
PREVENTIVE DETENTION: EXTRAORDINARY LAW OR A LIE?

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ABSTRACT

The Preventive Detention Laws have been classified as a black spot on the Constitution by many scholars. During 1950s the legislators and the courts defended the Preventive Detention law as an extraordinary measure or an extra ordinary rule to be used in exceptional circumstances. However, we have lately witnessed that the Preventive Detention laws are being used in addition to the ordinary laws to curtail dissent, and punish the dissenters. This paper looks at the Telangana Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders and Land-Grabbers (Amendment) Act, 2018 and see how the Preventive Detention is attempted to be extended to ordinary offences as well using the framework of State of Exception. The paper argues that Preventive Detention is being used to circumvent due process and procedure, and is invoked for ordinarily preventable offences. The paper finally look at the distinction between law & order and public order and culminates with some specific observations.

Keywords: Preventive Detention, State of Exception, Constitutional Law, Telangana, Arrest, Detention.

Introduction

While many Indian scholars have taken pride in the liberal and democratic rights enshrined in the Indian Constitution, what is never mentioned that the Indian Constitution is one of those few constitutions of the world enclosing the provisions for preventive detention. Article 22 of the constitution deals with the preventive detention. Further, Entry 9, List I empowers the Central legislature to make law on preventive detention. Similarly Entry 3 in List III empowers the state and central legislature concurrently.

This system forms the foundation to many states and the central legislations on the preventive detention. In this article, I shall attempt to study the Telangana Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders and Land-Grabbers (Amendment) Act, 2018 [Amendment Act].¹

The Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders and Land-Grabbers Act, 1986 was enacted in the year 1986, and the same was adopted by Telangana on 02.06.2014 [PD Act].² Under the act, a person can be preventively detained for a maximum period of one year. The territorial jurisdiction of the district magistrate and commissioners extend beyond boundaries of Telangana itself.

In past, the act has greatly curtailed the powers of the courts in granting bail or any other reliefs to the persons against whom the act has been invoked. The only recourse is a writ of *habeas corpus*, but the same has not been much successful. Between April 2015 and May 2016, more than 250 detention orders made, however, only around 40 came to be heard on merits and the final judgment was reached in about 18 cases, that are publicly available. In these, the order was upheld only in 4 cases.

However, even in the cases where the detention orders were quashed, the courts had taken a minimalistic approach³ only looking at the internal process laid down in the act. Majorly the

¹ The Telangana Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders and Land-Grabbers (Amendment) Act, 2018, No. 13, Act of Legislature, 2018.

² Telangana Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders and Land-Grabbers (Amendment) Act, 1986, No. 33, Act of Legislature, 1986.

³ Mrinal Satish & Aparna Chandra, *Of Maternal State and Minimalist Judiciary: The Indian Supreme Court's Approach to Terror-Related Adjudication*, NSLR, 51-89, (Vol. 21, 2009).

orders were quashed for non furnishing of the detention order to the detainees or non-observance of the timeline.⁴

The concerned amendment was made in 2018 introducing the following activities in the ambit of the act.

Spurious Seed Offenders, Insecticide Offenders, Fertiliser Offenders, Food Adulteration Offenders, Fake Document Offenders, Scheduled Commodities Offenders, Forest Offenders, Gaming Offenders, Sexual Offenders, Explosive Substances Offenders, Arms Offenders, Cyber Crime Offenders and White Collar or Financial Offenders.

It thus appears that the intention of the legislature was to increase the ambit of the PD Act and to invoke the PD against the person committing ordinary offences as well. As the Governmental Orders (GOs) and other data is not available post 2016, the actual/on ground implications of the amendment has not been studied. Rather, a doctrinal approach is taken to understand the amendment in the broad framework of state of exception. While it can be argued that these additional grounds may not actually be invoked, and they are added as tokens, but they might still have a chilling effect and add to the powers of police tremendously.

State of exception

The state of exception is a process by which government allows the rule of law to be dismissed in name of a specific cause or issue. The state of exception can be located on the emergency provisions provided in various constitutions to take extra-ordinary measures in times of unforeseeable events like, wars, internal aggression, or external aggression etc.⁵ Article 352 of the Indian constitution exemplifies this.

However, Agamben has claimed that world is moving to a *global civil war* i.e. a war of all against all, coming closer to the Hobbes' state of nature. This leads to continuous state of exception and the state of emergency or the state of exception becomes the norm.⁶

⁴ Ishwar Lal v. State of Telangana, MANU/AP/0624/2015.

⁵ Derek P. Jinks, The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India, 22 MICH. J. INT'L. L. 311 (2000-2001).

⁶ Rod Jones, *Global war and the state of exception*, Open Democracy (Oct. 8, 2013), <https://www.opendemocracy.net/en/opensecurity/global-war-and-state-of-exception/>.

Taking the idea further, Riccardo Cascioli⁷ argues that fear is created in the minds of the citizens, making them believe that they should sacrifice their liberties to experts and scientists. Thus, ultimately it becomes impossible to distinguish between actual and created emergencies.

In the context of preventive detention, if we see fears of public disorders are invoked to justify the subjugation of the liberties. The provisions that were justified using the arguments of extraordinary times of partition distress, are now widely used for ordinary times. The procedural safeguards laid down in the ordinary laws are circumvented using these extraordinary laws. In light of this, the Amendment act will be studied on following heads.

- a. Circumventing the ordinary laws
- b. Ordinarily preventable offences.
- c. Public order v/s law and order

Circumventing the ordinary laws

The one argument that is often made is that the courts are very generous in granting of bail, making it difficult for the executive to curb the crimes. The same line of argument was taken by the MP introducing the bill, had listed the same reason for pushing forward the amendment.⁸ In some cases, the granting of bail has been claimed as the sole reason for invoking the extraordinary powers under the PD Act.⁹

However, the Amendment Act not only curtails the powers of the court in granting bail, but also circumvent the legislations dealing with the specific crimes that are now listed in the PD Act. This segment highlights how the Amendment act circumvent the provisions on two counts, i.e. bail provisions and duration of incarceration.

i. *Bail provisions*

The amendment act brings certain offences under its ambit, which have inbuilt statutory provisions for the bail. The executives argue that the courts overstep and give

⁷ Ricardo Casicoli, *The continuous state of emergency is euthanising democracy*, New Daily Compass (Oct. 29, 2021), <https://newdailycompass.com/en/the-continuous-state-of-emergency-is-euthanising-democracy>.

⁸ Telangana Legislative Assembly Debate; November 9, 2017, page 44.

⁹ Muppidi Swapna vs. The State of Telangana and Ors. (30.03.2016 - HYHC) : MANU/AP/0178/2016.

discretionary bails, but this line of arguments fall flat, if one considers that there are many offences under which the bail can be granted to the accused.

For instance, 77B of the Information Technology Act, 2000¹⁰ the offences for which the maximum punishment is less than 3 years, are bailable, the majority of the offences under the IT act are thus bailable. Similarly, offences in the Food Adulteration Act, 1954¹¹ are bailable except in 20(1AA).

Offences under sections 354A, 354C and 354D are bailable (they fall under the definition of the Sexual offenders under the Amendment Act). Similarly offences under IPC 417, 465, 469-475, and 486-489 are bailable, which are covered in the definitions of the White Collars or Financial offences.

ii. Period of incarceration

The Amendment Act, brings certain act under the ambit of the PD act, for which the period of incarceration may well be lesser than one year (duration of PD).

For instance, the spurious seeds offences, under Seeds Act, 1966¹² envisions the maximum imprisonment of six month as per section 19, but by invoking the PD act, the same person can be subjected to a maximum imprisonment of one year. Similarly for certain offences under the Insecticide Act under section 29(2), the maximum punishment is 6 months.¹³ Similarly, under Section 25 of the Telangana Forest act, 1967,¹⁴ envisions a maximum punishment of three months for pasteurizing, similarly, for general rule contravention, the maximum imprisonment envisioned is that of six month (section 27). For any unrelated offence, the punishment is 6 months (section 68). In the similar manner, for gaming offences, the maximum punishment is less than 1 year.¹⁵

Thus, it becomes clear how the act in garb of maintaining the public order is circumventing the provisions and safeguards laid down in various legislations, even for the trivial ones for which the maximum punishment is less than one year.

¹⁰ The information Technology Act, 2000, No. 21, Act of Parliament, 2000.

¹¹ The Food Adulteration Act, 1954, No. 37, Act of Parliament, 1954.

¹² The Seeds Act, 1966, No. 46, Act of Parliament, 1966.

¹³ The Insecticide Act, No. 46, Act of Parliament, 1968.

¹⁴ The Telangana Forest Act, 1967, No. 1, Act of Parliament, 1967.

¹⁵ The Telangana Gaming Act, 1974, No. 27, Act of Parliament, 1974.

Ordinarily preventable offences

There are certain offences that are brought under the PD Act, through the Amendment in 2018, despite the fact that these offences can be prevented or checked through the ordinary yet elaborate provisions laid down in ordinary legislations itself. Some examples of the same is discussed in this segment.

The Seeds Act in section 10 provides that the certificate which is mandatory for a person for selling or keeping the seeds, can be revoked. The revocation of such certificate is an effective method to curb majority of the contravention. Further, section 15 of the same lays down the procedure to be followed by the seed inspectors and the seed analysts/laboratories under which the written notice is to be furnished, and the samples of seeds are to be delivered to the accused and laboratories. The finding of seed analysts is to be produced. The provision balances public concerns and the procedural fairness, this is adequate to prevent to offence. There is no reason to circumvent these provisions by invoking the extraordinary laws, especially when the scientific evidence is significant, but the discretionally powers that the PD act gives by use of *public order* and *reasons to believe*, these provisions can be circumvented.

For the Insecticide offences similarly, the license required for importing, selling, producing the insecticide, section 14 of the act empowers the licencing authority to revoke, amend and suspend such certificates. Section 22 lays down similar procedural as the Seeds Act, to be followed by the insecticide inspector. Identical establishments for the central and state laboratory are there under the Food Adulteration Act and Food Safety and Standards Act, 2006.¹⁶

Finally, it is important to briefly mention the Fertilizer offenders, the fertilizer order, 1985,¹⁷ under the Essential Commodities Act, 1955. The laboratories are established (rule 29), the provisions of issuance and renewal of certificates (rule 9 and 10) are there. But what is more important is that the rules embodies many procedural requirements like record keeping, facility maintenance, the failure of the same can also be used for the PD act, despite there being hardly any element of public concern present, as the entire order is made applicable under the definition of fertilizer offender. The open ended definition of the offenders/offences is a theme

¹⁶ S. 43, The Food Safety and Standards Act, 2006, No. 34, Act of parliament, 2006.

¹⁷ The Fertiliser (Control) Order, 1985, No.11-3/83-STU.

common to the preventive detention legislations.¹⁸ For example one can look at the definition of *goonda* in the PD Act which encompasses 3 entire chapters of IPC.

Public order and Law & Order

The public order can be given a very wide definition, encompassing anything and everything directly and if not, then tangentially. However, a distinction has to be drawn between the matters pertaining to the public order problem and those pertaining to law and order problem.

The distinction has been explained recently in the case of *Banka Sneha Sheela vs The State Of Telangana*¹⁹ drawing from *Ram Manohar Lohiya v. State of Bihar*²⁰ in terms that while law and order problems include *a wide spectrum* of problems ranging from a minimum disturbance to catclysemic disorder. Whereas the public disorder will only include those situation where there is a probability of public disorder, i.e. public fighting. This is elaborated by differentiating the case of two drunkard fighting and two person representing different communities fighting. While in the former the law and order problem is there, in latter a public order problem can be seen.

It is only in the case of latter, can the extraordinary powers can be invoked, as far as problem of law and order is concerned, the ordinary laws only should be used. The police should not be allowed to take the easy route in such cases.

If one is to proceed with the above discussed logic, then one sees that a lot of the offences covered under the PD act are pertaining to the problem of law and order only and not public order. For an instance, if one looks at the discussion round the seeds offenders, fertilizer offenders etc, in preceding segment, one can reasonably conclude that in most cases these would not include any question of public order.

It is not necessary that what constitutes public order during the inception of the Constitution may continue to be soon. The problem of public order is evolving. If one look at Entry 3 List 3, listing *maintenance of supplies and services essential*, as one of the ground for the preventive detention. The same has been carried forward in various legislations, and in PD act as well. It has been argued that in 1950, the times of wars and destruction were there and the unification

¹⁸ *Supra* no. 3.

¹⁹ *Banka Sneha Sheela vs The State Of Telangana*, SLP (Cri) No. 4729 of 2021.

²⁰ *Dr. Ram Manohar Lohia v. State of Bihar*, [1966] 1 S.C.C 709.

of the territories and scarcity of the crops and import facilities had made the access to essential commodities as moot point, but in present time, going ahead with the same assessment is not proper.²¹ Thus, the problem of the essential commodities supply is question of law and order only.

The Forest offender's definition in the Amendment Act makes non observance of the Telangana Forests Act and the Wildlife Protection Act,²² The aim and object of the Telangana Forest Act is to secure the national wealth and forests. The preservation of national wealth while indeed necessary, does not directly impact the public order. While it may have an impact on the general population, but a causal relationship to order is not there. Further, there have been recorded instances in work of Mahashweta Devi,²³ noting the use of preventive detention against the local tribe which is very concerning as the state of Telangana has a tribal population of around 10%.²⁴

Another, area where public order is not involved is that of white collar offences, as the same is a matter of law and order. Although, it is unlikely that state will invoke the PD act against the white collar offenders.

Current observations

The discussions in the preceding section shows the issues with the law itself. Before concluding it becomes important to look at the PD act in practise, which exacerbates the concerns.

Firstly, one may claim that the Amendment act although brings some minor offences in its fold, but it is only used against repeat and hardened offender. This line of argument falls on two counts. First, even hardened criminals have the right to get proper process. Secondly, in practise a single act is charged with multiple counts of offences to slap the preventive detention. In *Malla Reddy v. State*²⁵ we saw how a sheet was opened against an accused for one single crime only. The High Court further in *Aabhrana v. State of Telangana*²⁶ has condemned the same practise. This is made possible by using vague and open ended definition. For example, to

²¹ Jaya Mishra, *Preventive Detention: A Necessity*, JIID, 22, (2, 2017).

²² The Wild Life (Protection) Act, 1972, No. 53, Act of Parliament, 1972.

²³ Salgado M. Tribal Stories, Scribal Worlds: Mahasweta Devi and the Unreliable Translator. *The Journal of Commonwealth Literature*. 2000;35(1):131-145.

²⁴ The Censes, 2011.

²⁵ M. Malla Reddy vs. The State of Telangana and Ors., MANU/AP/0404/2015.

²⁶ Aabhrana v. State of Telangana, WP (Cri.) 22 of 2017.

classify a person as *Goonda*, for a single offence, multiple sections of IPC may be slapped as separate counts,

Secondly, as seen in the initial segment of the paper, the judiciary has limited powers in terms of Habeas Corpus, and only limited number of cases are finally heard on merits and the final judgment is reached in less than 10% of the cases. This is also due to the fact that usually PD act is slapped against the people who are powerless and poor. Usually, the rikshaw drivers, bus conductors etc are classified as *goondas*. These people do not always have the resources to reach the court, or making a convincing case.

Thirdly, one can say that a necessary check to the powers of the District Magistrate and the Commissioner is present in the form of the advisory board, ideally the retired judges sit there. But in practise, the board mechanically affirms the finding of the commissioner. The board does not give the proper hearing to the accused. It would not matter who sits at the board. The board becomes the indistinguishable part of the executive.

Conclusion

By way of conclusion, the paper has tried to understand how the law made for the extraordinary times are slowly begun to be used in the ordinary times and we move to continuous state of exception. The first segment shows how under the state of exception, the rule of law is denied, and the ordinary laws are circumvented. In the next segment it is seen, how ordinary laws are sufficient to deal with the problem of disorder, yet the extraordinary law is invoked in the first instance. Finally, it is seen that in the continuous/permanent state of exception, the law and order problem is subsumed in the public order problem.

In *AK Gopalan v. State of Madras*,²⁷ it was said that preventive detention should not be used on ordinary times and that it is a law of extraordinary circumstances and to be sparing used. But we do not see the same happening. It is the rather diagrammatically opposite, where it is a possibility that preventive detention will become the norm soon.

²⁷ *AK Gopalan v. State of Madras*, 1950 AIR 27, 1950 SCR 88.