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Preventive Detention Laws

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ABSTRACT: ***The author's major goal in this paper is to examine the idea of preventive detention under the Indian Constitution and to address the question of whether preventive detention can be considered a punishment for the purposes of criminology. The paper is split into three sections. The author briefly covers the various methods to Punishment, namely Punitive, Therapeutic, and Preventive, in the first half. The author investigates what constitutes punishment and what it entails. The opinions of many jurists, such as H.L.A. Hart, are used for this purpose. Preventive Detention is discussed in the next section as an insult to the all-pervasive idea of personal liberty. The Author delves into Article 22, substantiating it with major court rulings, as well as the history of Article 22 and the numerous preventive detention legislation now in force in India. The author also covers the Dimple Happy Dhakad case, which was a contentious ruling. In the final section, the author addresses the important topic of whether Preventive Detention is a Punishment. This section is supported by the author's examination of several definitions of preventative detention and punishment. The author then discusses the declarations of several criminologists and asserts and shows a different viewpoint from them using modern Indian instances.***

KEYWORDS: ***Crime, Detention, Preventive, Sentences, Rights***

1. INTRODUCTION

At different eras of human civilization, and even within a single society, diverse reactions to crime have been seen. It has been correctly stated that a society's attitude toward crime and offenders at any given moment reflects its core principles. Extreme sorts of emotions expressed by civilizations have always colored society's view toward offenders. Criminals, in the words of Elmer Hubert Johnson, might be portrayed as monsters, hunted animals, or defenseless victims of cruelty.

Three sorts of reactions may be identified in diverse civilizations as a result of shifting views. The first is a classic, universal reaction known as a Punitive Approach. It considers a person to be a fundamentally terrible person, and the goal of this approach is to punish the offender in order to protect society from his attacks. The second, more modern perspective views the criminal as a victim of circumstances and a product of different variables inside the criminal and societal context. The Therapeutic Approach is named by the fact that it treats the offender as if he or she were a sick person in need of therapy. Finally, there is the Preventive Approach, which, rather than focusing on specific criminals, aims to eradicate the conditions that lead to crime. The prevention of crime and juvenile delinquency, like the prevention of any other unpleasant and harmful occurrence, is clearly preferable to the control of such phenomena after they have occurred [1].

Crime and delinquency can be prevented in a variety of methods and circumstances. When an offender is imprisoned or given the death penalty, he is prohibited from committing additional crimes for the duration of his incarceration or, in certain cases, forever. Criminologists use the term "prevention" in a limited meaning in this context, i.e., preventing criminal behavior by taking proactive steps in terms of human and environmental changes. In this sense, attempts to strengthen family connections, encourage better school adaptations, provide education and

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enjoyment aimed to develop useful and upright citizens, and the employment of assistance in the domains of social work, medicine, and psychiatry are all included[2]. The limits of preventative programs observed elsewhere are certain to reveal themselves more strongly in countries like India, which are plagued with widespread poverty. It's important to note, however, that none of these techniques are mutually incompatible. They not only overlap at times, but they also co-exist as components of the society's broader structure at times. These theories reflecting these methods, on the other hand, are not 'theories' per se; they are moral claims, not assertions [3].

Inflicting pain should be coercive, according to Jerome Hall, and it is done in the name of the state. He goes on to say that it is predicated on rules, their breach, and the final finding of that in a judgment [4]. The penalty is imposed on a wrongdoer who has broken the law. Punishment must involve pain and its consequences must normally be unpleasant, it must be for any legal wrong, it must be given to an actual offender who has committed the offence, and the pain must be inflicted by the authority that has been constituted by a legal system, according to Benn and Flew.

At this point, an interesting question may arise as to how people's desire to punish offenders may be explained. Donald R. Cressey attempted to answer this topic using his "scapegoat theory," which argues that a criminal is made a scapegoat to provide comfort or satisfaction to community members. This sensation of comfort or satisfaction stems from their sense of release from their own guilt feelings regarding the crime as a result of the offender's punishment. This is predicated on the notion that everyone has criminal proclivities, even if they aren't always manifested in real behavior. If punishment fails to offer an outlet for such sentiments, the people may turn to lynching. According to another viewpoint, the community's negative reaction to criminals serves as a link amongst non-criminal members. The connection signifies a reaffirmation of moral ideals shared by all members of the community, as well as a reminder of taboos [5].

Whatever the true motivations in the human mind that lead to the inflicting of punishment on the wrongdoer, there are several plausible reasons offered. Despite the fact that opinions on the nature of necessity varies, virtually all arguments are based on the concept of "grim necessity." Only pure and severe retributionists believe that punishment is intrinsically desirable, and that no reason is necessary to punish criminals [6]. The 'social compact,' which establishes a give-and-take scenario, is frequently used to justify punishment. Individuals must restrict their freedom vis-à-vis others in order to enjoy individual rights and advantages, and if they fail to do so, punishment must be imposed.

2. DISCUSSION

Preventive Detention and Personal Liberty

According to Dicey, "The right to personal liberty as understood in England" implies "a person's right not to be imprisoned, arrested, or subjected to other forms of physical coercion in any manner that does not accept of legal justification." The definition supplied by Dicey is not just applicable to England; in A.K. Gopalan v. State of Madras, the Apex Court weakened and stunted the flowering development of Personal Liberty jurisprudence in the shape of Article

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21 of the Indian Constitution, based on Dicey's restricted definition. According to the court, the term "law" applies exclusively to state-made legislation and excludes "jus naturale" or natural-justice principles. The court held that all that is necessary to pass test under Article 21 is the existence of a State-created legislation, which is essentially a fairly low threshold for determining the constitutionality of a statute. During the 1976 Emergency, our Courts ruled that people' treasured liberty is subject to the passing laws of the day. “Liberty is itself a gift of law and may be forfeited or curtailed by law,” the court stated.

The Supreme Court later said in Maneka Gandhi v. UOI that "the Court's effort should be to enhance the reach and scope of the Fundamental Rights rather than to diminish its meaning and content via judicial construction." The Court emphasized the need of procedural protections. The method must meet the natural justice standard, i.e., it must be just, fair, and reasonable.

A legislation for preventive detention can only be adopted by Parliament under Entry 9, List I for grounds related to India's defense, foreign affairs, or security. Furthermore, under Entry 3, List III, Parliaments and State Legislatures can enact a legislation for preventive detention for grounds related to state security, public order, or the maintenance of critical supplies and services to the community. However, the above-mentioned items do not cover all of Parliament's legislative territory when it comes to Preventive Detention for other reasons. Apart from that, Parliament can make a legislation allowing for preventative detention on any other grounds in the exercise of its residuary authority [7].

India, the world's biggest democracy, protects people's personal liberty under Article 21 of the Constitution, but also allowing for preventative detentions under Article 22. During times of peace, no civilized country has made preventive detention a regular legislative prerogative. Preventive detention is a significant violation of the universally recognized right to personal liberty. Prior to independence, such preventative imprisonment laws were strongly resisted by freedom fighters. The Preventive Detention Act, 1950, the Maintenance of Internal Security Act, 1971 or MISA, a National Security Ordinance issued in 1980, COFEPOSA, the Terrorist and Disruptive Activities (Prevention) Act, 1987 or TADA, and other preventive detention legislations have been enacted by the Indian Parliament from time to time since independence.

As a Punishment, Preventive Detention

Preventive detention, according to Lord McMillan, is a preventative action that has nothing to do with an offense. It is to intercept a guy before he does anything and prevent him from doing it, not to punish him for what he has done. In his book "Law of Preventive Detention," Dr. Ashutosh defines the term "preventive detention" as "no offence is proved, nor any change formulated; and the justification for such detention is suspicion or reasonable probability, rather than criminal conviction, which can only be justified by legal evidence."

Preventive Detention Law, according to Mukherjea J., "the aim is not to penalize a man for having done something, but to intercept him before he does it and to prevent him from doing it." There is no accusation or proof of an offense, and the rationale for such detention is suspicion or a reasonable probability, not a criminal conviction, which can only be justified by legal evidence [8].

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The fundamental goal of preventative detention, according to Altamas Kabir, J., is to apprehend a person before he does something. To put it another way, it is not a punishment for a person's past actions, but rather a deterrent to the person from engaging in future behaviors that are banned by a relevant law, with the goal of stopping him from harming others in the future.

After reading all of these definitions provided by various learned jurists, it can be succinctly stated that preventive detention refers to the detention of a person without a trial or conviction by a court, but solely on the basis of the detaining authority's suspicion that if he is released, he will commit further crimes in the near future. Preventive detention is fundamentally and qualitatively distinct from incarceration following a criminal trial and conviction.

As a result, it would not be incorrect to say that Preventive Detention is not a Punishment in the legal sense, because he has not committed any crime and no one has been convicted in a court of law or sentenced against him. Coercive infliction of suffering in the name of the state is a requirement, according to the fundamentals that make up a punishment. Furthermore, punishment necessitates the existence of norms, their breach, and a judicial decision to that end. Preventive Detention, according to Jerome Hall's findings, is not a punishment because it does not meet the above-mentioned criteria. There may be no forced imposition of suffering, no rules that have been broken by the individual, and no decision from the courts to that effect.

Benn and flew also listed several elements of punishment, including: punishment must entail pain and its effects must generally be unpleasant, it must be for any lawful wrong, it must be delivered to an actual offender who has committed the offence, and the suffering must be imposed by a legal authority. Two requirements are satisfied, but two are not, according to this definition. Preventive Detention does cause pain (mental) and has negative repercussions. In addition, this

The power formed under a recognized legal system inflicts suffering. However, there has been no legal wrongdoing, and the individual has not yet been designated a real criminal. As a result, it is fair to conclude that the topic of whether Preventive Detention is a Punishment is as hazy as it has always been [9].

Jurists and criminologists think that current preventive detention systems are neither punishments nor can they be transformed into penalties. Deprivation based on the potential of future crime is commonly considered as a misuse of criminal law, no matter how well founded. The use of the criminal justice system as the principal tool for preventing future crimes, in the words of Paul Robinson, "seriously perverts the purpose of our institutions of justice."

According to Christopher Slobogin, criminal punishment is entirely dependent on a conviction for an infraction and can only occur if such a conviction is obtained. Preventive detention is purely based on a forecast of future transgressions, and it can only be used if such a prognosis exists. As a result, preventative detention is not a criminal offense. However, I disagree with this concept of Preventive Detention and its reach. It is my modest opinion that the core of any punishment is to take away a person's liberty or to attach a stain to his reputation. Preventive detention accomplishes both goals. Furthermore, the essence of Slobogin's argument is that no crime has been committed. However, I respectfully argue that whether or not a person commits a crime is exclusively determined by the content of positive law.

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If we wish to punish the individual, we suggest detention without charge, but we must first establish that they are guilty of a criminal violation. To do so, we simply need to modify positive legislation to enact new statutes for these people to break. The primary goal of imposing penalties on an individual is to punish him for the wrongs he has committed, and the underlying concept is usually invariably the restriction of his liberty. It is regarded as a cost he must bear. But what if a person's liberty has been taken away despite the fact that he hasn't committed any crime, but only on the suspicion that he "may" do one in the future? That obviously goes against all of the fundamental ideals that a free society aspires to.

Nonetheless, it is not seen as a punishment! In light of restriction of liberty at the whims and fancies of the detaining Authority, the conventional definitions of Paul Robinson, H.L.A. Hart, and Slobogin must be reassessed. The detaining authority in the Happy Dimple Dhakad case (above) was unable to file a COFEPOSA FIR within the statutorily prescribed time frame, and therefore had the “indefatigable right” to bail under Section 167(2) of the Cr.P.C. However, they were still unable to enjoy their freedom. Why? Because the detaining authority requested their preventative detention, which the Apex Court granted. It is impossible to say with a straight face that Preventive Detention was not utilized to deprive the accused of their liberty in this instance [6].

Following the de-operationalization of Article 370 and the revocation of Jammu and Kashmir's special status, several political leaders, including National Conference leaders Farooq Abdullah and Omar Abdullah, PDP Chief Mehbooba Mufti, and JK People's Conference leader Sajjad Gani Lone, were placed under house arrest under various preventive detention laws. Mehbooba Mufti, who was freed on October 13th, 2020 after being detained under the Public Safety Act from August 5, 2019, has the longest incarceration term. Preventive detention laws are once again being utilized to stifle people's basic rights to speech and expression, and so they cannot be considered punishment in the purest sense [10].

3. CONCLUSION

After reviewing various court rulings and detention authorities' practices, as well as theories advanced by penologists and jurists, it can be concluded that, while Preventive Detention cannot be considered a Punishment per se in strict legal and penological terms, it can be considered a Punishment when such laws are used as a weapon to deprive a person of their liberty.

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