A COMMENTARY ON NATIONAL SECURITY ACT, 1980

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ABSTRACT

National Security Act, 1980 has been the subject of ire and disrepute ever since its inception. The law has been widely criticized for being a purely executive-driven process granting the executive extraordinary powers to curtail the personal liberty of any person. The Act enforces preventive detention, which has been accorded constitutional sanction by the Constitution-makers. So far India is the only country in the world which prescribes for preventive detention during peaceful time, wherein any person can be ordered to be detained by the executive authorities on mere grounds of suspicion that they can pose imminent threats to national security, security of state, maintenance of public order etc. Independent India has witnessed widespread abuses of this law, wherein often the State authorities have deployed the law, not to prevent but to pursue punitive measures, against persons. The paper shall delve into the subject investigating the lacunae and loopholes in the legal front which facilitate the arbitrary exercise of the preventive detention powers by executive authorities with almost complete impunity.

Keywords: Preventive Detention, National Security Act, Article 22, Supreme Court, Rule of Law, Right of Personal Liberty, Rule against arbitrariness

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INTRODUCTION

When does a law become draconian?

Are laws born draconian?

Do laws have a life of their own?

And if they do, do they have a soul?

What if law does have a soul?

Perhaps it would be sensible to question then, if the law inhabits the soul of 'Constitutionalism'; or is it possessed by a spectre of 'Arbitrariness'?

In any case, should such a law which serves merely as a conduit for the spirit of 'Rule of Law' or the ghost of 'Arbitrariness' be revered by the parishioners who consume its body merely, for the sole reason that, it is served in a platter of democracy?

These questions perhaps might serve as impressions of irresponsible anthropomorphism, but they essentially imbue the kind of inquiries which must be made in any judicial investigation under any legislation. In fact, it is essentially, the absence of such an investigation into law in recent times, which foretell a series of presumptuous episodes such as the 'Name and Shame' campaign,[108] the Vikas Dubey fake encounter case, booking of students protesting the CAA[109] under the stringent UAPA[110] law, or the exploitation of legal framework for political vendetta by public officials and constitutionally elected governments.

It is the existence of such legal machinations which allow room to serve the arbitrary instincts of the political masters rather than the 'Rule of Law' and the 'brooding spirit of democratic constitutionalism', which serve as the oars for the aristocracy to row itself through the 'checks and balances' of democratic setup and forever ride in the boat of absolute power. Moreover, it is through these machinations that such governing classes rule and hold on to the power by destroying any challenge to their authority, all the while utilizing the

[108] SNS Web, 'UP Brings Ordinance on Damage Recovery After SC Said 'No Law' on 'Name and Shame' Hoardings' *The Statesman* (New Delhi, 14 March 2020) <https://thestatesman.com/india/up-brings-ordinance-on-damage-recovery-after-sc-said-no-law-on'-name-and-shame-hoardings-1502865642.html> accessed 10 September 2020.
[109] The Wire Staff, 'Invocation of Sedition Laws, UAPA Against CAA Protesters Illegal,' Say Activists' (*The Wire*, 24 April 2020) <https://thewire.in/rights/anti-caa-protesters-uapa-caa> accessed 10 September 2020.
[110] Unlawful Activities (Prevention) Act 1967.

constitutionally established democratic setup to award their position legality and (make) themselves less vulnerable to attack by the servile class.[111] Thus, Dr. Ambedkar believed that, *"in devising a Constitution for democracy he (one) must bear in mind: that the principal aim of such a Constitution must be to dislodge the governing class from its position and to prevent it from remaining as a governing class for ever*."[112] In fact, he believed that the Western writers who considered democracy to be an ad-combination of 'constitutional morality, adult suffrage and frequent elections as the be-all and end-all of democracy' were very much flawed and rather 'they are doing nothing more than and nothing different from expressing the point of view of the governing classes.'[113]

The contention of the paper therefore is to investigate, how far is preventive detention justified in the scheme of the Constitution and its promised liberties? Whether the 'preventive detention' provisions of Article 22 and its derivative legislations can be allowed impunity to trample upon all the other guaranteed fundamental rights of the Constitution? How far can such anachronism on the face of Constitution be allowed to dictate the whole scheme of India's democratic setup? And if it is indeed allowed, then are we still a viable democracy in essence or a farce republic which is living in its democratic credentials only on paper? Following propositions shall be dealt in the paper.

RECENT TREND

In present times, it is the misuse of National Security Act, 1980[114] (the governing law mantling the procedure and principles for prescription of 'Preventive Detention' under Article 22 of the Indian Constitution) (hereinafter referred to as NSA), which has served as the greatest weapon in the arsenal of public officials and elected governments to execute irresponsible (yet legally valid) incarcerations of citizens without any fear of judicial scrutiny. In its four decades of existence, the law has served to be in the news for all sorts of wrong reasons. The crude humour of the story of its enforcement being that it has, more often than not, been used for settling political scores, curb dissent and even in quarrel amongst children concerning a cricket match.[115]

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[111] Rodrigues Valerian (ed), *The Essential Writings of B R Ambedkar* (OUP 2004) 64.
[112] ibid.
[113] ibid.
[114] The National Security Act 1980.
[115] 'When UP Invoked National Security Act Over Cricket Match in Muzaffarnagar' (*News18*, 15 November 2018) <https://news18.com/news/ivideos/when-up-invoked-national-security-act-over-cricket-match-in-muzaffarnagar-1940273.html> accessed 9 September 2020.

With a surge of the number of cases booked under the NSA in recent times, in which different State governments have invoked the harsh law to detain citizens extra-judicially for questionable and petty offences, the NSA has been brought under scrutiny for its potential abuse by the authority. The latter half of December 2019 saw the Uttar Pradesh government pursuing an aggressive drive to curb the Anti-CAA protests by belligerently deploying the NSA against an estimated 5,558 citizens (mainly peaceful protestors) while arresting 1,113 persons, all within a span of 2 weeks of the protests.[116] Other states also followed the same pattern for curtailing widespread peaceful protests within their territories, while the Supreme Court refused to interject with the discretion of the State governments or to question the legality of the imposition of NSA.[117] In the most recent instance, the Uttar Pradesh Additional Chief Secretary (Home) Awanish Kumar Awasthi openly and rather proudly brandished the misappropriation of the law by the State government when he said that, the government has booked 76 (more than half) of the total 139 people under NSA in the month of August 2020 for cow slaughter. It entrenched the narrative of the Hindutva politics and it conflated cow-slaughter and beef-consumption as issues which threaten national security.[118] The figure must be contrasted with the fact that the number of people considered as threat to the national security for their involvement in heinous crimes was mere 37 during this period (which is less than half of the number of people booked for cow slaughter).[119]

However, a recent trend has been reported by several organizations wherein imputations of foul play have been cast on the State Governments for playing on to the majoritarian sentiment by specifically deploying the NSA to target the minorities and lower castes in BJP led states, particularly Uttar Pradesh.[120] While the BJP led Uttar Pradesh, has seen some gross

[116] Omar Rashid, 'Anti-CAA Protests: 1,113 Arrests 5,558 Preventive Detentions 19 Dead in UP' *The Hindu* (Lucknow, 26 December 2019) <https://thehindu.com/news/national/anti-caa-protests-1113-arrests-5558-preventive-detentions-19-dead-in-up/article30402858.ece> accessed 12 September 2020.
[117] PTI, 'SC Refuses to Entertain Plea Against Imposition of NSA Amid Anti-CAA Protests' *The Economic Times* (New Delhi, 24 January 2020) <https://economictimes.indiatimes.com/news/politics-and-nation/sc-refuses-to-entertain-plea-against-imposition-of-nsa-amid-anti-caa-protests/articleshow/73578327.cms?from=mdr> accessed 12 September 2020.
[118] The National Security Act 1980, s 3(2).
[119] Manish Sahu, 'In Uttar Pradesh, More Than Half of NSA Arrests This Year were for Cow Slaughter' *The Indian Express* (Lucknow, 11 September 2020) <https://indianexpress.com/article/india/in-uttar-pradesh-more-than-half-of-nsa-arrests-this-year-were-for-cow-slaughter-6591315/> accessed 11 September 2020.
[120] Neha Dixit, 'In Run up to 2019, NSA is the Latest Weapon Against Muslims in UP' (*The Wire*, 10 September 2018) <https://thewire.in/rights/in-adityanaths-up-the-national-security-act-is-latest-weapon-against-muslims> accessed 13 September, 2020; PTI, 'NSA Slapped Against Quarantined Tablighi Jamaat Members Who Harassed Nurses in Ghaziabad' (*The Print*, 3 April 2020) <https://theprint.in/india/nsa-slapped-against-quarantined-tablighi-jamaat-members-who-harassed-nurses-in-ghaziabad/394708/> accessed 13 September 2020; Ghazanfar Abbas, 'SC Should Act on Misuse of NSA Against Muslims, Dalits in UP: Activists' (*Clarion*

abuses of the law, it must be noted that other states ruled by other parties have not been lagged behind in the deployment of NSA provisions for political mileage. The Kamalnath-led Congress government in Madya Pradesh also reportedly misused the law last year in February 2019 where it booked 3 men under NSA who were accused of killing a cow. This move was heavily criticized for portraying vote bank politics to win the favour of the hardcore Hindutva followers.[121]

The 1975-77 nationwide Emergency witnessed Indira Gandhi usage of NSA's predecessor MISA (Maintenance Of Internal Security Act, 1971) to decimate dissent by sending more than 1,75,000 citizens (which included the entire opposition) under 'Preventive Detention' to the prison. The period was often referred as the 'Darkest days' of the Indian democracy and it also saw the most powerful institutions in the country bending their knees to the despotic rule of a democratically elected Executive, thereby animating the prophetic dictum of Dr B R Ambedkar that, "*in a democracy adult suffrage can produce government of the people in the logical sense of the phrase, i.e., in contrast to the government of a king. But it cannot by itself be said to bring about a democratic government, in the sense of the government by the people and for the people*." The Supreme Court had struck its lowest point during this period when in *ADM Jabalpur v Shivkant Shukla*[122], the Judges in ratio of (4:1) held that the courts shall not entertain 'Habeas Corpus' petitions or shall grant relief to persons detained under preventive detention. Since, during an emergency their right to life under Article 21[123] ceases to operate. This case was however, overruled in subsequent judgments with a final burial in *K S Puttuswamy v Union of India*.[124]

And perhaps this is a tragedy that the decisions of the Supreme Court post-Puttuswamy judgement have often failed to arouse the judicial conscience to uphold individual's right to life and liberty when it is threatened with extra-judicial detention.

Currently, no statistical data has been released in the public domain regarding the number of people who were booked under the NSA by the NCRB or any government agency. Therefore, an exact estimate of the number of cases booked under the law cannot be officially

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India, 12 September 2018) <https://clarionindia.net/sc-should-act-on-misuse-of-nsa-against-muslims-dalits-in-up-activists/> accessed 14 September 2020.

[121] The Wire Staff, 'NSA Invoked Against Three Men Accused of Cow Slaughter in Congress-Ruled MP' (*The Wire*, 6 February 2019) <https://thewire.in/government/madhya-pradesh-nsa-cow-slaughter> accessed 12 September 2020.

[122] *ADM Jabalpur v Shivkant Shukla* (1976) 2 SCC 521.

[123] The Constitution of India, art 21.

[124] *K S Puttuswamy v Union of India* AIR 2017 SC 4161.

determined. The Act in itself also does not postulate any accountable mechanism to maintain such a record. The last available statistics was provided in the 177th Law Commission Report (2001) wherein the total number of persons arrested under preventive provisions in India was reported to be 14, 57, and 779 (excluding the ex-State of Jammu and Kashmir).[125]

OVERVIEW OF THE NATIONAL SECURITY ACT, 1980

The National Security Act, 1980[126] was enacted in pursuance of Article 22(7) to bring a legislation to deal with 'preventive detention' which essentially connotes detention without a trial. Unlike 'punitive detention' whose object is to prescribe punishment to a person for an offence after being subject to judicial scrutiny through a court trial, 'preventive detention' seeks to prevent the person from committing such offence prescribed in the preventive detention law. Upon contrasting with the other countries of the world including the USA and the UK (which have a history of prescription of preventive detention during the time of emergency or war), India happens to enforce it as an ordinary law of the land even during peace time. The genealogical roots of the Act can be traced back to the Preventive Detention Act, 1950 and its subsequent counterpart Maintenance of Internal Security Act, 1971 (MISA) (both repealed now), essentially branding NSA as an 'old wine in a new bottle', since it retains the stringent character of its predecessors.

The Act allows the Central Government, State Governments as well as the empowered state official (District Magistrate or the Commissioner of the Police) to order detention of any individual if they believe to their 'subjective satisfaction' that the person might act in a manner which can be prejudicial to the 'defence of India', 'the relations of India with foreign powers', 'security of India or state', 'maintenance of public order' or 'maintenance of supplies and services essential to the community' or if he is a foreigner to regulate his presence in India or to make arrangements for his expulsion from India. Such a person is afforded constitutional safeguards as mentioned in Article 22(4) to Article 22(7) of the Indian Constitution:

1. The Government is entitled to detain such person in detention and it should not be beyond 3 months. If the detention is sought to be extended beyond the said period, it must be ratified by an advisory board which shall look into the merits of such demand

[125] Law Commission of India, *Law relating to Arrest* (Report No 177, Law Commission of India 2001) 8.
[126] The National Security Act 1980.

after considering all available circumstances, evidence, facts and representations. (Article 22(4)(a))

2. The detenu must be accorded the earliest opportunity of making a representation to the detaining authority against such order of detention. (Article 22(5))

3. The detenu shall, as soon as may be, informed of the grounds of his detention (except the facts which the detaining authority considers to be against the public interest to disclose). (Article 22(6))

The NSA further elaborates the procedure of 'preventive detention' as framed by the Parliament under Article 22(7) of the Constitution.

Following are the main highlights of the Act:

1. The person detained under NSA does not have the right to legal representation. (Section 11(4))
2. The Central Government, State government, as well the District Magistrate or Commissioner of Police can order preventive detention. (Section 3(3))
3. The appropriate government has the power to regulate the place and conditions of detention. (Section 5)
4. The detenu must be informed of the grounds of his detention as soon as possible, but ordinarily within five days from his date of detention, which must not be later than fifteen days from the date of detention in exceptional cases. (Section 8(1))
5. The authority has power not to disclose facts which it considers to be against the public interests. (Section 8(2))
6. The detaining authority shall under Section 10 refer the detention order to the Advisory Board, constituted under Section 9 within 3 weeks from the date of detention.
7. The Advisory Board shall submit its report within seven weeks from the date of detention, along with its opinion on whether there is sufficient cause for the detention of the person or not. (Section 11) The appropriate government as per Section 12 is required to act accordingly.
8. The proceedings and the report of the Advisory Board shall be confidential. (Section 11(4))
9. The person can be detained for a maximum period of 12 months. (Section 13)

10. Section 14 empowers the appropriate Government to revoke the detention order at any time or modify it. However, it can re-order detention even after expiry or revocation. It also has the power to temporarily release the detenu. (Section 15)

11. Section 16 provides protection to all orders of preventive detention made under good faith.

12. A detention for a period not exceeding 3 months can be ordered in the first instance by the State Government. Whereas, if it is necessary to extend it beyond 3 months, such a detention order can be passed by the State government for up to a maximum of 12 months, only after the satisfaction and assent of the Advisory Council.

DICTUM ON PREVENTIVE DETENTION

Preventive Detention has often been termed as an 'anachronism' in the democratic constitutional setup of the country. The law which is notoriously sloganeered for its '*no vakeel, no appeal, no daleel*' (No lawyer, no appeal, no argument) approach has been deep-seated in controversy ever since its inception. Even Alladi Krishnaswami Ayyar, the most prominent voice in the Constituent Assembly was in support of inclusion of the 'Preventive Detention' provisions in the Constitution. He had acknowledged it to be a 'necessary evil' in his defending speech in the Assembly.[127] The draft provision had faced widespread criticism and condemnation in the Constituent Assembly. Shri Mahavir Tyagi while addressing Dr. B R Ambedkar, warned of the ominous consequences of granting such vast unfettered power to the Executive. In his words, *"There might come a time when these very clauses which we are now considering will be used freely by a Government against its political opponents…. This is an article which will enable the future Government to detain people and deprive them of their liberty rather than guarantee it"*.[128] His soliloquy was met with acknowledgment but was not paid heed. Down the line, after seventy years his fears have long been materialized into reality of the land and have ensembled a history of their own. The widespread abuses which were heaped on the Indian citizens during the time of emergency, under the garb of preventive detention failed to awaken the conscience of the Nation and the Parliament. In 1977-78, some legitimate attempts were made to erode the potency of preventive detention but it was diffused soon enough due to lack of political will and a resurgent attempt by the succeeding Indira Gandhi government, in the form of National Security Act, 1980. The

[127] IX *Constituent Assembly Debates*, 1536.
[128] IX *Constituent Assembly Debates*, 1547.

successive governments showed little willingness to pursue any action against it, instead found new method in deploying it against their political opponents and dissenting citizens. The 44nd Amendment Act, 1978 which had curtailed the powers of the Executive by making amendments to Article 22, was passed by the Parliament, but close to half a century since its passing, it has not been notified for its enactment by the central government. This position has to be contrasted with the fact that about half of the people who have graced the chair of the Prime Minister have been under Preventive Detention at one part or other of their lives.

On the face of such a lack of political will to curb the existing chaos, it was the Judiciary which served as the watchman of the fundamental liberties of the citizens. in 1950, attempts were made to challenge the law on preventive detention. In *AK Gopalan v State of Madras*,[129] a 'habeas corpus' petition was filed to secure the release of the petitioner detained under the Preventive Detention Act, 1950. A challenge was also issued against the constitutional validity of the said Act on the grounds that it violates Article 13, 19, 21 and 22 of the Indian Constitution. It was pleaded that fundamental rights as enshrined in different articles of the Constitution must be read collectively, in tandem. The majority of the judges in this case however disagreed and held that when a law necessarily satisfies the requirements of the fundamental right, it is enforcing, it cannot be held unconstitutional or bad in law for the violation of any other fundamental right. Therefore, the constitutional validity of the Act was upheld. It meant that every fundamental right is distinct and must be read in isolation and each Article is a separate code in itself and they shall not coincide with the other fundamental rights as mentioned in the Constitution. If any legislation was brought in to enforce a fundamental right, it shall have to conform only to the requirement and limitations of the said Article, and the encroachment of the legislation on other fundamental rights shall have no bearing to determine its constitutionality. Justice Fazal Ali, in his dissenting opinion said, "*a person who is preventively detained cannot claim the right of freedom of movement, because he is not a free man and certain other things which, whether taken singly or collectively, are too unsubstantial to carry any weight. In these circumstances, I am strongly of the view that Article 19(1)(d) guarantees the right of freedom of movement in its widest sense, that freedom of movement being the essence of personal liberty, the right guaranteed under the Article is really a right to personal liberty and preventive detention is a deprivation of that right… the*

[129] *AK Gopalan v State of Madras* AIR 1950 SC 27.

law of preventive detention is subject to such limited judicial review as is permitted under Article 19(5)."[130]

It was however, the view of the minority judgment delivered by Justice Fazal Ali, which took precedence in the course of time and flowered as the established norm in *Maneka Gandhi v Union of India*[131] where the Supreme Court reversed the position and held that Part III of the Constitution must be read in a holistic manner, and it is not sufficient that a law must only satisfy the requirements of the fundamental right it is enforcing, but rather it must conform to the operation of other fundamental rights as well. The Court said, *"Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow of unimpeded and impartial justice."*[132]

The *Maneka Gandhi* case opened new aspects of fundamental rights by allowing dynamic interpretation of the Constitution. It was in this backdrop, the challenge to the constitutionality of the newly enacted National Security Act, 1980 and the National Security Ordinance was challenge in *AK Roy v Union of India*[133], wherein the Supreme Court, disregarded the jurisprudence established in *Maneka Gandhi* case as well as the 44th amendment passed by the Parliament which amended Article 22 and took a positivist approach taken by the majority in Gopalan case and upheld NSA to be constitutionally valid. To arrive at such conclusion, the court took reference to Article 22 (prior to 44th amendment) mentioned in the present text of the Constitution. With regard to the question, whether the grounds of preventive detention mentioned in Section 3 of the NSA were vague, broad and uncertain, the Supreme Court held that "*a certain amount of minimal latitude has to be conceded to it* (Parliament) *in order to make those laws effective. In other words, though an expression may appear in cold print to be vague and uncertain, it may not be difficult to apply it to life's practical realities. This process undoubtedly involves the possibility of error but then, there is hardly any area of adjudicative process which does not involve that possibility…. Formulation of definitions cannot be a panacea to the evil of vagueness and uncertainty. Even so the impossibility of framing a definition with mathematical precision*

[130] ibid.
[131] *Maneka Gandhi v Union of India* AIR 1978 SC 597.
[132] ibid.
[133] *AK Roy v Union of India* AIR 1982 SC 710.

cannot either justify the use of vague expressions or the total failure to frame any definition at all which can furnish, by its inclusiveness at least, a safe guide-line for understanding the meaning of the expressions used by the legislature. But the point to note is that there are expressions which inherently comprehend such an infinite variety of situations that definitions, instead of lending to them a definite meaning, can only succeed either in robbing them of their intended amplitude or in making it necessary to frame further definitions of the terms defined."[134]

The Supreme Court also issued certain directions in the case to deter the Executive from exercising punitive detention for punitive causes, namely:

1. The kith and kin of the detenu must be informed immediately in writing about his detention and the place of detention.
2. The detenu must normally be kept in detention in a place which is near to his or her ordinary place of residence. Keeping the detenu in a far-off place shall be considered as punitive measure. He must be allowed to meet his family and friends, to have his own food, to have books and writing materials etc. Only in exceptional circumstance of administrative convenience, safety and security, he can be detained at some other place.
3. Section 16 does not protect a malafide order. Only those passed in good faith and in pursuance of the National Security Act are protected.
4. The detenu must be kept separately from those convicted.
5. No treatment of a punitive character should be meted out to him and he must be treated with human dignity.
6. When the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board, the detaining authority or the Government also cannot take the aid of a legal practitioner or a legal advisor before the Advisory Board. If the detaining authority or the Government takes the aid of a legal practitioner or an advisor before the Advisory Board, then Article 14 requires that the detenu shall also be allowed the facility of appearing before the Board through a legal practitioner.
7. The detenu can however take aid of a friend to assist him to make representation before the Advisory Board.

[134] ibid.

8. The detenu can present oral and documentary evidence before the Advisory Board in order to rebut the allegations which are made against him.
9. The detenu can approach the courts to contest that the restraints imposed upon him in any particular case are excessive and unrelated to the object of detention and the Courts shall have the power to strike them.

NATIONAL SECURITY ACT, 1980: CHALLENGES AND ISSUES

It is a fairly acknowledged fact that preventive detention has been an eyesore for proponents of individual liberty and human rights. There can possibly be two explanations for it; 'wrong law' or 'wrong dispensing' (abuse). While the jurisprudential justifications for preventive detention themselves acknowledge its menacing character and shortcomings facilitated by its arbitrary exercise, it is rather 'wrong dispensing' which takes precedence in such determinations. An arbitrary law, in the hands of a responsible authority at best can be tolerated, and at worst can wreak havoc upon the public life, altogether threatening the very fabrics of the democratic way of life. Therefore, though it is the wrong dispensing that determines the approval or disapproval of the law, it is in fact, the structural framework of the law itself which determines the scope of such arbitrary dispensing. Essentially, a law which is in consonance with basic freedoms, and allows minimum use of discretion, has lesser propensity to encourage abuse of its provisions than a law which allows wider discretionary powers and this is fairly the region where NSA fails in its essence.

Section 9(2) of the Act reads, "*Every such Board shall consist three persons who are, or have been, or are qualified to be appointed as, Judges of a High Court, and such persons shall be appointed by the appropriate Government*." In other words, the advisory board which was originally stipulated in the Constituent Assembly Debates shall work as an independent reviewing authority and shall serve nothing but an agency appointed by the executive which shall only parroting the dictates of its Executive masters. Section 9(1) stipulates that such advisory board can be formed 'whenever necessary', either for a class of cases or on a case-to-case basis. Article 22(4)(a) happens to facilitate such a colourable exercise in which it is silent on independence of the Advisory Board. In this regard, aspersions were raised by Shri H V Pataskar in Constituent Assembly that, *"I expect the people will be appointed by the Executive and it will give a loophole in their hands- not that it is fair that I should charge that the present Executive would be unfair- but the question remains that if a loophole is kept whereby somebody who might in future be in charge of Government might take advantage of*

it and cram the Board with persons who are not fit enough for the purpose."[135] Attempts were made to rectify it by the Janta party government which passed the 44th Amendment Act, 1978. Section 3 of the Amendment Act stipulated an amendment to Article 22(4)(a) which read:

"No law providing for preventive detention shall authorise the detention of a person for a longer period than two months unless an Advisory Board constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court has reported before the expiration of the said period of two months that there is in its opinion sufficient cause for such detention:

Provided that an Advisory Board shall consist of a Chairman and not less than two other members, and the Chairman shall be a serving Judge of the appropriate High Court and the other members shall be serving or retired Judges of any High Court:

Provided further that nothing in this clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (a) of clause (7)."[136]

However, after 42 years the enactment date has not yet been notified for the enforcement of this amendment, which makes it operationally a dead letter.

Another issue which pervades the operation of NSA is that, it allows a wide room for the discretion of the Executive, bordering arbitrariness along with granting an excessive degree of impunity to the Executive for the exercise of their power of ordering preventive detention in an arbitrary manner. The only condition precedent which is required to be fulfilled by the Executive for passing such detention order is that they must be subjectively 'satisfied' with respect to that person and that it was necessary to detain such person 'with a view to preventing him from acting in any manner prejudicial' as enumerated in Section 3. The effect of such provision is that it significantly reduced the scope of judicial review of such executive order. The Courts are not allowed to question such decision, however through judicial craftsmanship they have developed norms on whose touchstone, though they cannot challenge the 'subjective satisfaction' of the appropriate government, but can review the material which led to such satisfaction upon certain grounds such as malafide, irrelevance,

[135] IX Constituent assembly debates, (15th September 1949).
[136] The Constitution (Forty-fourth Amendment) Act 1978, art 3.

vagueness, or other non-existent grounds. In *Khudi Ram Das v State of West Bengal*[137], the Supreme Court held that the subjective satisfaction of the detaining authority shall be amenable to judicial scrutiny on the following grounds, namely:

1. Non application of mind.
2. Improper and dishonest exercise of power.
3. The authority has acted under the dictation of another authority and has not used its discretion.
4. The authority has disabled itself from applying its mind by self-made rules of policy, etc.
5. Application of a wrong test or misconstruction of statute.
6. The satisfaction is not grounded on 'materials which are of rationally probative value'.
7. The grounds for satisfaction must satisfy the criteria of a reasonability and rationality and must not be extraneous.
8. The order must be made within the discretion which must be guided by the rules of reason and justice and must not be a private opinion. Such order therefor cannot be arbitrary, vague or fanciful but must be legal.[138]

The development of such judicial doctrine in the face of such executive-driven legislation has indeed provided a degree of respite by allowing the detained persons a channel to challenge their detention, but these happen to be grossly insufficient to satisfy the benchmark of the 'principles of natural justice', which are essential to be adhered to in every decision of the government agencies. However, the blame for such insufficiency cannot be heaped on the judiciary, since the jurisprudence of preventive detention as formulated in the constitutional scheme itself runs contrary to the ideals of principles of natural justice. Fundamental rights, as enumerated under Article 22(4)-(7) in case of preventive detention, happen to be themselves plagued with loopholes which validate the exercise of arbitrariness. To illustrate: The detention order is issued by the Executive, and a representation against it, as prescribed by Article 22(5) and NSA, can be made only to the detaining authority itself, while a later mandated review of such detention order by the advisory board (which is constituted by the Executive itself, and is not an independent body in itself) happens to violate the basic tenet of *nemo judix in causa sua*. While the contest of such detention by the detenu is being allowed

[137] *Khudi Ram Das v State of West Bengal* 1975(2) SCC 81.
[138] ibid.

only at the later stage of detention (Article 22(4)(a) allows such detenu to be kept in preventive detention for 3 months without making his representation before the Advisory Board) serves as a disguised attempt to dislodge the principle of *audi alteram partem* which defeats its spirit to serve only as a dead letter. While, the exemption of the detaining authority to not supply facts under Section 8(2) and the Advisory Board to not supply the reasons to the detenu or to the public reasons for such detention, under Section 11(4). It violates the basic tenet of providing a 'reasoned decision'.

While the provisions of preventive detention do not encapsulate principles of natural justice, the Supreme Court and several High Courts have entrenched the 'principles of natural justice' which serves as the minimum benchmark for consideration of challenges under preventive detention. In *Nand Lal v State of Punjab*[139] the Supreme Court allowed the challenge to the procedure by the Advisory Board wherein the State was allowed to be represented by lawyers before it, while the detenu was denied the same right by the board since Section 11(4) expressly bars it. The Court held that, the board blindly applied the provisions of Section 11(4) of the NSA to the detenu's case while allowing the State, thereby violating Article 14[140] of the Constitution. The court vitiated the detention order on grounds of arbitrariness in the procedure adopted by the Board. The Supreme Court held that the principle of reasonableness is an essential element of equality and the procedure contemplated under Article 14 and 21.[141] Thus, the discretion of the Advisory Board cannot be exercised arbitrarily.

The next issue which happens to permeate the NSA as a despotic legislation is that it does not hold the detaining authority liable for the gross abuse of its powers. Section 5A was specifically introduced in 1984 to curtail the scope of judicial review of the detention order passed by the Executive, while Section 16 exempts the detaining authority of any liability for an order passed in good faith. The Courts have not reflected Section 16 to its potential to hold the detaining authorities guilty for illegal detention; rather they have contributed to obliterate its application to grant considerable impunity to such detaining authorities against their actions. In *A K Roy v Union of India*[142], the Court diluted the tone of the provision and held that the detaining authorities are guilty of illegal exercise, which includes negligent acts

[139] *Nand Lal v State of Punjab* AIR 1981 SC 2041.
[140] The Constitution of India, art 14.
[141] The Constitution of India, art 21.
[142] *AK Roy* (n 133).

within the ambit of good faith and observed *"If the policy of a law is to protect honest acts, whether they are done with care or not, it cannot be said that the law is unreasonable. In fact, honest acts deserve the highest protection. Then again, the line which divides a dishonest act from a negligent act is often thin and, speaking generally, it is not easy for a defendant to justify his conduct as honest, if it is accompanied by a degree of negligence. The fact, therefore, in the definition contained in Section 3(22) of the General Clauses Act includes negligent acts in the category of acts done in good faith will not always make material difference to the proof of matters arising in proceedings under Section 16 of the Act."*[143]

It is the reluctance of the Courts as well as detenus who have secured release from such illegal detention order and to seek prosecution of the detaining authorities which empowers the executive to do the gross misuse of the law. Section 220 of the Indian Penal Code, 1860 allows for the prosecution and punishment of such authorities abusing preventive detention laws. The Section reads, *"Whoever, being in any office which gives him legal authority to commit persons for trial or to confinement, or to keep persons in confinement, corruptly or maliciously commits any person for trial or confinement, or keeps any person in confinement, in the exercise of that authority, knowing that in so doing he is acting contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."*

In the most recent decision of Allahabad High Court, in *Nuzhat Perween v State of UP*[144], where the habeas corpus petition was filed by the mother of the detenu Dr. Kafeel Khan against his illegal detention under NSA, who had been a constant object of political vendetta by the BJP led State government and had been persecuted many a times by the State government under false charges. The High Court explicitly remarked "*the petitioner and his other family members including the detenu were continuously harassed and victimized by the State authorities including the District Administration, Gorakhpur by several means*." The Court while granting the Habeas Corpus petition and ordering the release of Dr. Kafeel Khan declared his detention as illegal and unjustified. But, even after making observations of the presence of the mala fide in the issuance of preventive detention order by the detaining authorities against Dr. Kafeel Khan, the High Court did not give any direction against the detaining authorities for their prosecution for abuse of power and illegal detention.

[143] ibid.
[144] Habeas Corpus Writ Petition No 264 of 2020.

The reason for such reluctance can be found in Section 197[145] of the Criminal Procedure Code which serves as the major roadblock for bringing such actions against such authorities and it stipulates that any such action against government authorities can be brought only when an express sanction by the concerned Central Government or State Governments, post which, they might authorise such official reports.

CONCLUSION

The above-elaborated exposition of the NSA and the judicial pronouncement dictates on its application clearly establishes that the laws relating to preventive detention are not the sole cause for its gross misuse. But rather it is the wider legal ecosystem, which nurtures impunity to the detaining authorities for gross abuse of preventive detention. Section 197 of CrPC completes the whole cycle of executive hegemony when it comes to determination of question of 'preventive detention'. While Article 22 empowers the Executive, NSA provides it the tools, and Section 197 CrPC grants impunity to determine the question of the prosecution in court of law. And it is this autonomy, operating as 'sovereign immunity' of the executive, which leverages the executive to dictate the abuse of preventive detention laws unchecked.

The Supreme Court has often made efforts to obliterate the harsh tone of preventive detention laws to make them more conforming to the rights of one's personal liberty and dignity. But in the absence of a legally stipulated channel by which it can punish the executive for its arbitrariness, their hands have often fallen short, to only override such arbitrary executive decisions but cannot pursue any punitive action against them. The Courts must venture to develop compensatory jurisprudence with regard to illegal detentions which are made under preventive detention laws. The operation of preventive detention laws as 'sovereign immunity' to the executive runs antithetical to the ideals of a responsible democracy. While the doctrine of sovereign immunity has long been refuted in cases of illegal violation of fundamental rights ever since the case of *Kasturi Lal Ralia Ram Jai v State of Uttar Pradesh*[146], the Supreme Court has mandated compulsory compensation for violation of fundamental rights by the State in several cases.[147]

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[145] Criminal Procedure Code 1973, s 197.
[146] *Kasturi Lal Ralia Ram Jai v State of Uttar Pradesh* AIR 1965 SC 1039.
[147] *People's Union for Democratic Rights v Police Commr Delhi* (1990) 1 SCC 422; *Bhim Singh v State of Jammu and Kashmir* AIR 1986 SC 494; *Rudul Shah v State of Bihar* AIR 1983 SC 1086; *Saheli v Commissioner of Police, Delhi Police Headquarters* AIR 1990 SC 513.

It must be noted that the India has an expressive reservation upon Article 9(5) of the ICCPR[148] which reads, *"Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation*". However, the judicial dictate has established a contrary viewpoint. In *Rudul Shah v State of Bihar*[149], the view taken by the Supreme Court has already watered down the express reservations made by India to ICCPR, wherein a compensation of Rs, 50,000 was ordered to be paid to the illegally detained petitioners by the State government.

Meanwhile, the precedent established by the India itself, refutes the bar proposed by India's reservation to Article 9(5) ICCPR wherein several states such as Madhya Pradesh, Rajasthan and Chhattisgarh have in the past provided for a pension for all persons detained under Maintenance of Internal Security Act (MISA) and Defence of India Act (DIR) during the 1975–1977 National Emergency, as compensation for the illegal detention and violation of right to personal liberty meted out to them under such preventive detention.[150] Therefore, it can be comfortably submitted that the compensatory jurisprudence with respect to preventive detention stands implicitly accepted in India. Thus, the Courts can and must move towards the direction of development of a compulsory compensatory jurisprudence against state in all such cases of illegal detention under preventive detention laws.

Secondly, it must be submitted that the 44th Constitutional Amendment Act, 1978 which was already passed almost 42 years back, has still not been notified for its enforcement by the Central Government. A petition regarding the issuance of the writ 'mandamus' to the Central Government was filed in the case of *A K Roy v Union of India*[151], however the Supreme Court refused to issue the same. The authors submits that the *A K Roy* case needs reconsideration in this regard, and as per the 'doctrine of legitimate expectation', the Supreme Court (given 42 years has been passed since the amendment was approved and there has been a growing misuse of the NSA) must consider the matter urgently and should pass an order of 'mandamus' to the Central government to notify the same.

[148] International Covenant on Civil and Political Rights 1996.
[149] *Rudul Shah* (n 147).
[150] Staff Reporter, 'Raje Re-Launches Pension Scheme for MISA and DIR Detainees' *The Hindu* (Jaipur, 1 March 2020) <https://thehindu.com/todays-paper/tp-national/tp-newdelhi/raje-relaunches-pension-scheme-for-misa-and-dir-detainees/article5738477.ece> accessed 14 September, 2020; TNN, 'Monthly Pension to Detainees under Maintenance of Internal Security Act' *The Times of India* (Jaipur, 4 January 2014) <https://timesofindia.indiatimes.com/city/jaipur/Monthly-pension-to-detainees-under-Maintenance-of-Internal-Security-Act/articleshow/28353798.cms> accessed 14 September 2020.
[151] *AK Roy* (n 133).