.html>

¹⁰ Deepak Bajaj V. State of Maharashtra, AIR 2009 SC: 628

¹¹ AIR 1980 SC 1579

other words, it prevents the arbitrary arrest of people.¹²

¹² Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, MICHIGAN JOURNAL OF INTERNATIONAL LAW, Vol. 22, Issue 2, 2001 <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1374&context=mjil>