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PRE-EMINENCE OF THE EXECUTIVE IN PREVENTIVE DETENTION LAWS

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Abstract

The rushed amendments to the Unlawful Activities (Prevention) Act 2004 reveal that the government lacks any new ideas about how to tackle terrorism. And yet, India has the benefit of past experience, both with terrorist attacks and different legislative anti-terrorism frameworks. The recent ruling by the Jammu & Kashmir High Court on preventive detention stands as an antithesis of the Constitution's function. The ruling again recognizes the boundless executive pre-eminence which is not restricted by judicial scrutiny and any constitutional safeguard. Any review of a detention order by the court invariably follows the model adopted in the Mian Abdul Qayoom v State of Jammu & Kashmir case: an assumption that the executive knows best and that any decision made by the executive is beyond the scope of judicial enquiry. The need to curb the growing power of the executive is essential in order to uphold the constitutionality to be followed by a country. For, as Gopalan's lawyer, M.K. Nambyar , told the Supreme Court all those years ago: no amount of fine phrasing can disguise the fact that detention without trial is repugnant to the "universal conscience of civilized mankind". The paper analyses the judicial approach of the courts in matters concerning preventive detention laws under counter-terrorism laws of India.

Keywords: Terrorism, Preventive Detention, Executive, Constitutionality, Judiciary

Introduction

Subordinate legislation is disputable. A subordinate legislation is admitted to question when it is *ultra vires.* Any subordinate legislation must surrender to the source from where it obtains such authority. A subordinate legislation can manifest itself as *ultra vires* in may ways.[1] The judicial inquiry into the *ultra vires* of any subordinate legislation is limited to the examination of its legality, the court doesn't have the competence to

[1] That administrative delegation is ultra vires the Constitution or the enabling Act, is in excess of the rule-making powers conferred upon the authority, in conflict with the enabling Act (substantively and procedurally), is unreasonable, is mala fide, is in conflict with provisions of other statutes, rule-making powers are conferred in subjective terms and the same has been exercised without any nexus to the purposes of the enabling Act.

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delve into the efficaciousness or the wisdom of the legislation. The underlying idea is the control that the executive must be conditioned under.

Preventive detention laws are areas that is predominantly administrative controlled and is thus designed to confer very wide discretionary powers with administrative authorities and allow confined space for judicial scrutiny. In *GB Mahajan v. Muncipal Corpn.*[2], the court drew up a difference between the test of reasonableness under Tort and the test of reasonableness under Administrative Law, in that, the standard of reason required is that of a reasonable man under Tort Law while under Administrative Law, the concept of a reasonable man cannot be imported because a Judge cannot substitute his own wisdom with that of the administrators'. Therefore, for the purposes of Administrative Law, the standard of reason is what the statute distinguishes as proper and improper power and its exercise. The court only delves into the question of whether the rules have a rational nexus with the object and purpose of the Act enabling such rule. The courts don't probe into the relevance of the purpose of the statute or propose an alternate policy that serves the purpose of the Act more effectively, because the Court doesn't have the expertise to correct an administrative decision. This has been the judicial attitude thus far, in matters concerning executive orders of preventive detention. The principle has come to be called the 'Wednesbury Unreasonableness', according to which a decision is unreasonable if it is construed to of such kind that no reasonable authority could have arrived at such a decision. An authority cannot be expected to construct a decision that has made irrelevant considerations. This also explains why the courts have rarely probed into executive orders challenged ultra vires on ground of mala fides. Colourable subordinate delegation needs to be proved beyond doubt, it is important to prove that the impugned action has been taken with specific object of damaging a party's interest or favoring another party's interest to damage the interest of another. This is because the automatic presumption by the Court is that the legislation is bona fide unless the contrary is proved. This is more so where orders of preventive detention are challenged. Even where an individual is detained for the same cause for which he was previously prosecuted ans subsequently acquitted, he may be detained. The rationale behind this judicial view is that preventive detention is not punitive and does not require proof beyond reasonable doubt since it is 'preventive' of future actions and is thus, a precautionary measure.[3] Owing to this fact, the executive is accorded with wide discretionary powers conferred on 'subjective terms' which is discussed in the following sections.

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[2] *GB Mahajan v. Muncipal Corpn* ,[1991] 3 SCC 91.

[3] *Samir Chatterji v State of West Bengal*, [1975] AIR 1165 (SC); *State of Maharashtra v Vharao Punjabrao Gawande,* [2008] 3 SCC 613.

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The provisions from the Prevention of Terrorism Act (POTA) which was repealed in 2004, has formed the basis of the amendment made to the UAPA Act, 1967. On any subjective “belief”, the government has the power to ban any organization “involved in terrorism”. It is quite ludicrous that the remedy available under this act is that the organization can make an appeal to the Central Government first, the very establishment that banned it. The only recourse available is to appeal to a review committee which is not bound to disclose any reasoning or objective material substance. The recent ruling by the Jammu & Kashmir High Court has also favoured the existence of such ambiguous laws in the name of the executive knowing the best. The current National Security Act, 1980 remains unclear on the grounds of detention and also lacks objectivity. Section 15 of the UAPA Act defines terrorist act as-

“Terrorist act. —Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country” the complete subjectivity of this definition increases the ambit of arbitrariness.

SUBJECTIVE SATISFACTION AND NON-APPLICATION OF MIND

The right of preventive detention practiced by a state gives rise to one of the most perplexing argument- can plausible power beyond the scope of Article 22 be granted to an authority issuing an order and detaining a person. Article 22(4)(*a*) of the Indian Constitution prescribes that a detenu cannot be detained beyond three months unless the advisory board which is constituted for such concerns is satisfied that such detention needs to sustained. Such an arbitrary power granted to the executive in deciding on circumstances pertinent to detention based on the sole opinion of an advisory board forms the foundation of giving rise to *ultra vires* nature of power and authority exercised by the executive. The Preventive Detention Act, 1950 had authorised detention up to 12 months if the central or state government were “satisfied” with the fact that it was imperative to avert an individual from acting detrimental to the defence or security of India, in relation of India with foreign powers, the security of India, and security of the state or the maintenance of public order. As the order of detention is competent with that of the Advisory Board, the court has also refrained from scrutinizing the administrative decisions on the grounds that “the executive knows best”. Even though the advisory board is a quasi-judicial body, the members of the board are elected by the central and the state government who are or are qualified to be judges of a High Court. This gives rise to prejudice as they may be compelled by the governments to function as per the whims of thee government. The safeguards provided

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under the Preventive Detention Act, 1950 had shortfalls as it was unsettled on the matter of the time period of detention. They are as follows:

1) A detenu must be informed of the grounds of his detention within five days of custody.
2) Orders made by the officers under the state government must inform the latter within 12 days of the detention. This must then be ratified by the central government.
3) All orders must be approved by the Advisory Board, within from 30 days to 10 weeks of the date of detention.

This subjective satisfaction by the governments has remained unfettered till date even after the constitutional rights of a detenu have been recognised. The same can be understood with reference to the landmark case *A.K. Gopalan v State of Madras*[4] which was later overturned on the repealing of the act. A.K. Gopalan, who had been detained for three years in the Madras jail, challenged the constitutional validity of the Preventive Detention Act, 1950 in the Supreme Court of India. He contended that the act curtailed his fundamental rights guaranteed under Article 19, 21 and 22. The court held that, the parliament had the final word in the detention of a person and the extent of scope of Article 22 of the Constitution of India. Section 14(1) of the act stated that no court will have the right to produce before it any substance in relation to the detention or any public officer in order to determine the validity of the detention. In the light of this section, Kania C.J. also stated that the section prevented the court from ascertaining whether the alleged ground of detention had anything to do with the circumstances or class or classes of cases under which he was being detained. As the court reckoned only "procedure established by law" and not "due process", it gave rise to the mercurial exercise of power by the executive in matters of detention.

In 1980, another period of political regime had arisen which led to the introduction of the National Security Act, 1980. Furthermore, the constitutional validity of this act was also probed in the case of *A.K. Roy v Union of India*[5]. First and foremost, the court dismissed the plea that preventive detention is impermissible under the Constitution of India. The essential discord was in relation to Section 3 of the Act which stated that an order of detention could be made by the Government if they are satisfied or satiated with the fact that it is necessary to prevent a person from acting in a manner detrimental to the defence of India, relations of India with foreign powers, security of India, security of the State, maintenance of public order, or maintenance of supplies and services essential to the community. The obscurity of the words such as 'maintenance of supplies and services

[4] *A.K. Gopalan v State of Madras*, [1950] AIR 27 (SC).
[5] *A.K. Roy v Union of India*, [1982] AIR 710 (SC).

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essential to the community' or even 'defence of India' indicated the unbridled disposition by a detaining authority in widening its purview in correspondence with the power vested in the body to detain a person leading to impairing the right to personal liberty of the subject. Although the court accepted the premise of vagueness in the act, it still refused to hold the act invalid on the ground that the executive will take into consideration reasonableness while detaining a person as no clear-cut definition can be pin-pointed under preventive detention laws. Another viewpoint has also been considered while dealing with curbing acts of lawlessness under the Preventive Detention Act. Section 41 and 151 of the Code of Criminal Procedure, 1973 authorises police to arrest a person either to prevent the commission of a cognizable offence or as soon as a complaint has been made of the commission of a cognizable offence, without a warrant or orders from a judicial magistrate. One facet of introducing prevention detention laws by the government may be because of the procedure to be followed by producing a person before a judicial magistrate within 24 hours of arrest and further detention orders to be given only by them[6]. The government then loses the power to administer such cases as per its yearnings.

In view of the latest amendment made to the Unlawful Activities (Prevention) Act, 1967, the definition of the word 'terrorist' has raised questions in regards to the non-consideration of material facts to vitiate subjective satisfaction of circumstances. As per the amendment, the Central government has the authority to declare any individual as a 'terrorist' during any stage of investigation. Section 15 of the Act defines 'terrorist act' which essentially postulates a threat or a likely threat to the unity, integrity, security and sovereignty of India or in a foreign country or to compel the government of India or the Government of a Foreign Country or any other person to do or to abstain from doing any act. Terrorist intention contemplates an intention to: threaten or likely to threaten the unity, integrity or sovereignty of India; to strike terror in the people in order to compel the Government of India or Government of a foreign country to do or abstain from doing something. The cause for concern is the fact that this act again provides limitless power to the government as criticism of the state can be termed an act "likely to threaten" India's sovereignty, and "means of whatever nature" has included pamphlets. It the becomes essential to determine whether the executive has the power to draw only subjective satisfaction while detaining a person and if an act empowers them to disregard every constitutional protection in order to abstain a person from being a 'threat'. In actuality too, the courts have refused to probe into grounds of detention which has resulted in free reign of the executive over such matters. The same was

[6] Niloufer Bhagwat, 'Institutionalising Detention without Trial' (1978) vol. 13 Economic and Political Weekly, no. 11, <www.jstor.org/stable/4366436.> accessed on 15th February, 2020.

also stated in the case of Gopalan[7], where the court expressly stated that subjective satisfaction of a detaining authority is not open to objective assessment by the court. It also cannot determine this satisfaction is reasonable as they are in no position to regulate what is reasonable and proper. The UAPA Act has again granted such sweeping power to the government which had led to the repealing of the Preventive Detention Act after the Gopalan case.

In *Pooja Batra v Union of India*[8], the court again upheld that a solitary or single instance is also sufficient to form the basis of subjective satisfaction of the detaining authority. Though the detaining authority has to take into account the precedence and the nature of the activities carried out which led to the justiciable conclusion of the necessity to detain a person. The question which arises again is whether a single instance is adequate to issue an order of detention. Likewise, what extent of reasonability is essential in order to classify a person as a 'threat'? In the case of *Laxmi Khandsari v. State of Uttar Pradesh*[9], two conditions for reasonable classification were laid- i) that the classification must be based on intelligible differentia and rational criteria, and ii) there should be a nexus between such classification and the objective to be achieved by the statute. The labelling of an act as a terrorist act must confirm with the objective of the act which forms the base of a reasonable classification. The past acts on detention laws along with the current UAPA Act in operation lacks the reasonableness due to the subjective satisfaction being the most ambiguous clause destroying any objectivity needed. The current act in operation not provide for any definition of a terrorist, rather such definition is inferred from section 15 that deals with what constitutes as a terrorist act. Reasonable classification under Article 14 of the Constitution is indispensable so as to restrict the ambit of power exercised by the government in order to uphold constitutionality in our country. The subjective satisfaction can be reviewed before a court, but the extent of this safeguard is again contentious. Thus, such a satisfaction can be called into question on grounds of *mala fides* and non-application of authority's mind if such satisfaction is based on irrelevant grounds[10]. This safeguard is again superficial and inconsequential as the court does not delve in into the adequacy of the grounds on which a detention order was issued. It solely scrutinises whether the grounds for detention can be reasonably drawn by the detaining authority. Therefore, obscuring the line between subjective satisfaction and objective assessment. Even after the growth of judicial activism in India, where due consideration is being given to 'due process' over 'procedure established by law', laws on detention has subverted this progress. Such acts have either been repealed on called into

[7] n(1).
[8] *Pooja Batra v Union of India*, [2009] AIR 2256 (SC).
[9] *Laxmi Khandsari v. State of Uttar Pradesh*, [1981] AIR 873 (SC).
[10] *Gurdev Singh v Union of India*, [2002] AIR 10 (SC).

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question due to the non-conformity with the principle of natural justice, and lack of such a law being reasonable, fair and just.

While comparing the mechanism of anti-terror laws in the Australian Commonwealth to that of the set-up in India, it can be noted that the Commonwealth ombudsman provides for a review mechanism of executive action pursuant to anti-terror legislation[11]. This clearly upholds the balance between human rights and national security of the country. The same way, a thorough scrutiny by the judiciary will provide a degree of protection to the citizens of the country against executive misuse. The only judicial remedy available is that of the writ of *habeas corpus* which can be negligible as the court often does not look into the objective substance needed to determine the validity of an order of detention. Application of mind while issuing an order of detention would entail specifying the ground of order based on the respective act. For example, taking into cognizance the National Security Act which is currently in operation, 'Public order' and 'security of state' are two separate grounds for detention. If a person is being detained under both the grounds, then the word 'and' must be stated expressly, otherwise the use of word 'or' signifies ambiguity. By applying the word 'or', it brings forth the non-application of mind of the detaining authority as it portrays that the authority is not certain of the activity of falling under which ground. This implies that the order was produced merely mechanically underneath a statutory formula[12]. In the case of *Raj Prakash v ADM, New Delhi*[13], a district magistrate had passed a detention order on the direction of a senior officer unaccompanied by any grounds on record for detention. This was held to be void by the court as the magistrate can only pass such an order if he is personally satisfied on the material substance before him. But a black mark on such a remedy is clearly seen in the current UAPA Act, as the Act specifies no procedures that the government must follow arriving at its belief that an order of detention must be passed. In conclusion, justice to be provided to the detenu is either delayed or not imparted altogether.

CONCLUSION

The efficiency of judicial control depends on how broad is the power of delegated legislation being conferred upon the delegate, by the enabling statute. The Doctrine of ultra vires becomes otiose because broader the powers conferred upon the administrative authority, the harder it gets for the courts to control such delegation effectively because the court cannot import its wisdom in deciding ultra vires, it must bind itself to only what is the extent of powers being conferred upon the delegate. If the powers being conferred are too broad, so will

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[11] *Report of the Security Legislation*, (Review Committee, June 2006).
[12] *Kishori Mohan v State of West Bengal*, [1972] AIR 1749 (SC).
[13] *Raj Prakash v ADM, New Delhi*, [1978] AIR 17 (Del).

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the court's interpretation of the same, the parameters within which judicial control must operate is also very broad and this brings to light the judiciary's unconversant knowledge about the technicalities with which the executive functions with on a daily basis. The problem with conferring wide discretionary powers to the executive in terms of 'subjective satisfaction of the executive' invariably results in misuse, specially under anti-terrorism laws where individuals are being notified as terrorists for possessing an ideology that is antithetical to the government's interests. Conferring powers in the nature of 'subjective satisfaction' of the executive is in itself too wide for the judiciary to control and this feature is being exploited by the executive. Therefore, it becomes necessary to define the limits wherever wide discretion is being bestowed upon the administrative authorities. Article 22 requires revaluation, A. 22(7)(b) which endows the parliament to prescribe under any law the maximum period for detention, ought to be amended. The maximum period for detention should be prescribed under the Constitution. The composition of the advisory board provided under Article 22(4) must be refashioned, the fact that the advisory board is the body for reviewing a representation made by the detenu against the government's order is for a fair hearing of the detenu, but where the authority reviewing such order is by itself appointed by the government such a authority is incapable of applying judicial mind. Additionally, the interposition of the advisory board appointed by the government creates multiple levels of communication vested with the same authority. When the government is already considering the representation made by the detenu, the same is presented to the advisory board, that is appointed by the government, for consideration of the representation. The advisory board should be appointed by the chief justice, for fairness. In *Mian Abdul Qayoom v. State of Jammu and Kashmir*[14], the petitioner has been detained for over six months since the abrogation of Article 370, which according to the government is "to prevent him from acting in a manner that is prejudicial to the maintenance of public order". The petitioner contended that the grounds of his detention were vague and that the material used in forming the 'subjective satisfaction' of the executive were first information records lodged back in 2007 and 2008, for which he had already faced detention. In what is becoming common sight, the Court ruled in favour of the State. It called 'preventive detention' as the primordial functions of the State that the need for such laws are felt more strongly than ever, in order to give impetus to the liberties of people, thus, the political executive must be given considerable immunity as to when these powers are summoned by the executive. This is clearly establishing executive preeminence. Further, the court held that the court had no competence to inquest into the whether or not the detaining authority's satisfaction was reasonable nor does it have the competence in imputing whether or not the person should've been detained under the given circumstance. The greatest

[14] *Mian Abdul Qayoom v. State of Jammu and Kashmir*, CrlM No. 727/2019, J&K HC.

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amount of scrutiny that the court can allowed to be done would be in seeing if the grounds of the detention order, whether reasonable or not, bears some nexus with the objective of the Act. The Public Security Act of Jammu and Kashmir, under which the petitioner is being detained, provides for detention for up to two years and can be extended. The Supreme Court, in *Jaya Mala v. Home Secretary, Government of Jammu and Kashmir*[15], has called the Act a "law less law", whereby criminal trials are under the threat of being replaced by excruciatingly long periods of detention without trial. The Act has been tackled by successive governments as an instrument to quell dissent. Any review made to the court, yields only decisions such as that which is found in Qayoom's case, an attitude of the Courts that exclude judicial scrutiny from administrative orders on the presumption that the judiciary cannot replace its wisdom for administrative expertise. This reduces judicial control to a delusion with no real significance, what judicial control ought to have done was to protect the Constitution which already apprehends the inherent dangers of vesting unbridled powers such as these on the Executive.

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