



Preventive Detention & International Human Rights Norms

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Abstract:

The notion of preventive detention is deeply ingrained in India's legal, political, and social landscape. It is premised on the value of precautionary state action to protect the public or national interest, and is adopted at a cost to the value of individual liberty and its sacrosanct protection under law. Preventive detention differs from the punitive detention imposed by a court of law in that it is imposed by the decision of a government official, and furthermore, in that it does not follow from the conviction of an offence, but rather anticipates the commission of a harmful act.

There is no authoritative definition of the term 'Preventive Detention' in Indian law. Preventive detention necessarily involves the detention of a person. Detention means that the person detained is not at liberty to go anywhere.

The detention of person is made without trial and conviction by a Court, but merely on suspicion in the mind of an executive authority. Preventive detention is fundamentally different from imprisonment after trial and conviction in criminal Court. In preventive detention, the past act is merely the material for inference about the future courses of probable conduct on the part of the detenu. Preventive detention is thus preventive not punitive in nature. Preventive detention is not to punish an individual for any wrong done by him, but at curtailing his liberty, with a view to preventing his injurious activities in future.

The object, therefore, is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved not any charge formulated if the justification of such detention is suspicion or reasonable probability and not criminal conviction warranted by legal evidence.

In recent centuries, numerous movements for political change have occurred with one of their reasons being human rights. The Universal Declaration of Human Rights (UDHR), one of the most recent declarations of human rights, occurred after World War II. This doctrine was established to avoid the horrific acts of the Holocaust from reoccurring. This doctrine lists specific human rights, such as the right not to be tortured, the right to own property, and the right to asylum. These rights are fundamental and take part in various other doctrines, declarations and constitutions. From this point, one can see how human rights have slowly moved away from society's moral code to political interests.

"The recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

Please cite this Article as : Atul A. Zarkar , Preventive Detention & International Human Rights Norms : Golden Research Thoughts (July; 2012)



The right to liberty is the very essence of a free society and it must be safeguarded at all times. The European Court of Human Rights has ruled that "detention without trial is violative of the European Convention on Human Rights except in time of war or other public emergency threatening the life of the nation" and even then to the extent "strictly" required by the exigencies of the situation, as the convention says.

Though the wordings of Preamble of the 'Universal Declaration of Human Rights' and 'European Court' mentioned above are true but the reality is what Mahajan, J. observed in *A.K. Gopalan Vs. State of Madras* that 'Preventive detention laws are repugnant to the democratic Constitution and they cannot be found to exist in any of the democratic countries of the world. . . . The Government of India Act, 1935, conferred authority on the Central and Provincial Legislatures to enact laws on this subject for the first time and since then laws on this subject have taken firm roots here and have become a permanent part of the statute book of this country. Curiously enough, this subject has found place in the Constitution in the chapter on Fundamental Rights. In the same case *Das, J.* observed regarding powers of Legislatures to enact preventive detention laws, that, "Under entry 9 of List I, the Parliament and under entry 3 of List III, both Parliament and the State Legislatures are empowered to make laws for preventive detention for reasons connected with several matters specified in the respective entries. This legislation is not conditioned upon the existence of any war with a foreign power or upon the proclamation of emergency under Part XVIII of the Constitution. Our Constitution has therefore, accepted preventive detention as distinct from emergency legislation. It is a novel feature to provide for preventive detention in the Constitution. There is no such provision in the Constitution of any other country. Be that as it may, for reasons good or bad, our Constitution has deliberately plainly given power to Parliament and State Legislatures to enact preventive detention laws even in peace time." Our Constitution also provides under Article 21 the right to life and liberty. Although sanctity of life and liberty was not something new when the Constitution was drafted. It represented a fact of higher values which mankind begins to cherish in its evolution from a state of tooth and claw to a civilized existence. Likewise, the principle that no one shall be deprived of his life and liberty without the authority of law was not the gift of the Constitution. It was a necessary corollary of the concept relating to the sanctity of life and liberty; it existed and was in force before the coming into force of the Constitution.

PROVISIONS IN ICCPR

Preventive detention is not explicitly provided for in international human rights law, nor does the prohibition on arbitrary arrest and detention exclude preventive detention per se.

That preventive detention is not prohibited under the arbitrary arrest and detention provisions of the international human rights instruments is supported by the fact that the authoritative international institutions have refused on several occasions to condemn the practice in unequivocal terms.

In fact, preventive detention was clearly contemplated by the General Comments of the Human Rights Committee on Article 9 of the ICCPR:

Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1)

That preventive detention is consistent with the right to personal liberty and security and does not offend the prohibition on arbitrary arrest and detention is a view similarly evidenced by India's reservation to Article 9 of the ICCPR.

Preventive detention is provided for in Article 22 of the Constitution of India, permitting preventive detention in non-emergency situations, allowing the detention of a person without charge or trial for a period of up to three months without judicial review. Article 22(3) of the Constitution of India excludes procedural guarantees to any person who is arrested or detained under any law providing for preventive detention. A person in preventive detention is not entitled to be informed of the grounds for such arrest nor entitled to judicial review before a Magistrate. Article 22(4) of the Constitution of India prohibits preventive detention for a period of longer than three months unless an Advisory Board finds sufficient cause for continued detention.

In respect of the preventive detention provisions of the Constitution of India, the Indian Government entered a reservation to Article 9 of the ICCPR:

With reference to Article 9 [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.

A reservation in international law is a statement that purports to exclude or modify the legal effect of a treaty in its application to a State. According to General Comment 24 of the Human Rights Committee, 'if a so-called reservation merely offers a State's understanding of a provision but does not exclude or



modify that provision in its application to that State, it is, in reality, not a reservation'.

The reservation by India does not purport to exclude or modify Article 9 of the ICCPR, but instead puts the other State Parties on notice that India's interpretation of Article 9 is consistent with and reflected in its Constitution. The Indian Government's view is that preventive detention laws under Article 22 of the Constitution of India do not involve an arbitrary or an unlawful deprivation of liberty.

That Article 9(1) can be used in cases of preventive detention has also been confirmed by the Human Rights Committee in *Campora Schweizer v Uruguay*, in which it was stated:

According to Article 9(1) of the Covenant, no one shall be subjected to arbitrary arrest or detention. Although administrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner, the Committee emphasizes that the guarantees enshrined in the following paragraphs of article 9 fully apply in such instances.

In this case the applicant was kept under 'prompt security measures' without charges at the disposal of the executive authorities. He had been arrested on grounds of 'association to break the law'. The Court held that the applicant's imprisonment violated Article 9(3) and (4) since he had not been brought before a judge and could not take proceedings to challenge his arrest and detention.

Although preventive detention is not in itself a violation of the ICCPR, the wide definition of 'arbitrary' discussed above has significant consequences for preventive detention.

The wide definition of 'arbitrary' means unjust preventive detention legislation will violate Article 9(1) ICCPR. If the provisions of a law authorizing preventive detention has elements of inappropriateness, injustice and lack of predictability, it will be 'arbitrary' for the purposes of the right to personal liberty and security. For example, when preventive detention is used to counter-terrorism it may be considered arbitrary, an issue beyond the scope of this paper.

Further, although preventive detention is not, per se, excluded by the prohibition on arbitrary arrest and detention, detention will be 'arbitrary' when a detainee is not accorded procedural safeguards. In cases where preventive detention abrogates the safeguards in Article 9, there will be a breach of the prohibition on arbitrary arrest and detention, as well as a violation of the specific Article in question.

SAFEGUARDS APPLICABLE TO THOSE IN PREVENTIVE DETENTION

Each of the safeguards that apply to a person deprived of personal liberty under Article 9 of the ICCPR are intended to avoid unlawful or arbitrary conduct from the moment of the deprivation of freedom. This section of the paper addresses the issue of the safeguards under Article 9 of the ICCPR apply to a person in preventive detention.

A. Article 9(2) – Right to be Informed of the Reasons for the Detention

Article 9(2) of the ICCPR provides:

Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

TWO RIGHTS EXIST:

- (i) Anyone who is arrested has the right to be informed at the time of arrest of the reasons for his arrest ('first element'); and
- (ii) A person charged with an offence has the right to be promptly notified of a charge or charges against him ('second element').

The description must go beyond a mere reference to the legal basis for detainment and enable the detainee to discern the substance of the complaint against him.

That the right to be informed of the reasons for detention at the time of arrest (the first element) applies to cases of preventive detention has been confirmed by General Comment 8 on Article 9 by the Human Rights Committee. The right serves the purpose of placing the detained person in a position to make use of their right to review the lawfulness of detention pursuant to Article 9(4).

B. ARTICLE 9(3) – TRIAL WITHIN A REASONABLE TIME

ARTICLE 9(3) OF THE ICCPR PROVIDES:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to



release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

This Article only applies to those 'arrested or detained on a criminal charge'. In *Kulomin v Hungary*, the Human Rights Committee confirmed that the first sentence of Article 9(3) of the ICCPR is intended to 'bring the detention of someone charged with a criminal offence under judicial control'.

Preventive detention, by definition, is based on predictive criminal conduct; no intention or reasons exists to charge or bring the detainee to criminal trial. Accordingly, those in preventive detention are not accorded a right to be brought promptly before a judge or other officer, nor a right to trial within a reasonable time or to release pending trial.

C. ARTICLE 9(4) – RIGHT TO CHALLENGE DETENTION

ARTICLE 9(4) ICCPR PROVIDES:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

The principle of judicial control over detention stems from, and is analogous to, the English remedy of habeas corpus, enabling a person arrested or detained to challenge the validity of his detention before court, and obtain release if detention is unlawful. The right of judicial control ensures persons who are arrested and detained are given the right to judicial review of the lawfulness of the measure to which they are subjected. The travaux préparatoires of the ICCPR show that the initial draft of Article 9(4) read:

Everyone who is deprived of his liberty by arrest or detention shall have an effective remedy in the nature of 'habeas corpus' by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

D. ARTICLE 9(5) – RIGHT TO COMPENSATION FOR UNLAWFUL ARREST OR DETENTION

ARTICLE 9(5) OF THE ICCPR PROVIDES:

Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The ICCPR applies to all 'unlawful detentions'. This would include detentions which are unlawful under the ICCPR, or detentions which are unlawful under a State's own domestic law. In *A v Australia* it was confirmed by the Human Rights Committee that compensation will be payable even when detention is 'lawful' under domestic law, but contrary to the ICCPR, for example when it is 'arbitrary'.

The analysis in this chapter of the safeguards for those arrested and detained under the ICCPR when applied to preventive detention has argued that, at the time of arrest, a detainee must be informed of the reasons for their preventive detention.

A person under preventive detention has, however, no right to be brought promptly before a judge or other officer to exercise judicial power. There is no right of a trial within a reasonable time for a person in preventive detention. Neither of these rights exists because they are predicated on criminal charge and trial — neither of which are relevant to preventive detention. None of the safeguards in international instruments explicitly prohibit indefinite preventive detention although such detention would fall within the general prohibition on 'arbitrary arrest and detention'.

The right provided for in Article 9(4) of the ICCPR does not make a distinction between executive and judicial detention. As such, this Article recognizes that every person in preventive detention has the right to take proceedings before a court to decide without delay on the lawfulness of the arrest or detention, where that court has the power to order release if the detention is not lawful.

In the event of a violation of the ICCPR, a person in preventive detention is entitled to compensation.

CONCLUSION –

Preventive detention is not explicitly prohibited by the ICCPR. Preventive detention is not, in itself, 'arbitrary arrest and detention' and is therefore, *prima facie*, a permissible deprivation of liberty under Article 9(1). Yet, given the wide interpretation of 'arbitrary' argued in this topic, preventive detention must conform to the principles of justice and must not be inappropriate or unjust. This means that, if a preventive



detention law of a signatory State is oppressive, and does not conform to the principles of justice or dignity of the human person, it will fall within the prohibition on arbitrary arrest and detention under the ICCPR. An assessment of the legality of preventive detention legislation within a State must therefore be based on a specific analysis of the appropriateness and proportionality of the particular preventive detention measures.

