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THE EROSION OF A SAFEGUARD: PREVENTIVE DETENTION AND THE UNFINISHED PROMISE OF ARTICLE 21

Why the Constitutional Guarantees of Article 22 Have Failed to Keep Pace with the Expanded Right to Personal Liberty

~ Puneet Sharma

ABSTRACT

Preventive detention occupies a peculiar place in Indian constitutional law: it is the one power by which the State may confine a person without charge, trial or conviction, and it is written not into a temporary emergency statute but into the fundamental-rights chapter of the Constitution itself. This paper argues that the constitutional safeguards surrounding that power, formidable as they appear on the face of Article 22, have failed to keep pace with the transformation of the right to personal liberty that began with Maneka Gandhi v. Union of India in 1978. The paper advances a single connected thesis: that the inadequacy of the safeguards is not a defect of their drafting but of their interpretation, and that the principal engine of their erosion is the doctrine of subjective satisfaction, which insulates the sufficiency of the detaining authority's material from judicial scrutiny. Drawing on the case law, on the comparative experience of the United Kingdom, the United States and the international human-rights instruments, and on the unenforced reforms of the Forty-fourth Amendment, the paper contends that the gap between the promise of the safeguards and their performance is real, that its cause is identifiable, and that its cure lies ready to hand in standards the Supreme Court already applies in every other field of personal liberty. The remedy proposed is not the abolition of a power the Constitution has chosen to retain, but the extension to preventive detention of the proportionality review and the fairness standard from which it has, by a kind of doctrinal exception, been withheld.

Keywords: *Preventive detention; Article 21; Article 22; personal liberty; subjective satisfaction; advisory board; Maneka Gandhi; proportionality; constitutional safeguards.*

1. Introduction

There is a contradiction at the very threshold of the Indian Constitution's treatment of personal liberty. Article 21 proclaims that no person shall be deprived of his life or personal liberty except according to procedure established by law; and the very next article confers upon the State a power to deprive a person of that liberty without a charge, without a trial and without the verdict of any court.[1] The two provisions stand side by side — the guarantee and its great exception — and the relation between them is the subject of this paper.

Preventive detention is the confinement of a person not for an offence he has committed but for an apprehension of what he may do. It is to be distinguished sharply from the punitive detention of the ordinary criminal law, which confines a person after guilt has been proved beyond reasonable doubt, by a court, on evidence, after a trial. Preventive detention dispenses with all of this: it rests not on proof of a past act but on the satisfaction of an executive authority that the liberty of the person is, for the future, a danger to the security of the State, to public order, or to one of the other grounds the detention statutes specify.[2]

The argument of this paper is that the constitutional safeguards which surround this power — the communication of grounds, the right of representation, the scrutiny of an advisory board, the limits upon the period of detention — have, over the seven decades of the Republic, been worn thin by interpretation and practice, until the protection they afford in fact falls well short of the protection their terms appear to promise. More particularly, the paper contends that this erosion is traceable to a single doctrinal source, and that it is remediable by means that lie already within the established law. The inquiry is timely, for the National Security Act and a multiplicity of State preventive-detention statutes remain in force and in regular use, and the High Courts continue to quash detention orders with a frequency that is itself evidence both that the safeguards have content and that they are, with depressing regularity, ignored.[3]

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[1] Constitution of India, arts. 21 and 22; the juxtaposition of the guarantee of personal liberty and the power of preventive detention within adjacent articles is the structural starting-point of the subject.

[2] On the conceptual distinction between preventive and punitive detention, see A.K. Gopalan v. State of Madras, AIR 1950 SC 27, and the restatement in Rekha v. State of Tamil Nadu, (2011) 5 SCC 244, emphasising that preventive detention is a serious encroachment on personal liberty to be confined within the narrowest limits.

[3] The National Security Act, 1980, and the various State preventive-detention statutes remain in force and in regular use; the frequency with which detentions are quashed by the High Courts in their habeas corpus jurisdiction is itself evidence both that the safeguards have content and that they are often disregarded.

2. The Constitutional Framework and Its Origin

The safeguards of preventive detention are contained in clauses (4) to (7) of Article 22, and they must be read against the history out of which they grew. Preventive detention is not an innovation of the Republic; it is an inheritance from the colonial regime, exercised under a succession of regulations and statutes of which the Bengal State Prisoners Regulation of 1818 is the earliest of lasting importance, and used throughout the freedom struggle against the very leaders who would later frame the Constitution.[4]

It is one of the ironies of the subject that those who framed Article 22 had themselves been detained under the colonial detention laws, and distrusted the power accordingly; yet they did not abolish it. The provision that became Article 22 was introduced late in the Constituent Assembly, by Dr. Ambedkar, as a corrective to a perceived deficiency in the draft of what is now Article 21 — for the Drafting Committee had chosen the formula "procedure established by law" over the American "due process of law", and the narrower formula left the subject exposed.[5] The safeguards of Article 22 were offered, and accepted, as the price of retaining so dangerous a power; and the central question of this paper is whether that price was high enough, and whether the courts have insisted upon its payment.

The safeguards themselves are four. The detenu must be informed, as soon as may be, of the grounds on which the order has been made, and afforded the earliest opportunity of making a representation against it.[6] His case must ordinarily be placed before an advisory board, composed of persons qualified to be judges of a High Court, before the detention may be continued beyond three months; and the board must report whether, in its opinion, there is sufficient cause for the detention. These are the constitutional minima, below which no detention law may fall. On paper they constitute a formidable apparatus of protection. The argument that follows is that the

[4]On the colonial ancestry of preventive detention, see the Bengal State Prisoners Regulation III of 1818 and its successors, and the historical survey in the Report of the National Commission to Review the Working of the Constitution (2002).

[5]VIII Constituent Assembly Debates (15 September 1949), in which Dr. B.R. Ambedkar introduced draft article 15-A; the rejection of "due process of law" in favour of "procedure established by law", and its role in occasioning the introduction of art. 22, is recounted in the constitutional histories.

[6]Constitution of India, art. 22(5), requiring communication of the grounds "as soon as may be" and the affording of "the earliest opportunity" of making a representation; art. 22(4) and (7) provide for the advisory board and the three-month limit.

apparatus, formidable in form, does not in practice perform the work the Constitution assigned to it.

3. The Transformation of Article 21 and the Lag of Article 22

For the first quarter-century of the Republic, the Supreme Court read Article 21 narrowly. In A.K. Gopalan v. State of Madras the majority held that "personal liberty" meant no more than freedom from physical restraint, that "procedure established by law" required only a procedure laid down by a valid statute however harsh, and that the articles of Part III were watertight compartments, each to be read by itself.[7] On that reading the protection of the detenu was thin, for a detention law had only to satisfy the specific terms of Article 22, which was treated as a self-contained code.

That edifice was dismantled in Maneka Gandhi v. Union of India. The Court held that personal liberty was of the widest amplitude, that the articles of Part III were not mutually exclusive, and decisively that any procedure by which a person is deprived of his liberty must be fair, just and reasonable.[8] The logical consequence ought to have been that a preventive-detention law must satisfy not merely the specific safeguards of Article 22 but also the general fairness requirement of Article 21, so that even a detention formally compliant with Article 22 might be struck down if the procedure as a whole was unfair. That consequence would have transformed the law of preventive detention.

In practice the courts drew back from the full implication of their own logic. While accepting in form that Articles 21 and 22 must be read together, they continued in substance to treat Article 22 as the principal sometimes almost the exclusive touchstone of a detention's validity, and declined to subject the executive's satisfaction to the searching scrutiny that the fairness standard, taken seriously, would require.[9] The result is an uneasy compromise: Article 21 has been admitted into the field in principle, but its admission has made far less difference than its logic demands. The central thesis of this paper is that the law of preventive detention has remained, in important

[7]A.K. Gopalan v. State of Madras, AIR 1950 SC 27, confining "personal liberty" to freedom from physical restraint and holding the articles of Part III to be mutually exclusive.

[8]Maneka Gandhi v. Union of India, (1978) 1 SCC 248, holding personal liberty to be of the widest amplitude and requiring that the procedure depriving a person of liberty be fair, just and reasonable.

[9]On the continuing deference to executive satisfaction notwithstanding Maneka Gandhi, see Haradhan Saha v. State of West Bengal, (1975) 3 SCC 198, and the subsequent line of authority treating art. 22 as the principal touchstone of validity.

respects, frozen at the level of protection the narrow Gopalan conception thought sufficient, while the general law of personal liberty has advanced far beyond it so that the gap between the two has widened not because the detention law has deteriorated but because the standard it must meet has risen and the detention law has failed to keep pace.[10]

4. The Doctrine of Subjective Satisfaction: The Engine of Erosion

If the safeguards are inadequate, the question is why; and the answer this paper presses is that the principal cause is the doctrine of subjective satisfaction and the narrow scope of judicial review that flows from it. A detention order rests upon the satisfaction of the detaining authority that the detenu is likely, if left at large, to act prejudicially to public order or the security of the State. The courts have repeatedly held that they will not sit in appeal over that satisfaction, will not weigh the sufficiency of the material on which it rests, and will confine their review to the legality of the procedure and the existence of some relevant material.[11]

The consequence is that judicial review of preventive detention is, in form, review of the legality of the procedure rather than of the merits of the apprehension. So long as the authority has observed the forms communicated the grounds, afforded the opportunity of representation, referred the case to the board and so long as there exists some material capable of supporting the satisfaction, the detention will ordinarily stand, however thin or unconvincing that material may be. The courts have made real inroads at the margins: they have struck down detentions founded on grounds that were vague, irrelevant or stale; they have insisted that the authority apply its mind and have quashed orders that betray a mechanical or borrowed satisfaction; they have policed the live and proximate link between the grounds and the apprehension.[12] But these are inroads at the margin. The core of the doctrine is that the sufficiency of the material is not for the court remains intact,

[10]The thesis that the law of preventive detention has remained frozen at the Gopalan level while the general law of personal liberty has advanced — most recently in K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 — is the organising argument of this paper.

[11]On the doctrine of subjective satisfaction and the limited scope of judicial review, see Khudiram Das v. State of West Bengal, (1975) 2 SCC 81, acknowledging the subjective character of the satisfaction while insisting that it be real and not illusory.

[12]On the marginal inroads — vague, irrelevant or stale grounds, non-application of mind, and the live and proximate link — see, among others, Bhawarlal Ganeshmalji v. State of Tamil Nadu, (1979) 1 SCC 465, and the cases on detention of a person already in custody such as Ramesh Yadav v. District Magistrate, Etah, (1985) 4 SCC 232.

and it is the core that does the damage, for it places beyond judicial reach precisely the question on which the justice of a detention ultimately turns.

The point may be put sharply. The procedural safeguards, however fully their formal vindication, cannot reach the substance of the matter so long as the courts decline to examine the sufficiency of the material on which a detention rests. A detenu may be told the grounds, may make his representation, may have his case considered by the board and may still be detained on material that a court examining its sufficiency would find wholly inadequate, because the court has disabled itself, by the doctrine of subjective satisfaction, from undertaking that examination. The procedural safeguards police the form; the doctrine of subjective satisfaction shields the substance; and it is in the space between the two that the inadequacy of the protection is most clearly seen.[13]

5. The Hollowness of the Advisory Board

The advisory board is the principal institutional safeguard the Constitution provide the body interposed between the executive's decision to detain and its continuation beyond three months. Yet the board, as it operates, is a far weaker protection than its constitutional billing suggests. It sits in private; the detenu has no right to be represented before it by a legal practitioner; its proceedings are not adversarial; and its opinion, though it may secure the detenu's release, is not a reasoned judgment in the manner of a court.[14]

The denial of legal representation is the single feature whose reform would do most to improve the fairness of the process, and it cannot easily be squared with the standard of fairness that Article 21 now requires. A detenu, often unlettered, frequently confined and cut off from advice, is required to meet the case against him before a board of persons qualified to be judges, without the assistance of anyone trained to do so while the State, if it chooses, may place its case through its own legal advisers. The Supreme Court has held that where the State is represented before the board the detenu must be allowed representation too; but the general denial of counsel

[13]The location of the inadequacy in the space between the procedural safeguards (which police the form) and the doctrine of subjective satisfaction (which shields the substance) is the analytical core of the paper's argument.

[14]On the constitution and procedure of the advisory board, and the absence of adversarial procedure, see A.K. Roy v. Union of India, (1982) 1 SCC 271.

remains, and it is a denial that the broader fairness jurisprudence ought long since to have swept away.[15]

A board so constituted cannot discharge the function the Constitution assigned it. It was meant to be the independent check that justified entrusting the liberty of the individual to executive judgment; it has become, too often, a formality interposed between the executive's decision and its confirmation, lending the appearance of independent scrutiny to a process that remains, in substance, executive from beginning to end. The Supreme Court has in recent years insisted that the board is not a "rubber-stamping authority"; the very need for the insistence is evidence of how far the practice has fallen from the constitutional design.[16]

6. The Comparative Mirror

The peculiarities of the Indian scheme are thrown into relief by comparison with other constitutional democracies, none of which has made a general power of preventive detention an ordinary, permanent feature of its peacetime legal order in the way that India has.[17]

In the United Kingdom, from whose colonial practice the Indian power descends, detention without trial is treated as a grave exception, reserved for war and emergency. When, after 2001, the United Kingdom sought to detain foreign terrorist suspects without trial, the House of Lords held the scheme incompatible with the right to liberty, on grounds of disproportionality and discrimination, and it was abandoned.[18] The significance of the decision lies less in its result than in the posture of the court: it weighed the measure against the threat, found the fit defective, and struck the measure down precisely the proportionality review that the Indian doctrine of subjective satisfaction forbids.

[15]On the denial of legal representation before the advisory board, and the qualification that the detenu must be allowed counsel where the State is represented, see A.K. Roy v. Union of India, (1982) 1 SCC 271; the general denial sits uneasily with the fairness standard of art. 21.

[16]The Supreme Court's recent insistence that the advisory board is not a "rubber-stamping authority", and that grounds must be communicated meaningfully, is reflected in Prabir Purkayastha v. State (NCT of Delhi), (2024) SCC OnLine SC 934.

[17]The comparative rarity of an entrenched, permanent, peacetime power of preventive detention usable against citizens is the framing observation of the comparative discussion.

[18]A v. Secretary of State for the Home Department, [2004] UKHL 56 (the "Belmarsh" case), holding the indefinite detention of foreign terrorist suspects incompatible with the right to liberty on grounds of disproportionality and discrimination.

In the United States, even the pre-trial detention of dangerous defendants was upheld only because it was hedged with an adversarial hearing, the right to counsel, the right to confront and cross-examine witnesses, and a governmental burden of clear and convincing evidence.[19] The contrast with the Indian advisory-board procedure, which affords none of these, is stark; and it suggests, more pointedly than any other comparison, the reforms the Indian process most needs. The international human-rights instruments tell the same story: Article 9 of the International Covenant on Civil and Political Rights guarantees to anyone deprived of liberty the right to have a court decide, without delay, on the lawfulness of the detention a guarantee with which a doctrine that forbids the court to examine the sufficiency of the material is, by India's own reservation, admittedly not in full conformity.[20]

The lesson of the comparison is not that any foreign model should be transplanted whole, but that the reconciliation of public safety with personal liberty is possible on terms far more favourable to liberty than the Indian law now allows for other systems have achieved it and that the devices by which they have done so, the adversarial hearing, counsel, a real burden on the State, a proportionality review, are not exotic but the ordinary furniture of a fair procedure. The comparison thus refutes the claim that the deficiencies of the Indian law are the unavoidable price of security.[21]

7. The Unenforced Promise of the Forty-fourth Amendment

No account of the inadequacy of the safeguards is complete without the most concrete instance of it. The Forty-fourth Amendment of 1978, enacted by the Parliament elected after the Emergency as the considered legislative response to its abuses, sought to strengthen the safeguards of Article 22 among other things by reducing the period before reference to the advisory board, and by reconstituting the board on a more judicial footing.[22]

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[19]United States v. Salerno, 481 U.S. 739 (1987), upholding pre-trial detention of dangerous defendants only because it was hedged with an adversarial hearing, counsel, confrontation, and a governmental burden of clear and convincing evidence.

[20]International Covenant on Civil and Political Rights, 1966, art. 9, guaranteeing the right to have a court decide without delay on the lawfulness of a detention; India's reservation to art. 9, applying it in consonance with the constitutional provisions for preventive detention, is itself an admission of non-conformity.

[21]The refutation of the claim that the deficiencies of the Indian law are the unavoidable price of security is argued to be the chief value of the comparative inquiry.

[22]The Constitution (Forty-fourth Amendment) Act, 1978, enacted as the considered response to the Emergency of 1975-1977; on the scale of the Emergency detentions, see the Report of the Shah Commission of Inquiry (1978).

The most important of those reforms has never been brought into force. By the simple device of not issuing the notification required to commence it, successive governments have left unenforced, for more than four decades, a constitutional reform that Parliament itself enacted in direct response to the gravest abuse of personal liberty in the nation's history. That a strengthening of the safeguards, deliberately written into the Constitution after the Emergency, should lie inert for want of a notification is a reproach to the whole system, and it is the clearest single illustration of the gap between the promise of the safeguards and their performance.[23]

The episode also points to where responsibility lies. The bringing into force of the amendment requires no fresh legislation and no change of judicial doctrine only a notification; and its continued non-enforcement is a failure of the executive and the legislature that no amount of judicial activity can repair. It is, accordingly, the reform this paper presses most insistently, precisely because it is the most easily achieved.[24]

8. The Argument for Reform

The deficiencies identified in this paper are not beyond remedy, and the remedy does not require the abolition of a power the Constitution has chosen to retain. It requires, rather, that the safeguards be made equal to the gravity of the power, and the means of doing so lie largely within the established law.[25]

Four reforms follow from the analysis. First, the unenforced provisions of the Forty-fourth Amendment should be brought into force without further delay. Second, the detenu should be afforded the right to legal representation, both in preparing his representation and before the advisory board, and the proceedings of the board should be made adversarial in character, with a real burden on the State. Third, and most importantly, the doctrine of subjective satisfaction should be relaxed to permit a genuine judicial review of the sufficiency and proportionality of the detention a reform that requires no legislation, but only that the courts carry the logic of Maneka

[23]The continued non-enforcement, by the device of non-notification, of the key provisions of the Forty-fourth Amendment strengthening the advisory-board safeguard is the clearest single instance of the gap between the promise of the safeguards and their performance.

[24]Because it requires only a notification and neither fresh legislation nor a change of judicial doctrine, the bringing into force of the Forty-fourth Amendment is the reform most easily achieved and is pressed most insistently here.

[25]The programme of reform is calibrated to preserve the power the Constitution has retained while supplying the independence, disclosure, representation and burden presently absent.

Gandhi into a field from which it has been withheld. Fourth, the power should be confined, in law and in practice, to the genuinely exceptional case in which the ordinary criminal law cannot meet the danger, and the courts should insist, more strictly than they have, that detention not be used as a substitute for prosecution.[26]The most hopeful path to reform is the judicial one. Several of the most important reforms require no statute at all, but only that the courts apply to preventive detention the same standards of fairness, reasonableness and proportionality they apply to every other deprivation of personal liberty. The materials are to hand the expanded Article 21, the proportionality standard, the recovered jurisprudence of liberty; what is wanting is their consistent extension to the one field from which, by a kind of doctrinal exception, they have been withheld.[27]

9. Conclusion

Preventive detention is, in one sense, a narrow and technical corner of constitutional law; but the questions it raises are not narrow at all. They are questions about the relation between the individual and the State, about the conditions on which a free people may entrust to its government the power to confine without trial, and about the role of the courts in holding that power to the standards a constitution sets. A constitutional order may be judged by how it treats the person it has the most reason to fear and the least reason to protect the suspected enemy of the State, confined upon an apprehension, charged with nothing, defended by no one and by that test the Indian law of preventive detention, for all the genuine work of the courts, falls short.[28]

The falling short is real, its cause is identifiable, and its cure is available. The safeguards are real but partial, formal more than substantial, and systematically weaker than the power they are meant to restrain; the great promise of the post-Maneka jurisprudence has, at the threshold of preventive detention, been largely held at the door; and the principal engine of the erosion is the doctrine of subjective satisfaction, which shields the substance of the matter from the very scrutiny that

[26]On the rule against detention as a substitute for prosecution, and against its use to defeat the grant of bail, see Rekha v. State of Tamil Nadu, (2011) 5 SCC 244.

[27]The central reform the extension to preventive detention of the proportionality review and fairness standard applied elsewhere, including in K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 requires no legislation, but only the consistent application of doctrine already established.

[28]The test of a constitutional commitment to liberty by reference to its treatment of the person the State has most reason to fear is the paper's concluding standard of judgment.

fairness demands. But the fault lies not in the constitutional design and not in the necessities of security; it lies in interpretation, and what interpretation has narrowed, interpretation can enlarge.

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