EDITORIAL

PREVENTIVE DETENTION

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There is a vital distinction between punitive detention and preventive detention. In the case of the former the person concerned is detained by way of punishment after he is found guilty of an offence as a result of a trial where he has the fullest opportunity to defend himself. In the case of the latter, however, 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 his detention is very limited. Preventive detention is not defined anywhere in the Constitution of India. However, the law relating to preventive detention is authorised by the Constitution —vide provisions of Art 22 read with Art. 246 and Schedule VII, List I Entry 9 and List III Entry 3. Under these provisions the Parliament can pass law relating to preventive detention (a) for reasons connected with defence, (b) for reasons connected with foreign affairs, (c) for reasons connected with the security of India ; and the Parliament and the State Legislature can pass detention law (d) for reasons connected with the security of a State, (e) for reasons connected with the maintenance of public order, or (f) for reasons connected with the maintenance of supplies and services essential to the community.

In India the provision for preventive detention was first introduced by the Bengal State Prisoners' Regulation III of 1818. This Regulation was later extended to the other parts of British India. Even after Independence the preventive detention had been in operation except for the lone year of 1977. At present besides the Central Acts like National Security Act 1980, Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974, and Prevention of Black marketing and Maintenance of Supplies Act 1980, there are State Acts in almost all States to enable the executive to detain persons without trial under preventive detention laws.

Preventive detention enables the Government of a country to take undesirable persons into custody and to keep them so without trial so that the existence of the State is not jeopardised. This contrivance is born out of administrative necessity and it has to work under certain safeguards against the abuse of power of detention by the executive. These safeguards differ from country to country. In any scheme of preventive detention procedural guarantees assume significant importance. Art. 22(1) and (2) of the Constitution of India confer fundamental rights on every person who is arrested (a) to be informed, as soon as may be, of the grounds of arrest, (b) to consult and to be defended by a legal practitioner of his choice, and (c) to be produced before a magistrate within a period of 24 hours. These fundamental rights are denied to a person detained under preventive detention law. However, Art. 22(5) confers fundamental rights on the person detained under preventive detention (a) to be communicated, as soon as may be, the grounds on which the order has been made and (b) to be afforded the earliest opportunity of making a representation against the order. Besides, the courts insist on strict compliance of the procedure prescribed by the various detention laws. The procedural provisions in clauses 3 to 7 of Art. 22 of the Constitution and in various detention laws have often been criticized as not conforming to the Principles of Natural Justice. The main points of such criticism relate to denial of the right of representation by the detenu's own counsel before the Advisory Board and denial of the right to speaking orders passed by the executive on detenu's representation and by the Advisory Board while giving its opinion.

The embargo on the appearance of a legal practitioner before the Advisory Board does not extend to preventing the detenu from being aided or assisted by a friend who, in truth and substance, is not a legal practitioner. The executive preparing a case for preventive detention has legal advice at its disposal. The Advisory Board is staffed with serving or retired judges from the High Court. The detenu is pitted against such legal luminaries. Even an intelligent and educated layman has small and sometimes no skill in the science of law. He is unfamiliar with the rules of evidence. He lacks the skill to prepare his defence and does not know how to establish his innocence. The subjects covered by entries 9 and 3 of Lists I and III of the VII Schedule of the Constitution are susceptible to diverse connotations as in the case of public order and law and order simpliciter. Subjects like subjective satisfaction of the detaining authority in the context of sufficiency of grounds which is not justiceable as opposed to sufficiency of grounds in the context of effective representation that is justiceable are matters which baffle even legal minds. A layman is not expected to know the implication of addition of new facts or particulars to the grounds supplied and whether the same become new grounds to make the right to the earliest opportunity to make representation unreal. A non-legal mind may become confused as to when grounds become vague or malafide, or become vitiated by mis-application or non-application of mind. While cases of irrelevant, extraneous and inadmissible evidence and mistaken identity occur in criminal cases, such cases occur in orders of detention also. These legal niceties cannot be brought to the notice of the Advisory Board without detenu's counsel pleading before it.

At present the opinion of the Advisory Board as well as the order of the Government on the representation of the detenu need not be in the form of a speaking order. Without the speaking order the detenu cannot challenge such order in any court and the court also in the absence of details is not able to appreciate whether the order was made after proper consideration. By such denial the High Courts and the Supreme Court appear to be debarred from performing their constitutional functions under Arts. 226, 136 and 32 of the Constitution. The denial of speaking order thus denies the right of access to court, debars the court from functioning as required by the Constitution and leads to abuse of power by dishonest officers.

In India preventive detention is mostly used against public dis-order. But there is hardly any activity prejudicial to public order which does not fall under the normal penal law. Of late there has been a tendency on the part of the law enforcing agencies to resort to preventive detention rather than regular trial. Dacoits, robbers, murderers, smugglers and rowdies are frequently detained under preventive detention. At present in some States one third of the total number of convicts is equal to the number of detenus under various detention laws. The Anglo-Saxon system of administration of criminal justice followed in India requires proof of guilt beyond reasonable doubt for conviction under criminal law. Very often offenders who are rich or who can tamper with witnesses by force or otherwise are able to escape from conviction. Such escapes have been increasing day by day. At the same time the public opinion is not yet ready to replace the Anglo-Saxon system by any other system. Under these circumstances it has become essential to use frequently the provisions for preventive detention. In view of this frequent resort to preventive detention increased judicial oversight to ensure absence of misuse of the detention powers by the executive is the need of the hour. One may not be surprised if in due course judicial activism may make subjective satisfaction of the detaining authority justiceable, permit detenu to be defended by a legal practitioner of his own choice before the Advisory Board, and insist on speaking orders by the Advisory Board and the Government.

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