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Preventive Detention Perspective

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ABSTRACT

The Constitution of India directs the State to enforce fundamental rights of the citizens as well as preserve public order, peace and tranquility across the nation. Precisely, the idea of maintenance of the 'public order' & 'freedom of a democratic society' demonstrates a rational justification for the existence of preventive detention. Article-22 of the Constitution gives detention power to the State for the protection of nation security and maintenance of international friendly relations, tranquility & peace of the entire society from antisocial and subversive elements namely antinational or smuggling activities or persons engaged in illicit trafficking of narcotic drugs and psychotropic substances, etc. The supreme goal is to prevent the perpetrator from causing mischief through his or her dangerous designs and radical ideologies however, the judiciary has showed its concern towards the irrational application of such laws and classified it as a most unwholesome encroachment upon the liberties of the people. Since the entire fabric of the Constitution revolves around the Constitutionalism and the Rule of law which implies a constitutional obligation of the State to enforce its provision in letter and spirits primarily the notion 'procedure established by law' in Article-21 of the Constitution which works as guiding factor for the authorities wherein the concept of 'due process of law' lies in its spirit. The judiciary has adopted the notion 'procedure established by law' in the guise of what 'it is' including 'it ought to be'. The author analyses the concept of preventive detention with the help of two notion namely 'procedure established by law' & 'due process of law' in the light of judicial pronouncements.

Keywords: *Rule of law, Civil liberties, Preventive detention, Procedure established by law, Due Process of law.*

I. CONFLICT PERSONAL LIBERTY UNDER INDIAN CONSTITUTION: A FACET OF 'RULE OF LAW'

The great play writer, William Shakespeare has observed that *'a man is master of his liberty'*. It demarcates that 'liberty' is the most valuable & cherished fundamental right. Ideally, it

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strengthens the rule of law having a supreme importance to human happiness & dignity[3]. In *Shafiq Ahmed Case*[4], the Supreme Court observed that:

> *"5. ... Preventive detention is a serious inroad into the freedom of individuals. Reasons, purposes and the manner of such detention must, therefore, be subject to closest scrutiny and examination by the courts."*

It demarcates that preventive detention laws are compulsory evil but essentially an evil wherein, its basic objective is the ensure protect the foreign affairs, security of India & State, public order, maintenance of supplies & services important to the society and to protect the general public from any risk and to prevent the suspicious person (s) from translating their radical ideas into action[5]. Expanding the horizon of the interpretation laid down in the case of *A.K. Gopalan v. State of Madras*[6], the Supreme Court observed[7] that the most important human right in criminal jurisprudence must be incorporated to make 'Right to life' lively[8]. It is perfectly enshrined in the expanded form of Article 21 of the Indian constitution. Khanna, J., observed[9]:

> *"...even in the absence of Art. 21, the State has no power to deprive a person of his life or liberty without the authority of law. This is the essential postulate and basic assumption of the rule of law and not of men in all civilized nations. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning."*

This leading judgment has created a historic watershed in the advanced progress of Constitutional & Criminal law. That's how we have been gifted with the notion 'due process' in the form of 'procedure established by law' which mandates that the state action must just, fair & rational. That's why the device commonly known 'Writ of Habeas Corpus' with the utmost promptitude was devised. According to Blackstone, this writ is 'the great and efficacious writ in all manner of illegal confinement'. It is the writ of 'freedom of personal liberty' which is grantable *ex debito justitiae*. Since the primordial objective of this writ to maintain the preventive justice aiming the prevention of apprehended objectionable activities

[3] *Pebam Ningol Mikoi Devi v. State of Manipur*, (2010) 9 SCC 618.
[4] *Shafiq Ahmed v. District Magistrate, Meerut* (1989) 4 SCC 556,
[5] Muntazir Ahmad Bhat v. Union Territory of JK and Another, 2021 SCCOnline J&K 900.
[6] AIR 1950 SC 27.
[7] *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.
[8] L.M. Singhvi, *Constitution of India*, Thomson Reuters, 3rd etd, vol. I, 2013.
[9] *ADM Jabalpur v. Shivkant Shukla*, (1976) 2 SCC 521.

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therefore, the burden lies on a detenu to prove that his or her detention as unlawful[10]. It can be described in the words of Benjamin Franklin as *"any society that would give up a little liberty to gain a little security will deserve neither and lose both".* Aptly, the maintenance of the 'public order' & 'freedom of a democratic society' demonstrates a rational justification for the existence of such laws[11]. Further, the Supreme Court also laid down that[12]:

> "*8. ...what is material and mandatory is the communication of the grounds of detention to the detenu together with documents in support of subjective satisfaction reached by the detaining authority*."

Such subjective satisfaction has two fold ingredients namely, the detaining authorities must be satisfied that such detained person would likely to act in certain manner which prejudices to 'security of state' & 'public order'. Such authorities also must be satisfied that detaining such person is the only resort to prevent him or her from creating such prejudices. It is pertinent to note that the Supreme Court has determined the significance of delay in the case of detention under National Security Act (*herein* after referred as 'NSA') that[13]:

> *'6. ... There can be no hard and fast rule as to the measure of reasonable time and each case has to be considered from the facts of the case. It needs no reiteration that it is the duty of the Court to see that the efficacy of the limited, yet crucial, safeguards provided in the law of preventive detention is not lost in mechanical routine, dull casualness and chill indifference, on the part of the authorities entrusted with their application. When there is remissness, indifference or avoidable delay on the part of the authority, the detention becomes vulnerable.'*

Further, the Supreme Court[14] determined the importance of representation under Section-14(1) of the NSA that the Central Government can revoke the detention order made by the State Government. Then it is duty of latter to transmit his representation to the former otherwise it amounts to degradation of detenu's most valuable right i.e. Right to make representation. However, the detenu can't claim the application of Art. 22(5) of the Indian Constitution if she or he intentionally fails to make representation before the appropriate authorities[15]. It was

[10] *R.* v. *Halliday,*169 ER 1252 referred in *Kubic Darusz* v. *Union of India,* (1990) 1 SCC 568.
[11] *Ayya* v. *State of U.P.* [(1989) 1 SCC 374.
[12] *State of Rajasthan* v. *Talib Khan,*(1996) 11 SCC 393.
[13] *Union of India* v. *Laishram Lincola Singh,* (2008) 5 SCC 490.
[14] *Haji Mohammad Akhlaq* v. *District Magistrate, Meerut,* 1988 Supp SCC 538.
[15] *R. Keshava* v. *M.B. Prakash,* (2001) 2 SCC 145.

observed that[16]:

> *"...No law is an end itself and the curtailment of liberty for reasons of State's security and national economic discipline as a necessary evil has to be administered under strict constitutional restrictions. No carte blanche is given to any organ of the State to be the sole arbiter in such matters."*

It signifies that the detention degrades person's most valuable jewel i.e. personal freedom hence, laws dealing with preventive detention must be construed strictly and in compliance with the procedural safeguard to protect his or her liberty. If the detention is merely made on basis of an apprehension over the activities of the detenu then the detaining authorities can challenge the detenu's bail if already granted[17]. However, this is not the case if such accused in detention is an under-trial prisoner & likely to get bail, then, detention order should be passed under applicable preventive detention law[18]. Further, an anticipatory bail can also cancelled upon the pretext of substantial suspicion over the activities of the detenu, presence of antisocial and subversive elements disturbing public tranquility and constant alarm of danger and insecurity among the general masses[19]. Another exception to the above-mentioned rule is that if the bail is granted or prosecution has failed then also the detention order could be made depending upon the facts & circumstances. This view was observed by the Supreme Court[20]:

> *"When a person is enlarged on bail by a competent criminal court, great caution should be exercised in scrutinizing the validity of an order of preventive detention which is based on the very same charge which is to be tried by the criminal court."*

It denotes that the State has two-fold duties namely 'maintenance of law & order' and 'enforcement of personal liberty of an individual' wherein the balance is to be maintained with great caution and care. It is also observed by *Hidayatullah, J.* in the case of *Ram Manohar Lohia*[21] that certainly such acts does not affect the 'public order' but still takes such sinister colour. So, it is for the court to make a balance between the individual rights & the public interest[22].

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[16] Infranote, 17.
[17] *Union of India v. Chaya Ghoshal*, (2005) 10 SCC 97.
[18] *Ramesh Yadav case* [(1985) 4 SCC 232 : 1985 SCC (Cri) 514.
[19] Banka Sneha Sheela v. State of Telangana and Others, (2021) 9 SCC 415.
[20] *Vijay Narain Singh case*,(1984) 3 SCC 14, 1984 SCC (Cri) 361 : AIR 1984 SC 1334.
[21] *Ram Manohar Lohia* v. *State of Bihar*, AIR 1966 SC 740 : 1966 Cri LJ 608.
[22] *Union of India v. Paul Manickam*, (2003) 8 SCC 342 : 2004 SCC (Cri) 239.

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II. DUE PROCESS OF LAW: TYPES AND AN OVERVIEW OF UK, US & INDIAN REGIME

In common parlance, the notion 'due of process of law' is generally classified into two types namely 'Procedural due process of law' and 'Substantive due process of law'. Such classification is made on the basis of its interpretation and utility as follows

i) **Procedural Due Process of Law:** It indicates a fair & non-arbitrary procedure which is to be followed by judiciary. For example notice must be sent as well as the hearing must be conducted before coming to a decision. It guarantees a fair decision making process with 'settled usages & modes of procedure' by the State also.[23] However, this type of process does not protect against the use of unjust laws on which the State makes a decision.

ii) **Substantive Due Process of Law*:*** The U.S. Supreme Court categorically coined and explained this notion in the case of *Calder v. Bull*[24] by Chase J., observed:

> *"....I cannot subscribe to the omnipotence of a state legislature or that it is absolute and without control: although its authority should not be expressly restrained by the constitution, or fundamental law of the state. The people erected their constitutions or forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law), contrary to the great first principle of the social compact, cannot be considered a rightful exercise of legislative authority."*

To some extent it laid down the roots of 'social compact' doctrine which aimed to maintain the moral trust in the State to protect their liberty & justice. The Court adopted the '*foundation of due process clause'* but the same was nullified by the parliament in *Bank Nationalization Case*[25] via 24th & 25th Amendment Act. The subsequent amendment to Article-13 & 368 of the Constitution including the insertion of Article 31-C made the legislature supreme & the idea

[23] *Joint Anti- Fascist Refugee Committee v. McGrath,* 341 US 123 (1951).
[24] *Calder v. Bull,* 3 U.S. 386 (1978).
[25] Rustom Cavasjee Cooper v. Union of India, (Bank of Nationalization), (1970), 1 SCC 248.

of judicial review illusionary.[26] Later, the parliamentary supremacy is curtailed by Supreme Court by coining the 'Doctrine of Basic Structure' which works on the philosophy of natural law and justice[27]. This opinion took place in *Keshvananda Case* but shaped in the *Maneka Gandhi Case*. It is apt to say that this doctrine is reflective of substantive due process of law where the judiciary can interpret the validity of a statute on the touchstone of Constitution.

(A) United Kingdom Regime

The English system follows the 'procedural due process' over 'substantive' as enshrined is Section-39 of Magna Carta, 1215-A document of English liberties. It protects of 'life' & 'property' against all the arbitrary actions of the king. However, the concept of 'law of land' is not clearly determined & replaced by the term 'due process of law' in the charter of 1354 by King Edward III. Sir Edward Coke said that[28]:

> *"…that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void. Statutes to be legitimate, must conform to the fundamental law, and merely because a declaration is an Act of Parliament are no guarantee that it is according to the principles of the English common law and custom."*

It assures the citizens that they will not be prosecuted or imprisoned by their king except through the application of the law of land. It makes every man a 'free men' irrespective of his or her situation. This protection is enforceable against the ruler as well as the courts except the British parliament because of the unwritten constitution. The scope of 'due process' is wider than the 'law of the land' because guarantees the procedure due to according to situation & circumstances. That's why if any statute is incompatible with the Human Rights Act, 1998 then it shall be held invalid. The only reason behind the incorporation of 'due process of law' was to protect the individual from arbitrary arrest & imprisonment in criminal matters.

(B) Indian Regime

Although the expression 'due process of law' isn't apparently incorporated in the Constitution however, the Apex Court has observed that it is available in abstract form under Article-14, 19, 20, 21 & 22 of Indian Constitution. Further, the Court has equated the concept of 'due process of law' with 'procedural established by law'. Krishna Iyer J. explicitly conceded the presence

[26] Acharya Dr. Durga Das Basu, *Commentary on the Constitution of India*, 8th edn., Vol. 3, Lexis Nexis Butterworths Wadhwa,p. 3084, 2008.
[27] Keshvanada Bharti v. State of Kerala, (1973) 4 SCC 225.
[28] *Thomas Bonham v. College of Physicians*, 77 Eng. Rep. 638.

of due process clause as under[29]:

> *"True our Constitution has no 'due process' clause but in this branch of law, after Cooper and Maneka Gandhi, the consequence is the same. Due process is considered to be limitation on the enactment of special laws because it makes arbitrary classification of subject that is unacceptable and it is slowly gained the ground in the legal system. Indian Constitution drafter had specifically enumerated the doctrine of equality in the Constitution because there should not be any kind of confusion and uncertainty of equality. Moreover, makers of Indian Constitution have not used the word "due process" in the Constitution. Further, it has been held that any law which gives unguided arbitrary power to the executive is likely to be abused by the executive by discriminating one person against another offends the doctrine of equality. Thus, in Indian due process concept can be perceived under the theory of basic structure, doctrine of non-arbitrariness under Article 14 and 'just, fair and reasonable' requirement of Article 21. Even Articles 19 (2) to (6), 20, and 22 also insulate the content of due process in the Indian legal system."*

Primarily, the Court determined that the core essentials of the term 'due process of law' exist in the Constitution of India in letter and spirits. The notion 'procedure established by law' and the notion 'justice' in Article-21 and Preamble to the Constitution respectively signifies that the procedure should be fair, just and non-arbitrary.

(C) U.S. Regime

The U.S. Congress has incorporated this concept in the federal constitution via 5th Amendment that "*no person shall be deprived of his life, liberty or property, without due process of law".* This provision puts restrain over the executive, judicial & legislative powers of the government when the congress makes any process 'due process' by mere will. Earlier, this protection of due process is not available to the black slaves. Later, the same was provided through 13th & 14th Amendment of US Constitution against all the tyrannical actions of the government. However, this concept is incorporated in the form 'procedure established by law' in the Indian Constitution. Therefore, it needs no clarification that the term 'due process of law' is nowhere mentioned or defined in the Indian constitution. Fortunately, the same is defined in Section 6(3) of Indian requisitioning and acquisition of Immovable property Act, 1952. Though our

[29] *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 409.

constitution framers have envisaged & included certain provisions from the U.S Constitution but left this expression "due process". The narrow clarification has stood for 27 years after the enforcement of Indian constitution. The Court in the case of *Hager v. Reclamation District*[30] defined the concept of 'due process of law' as a means to meet the end for protection of the parties; it must be give them an opportunity to be heard respecting the justness of the judgment sought. Cooley has determined the presence of the 'due process' in the following segments:

- Limitation on judicial, executive & legislative action of the government.
- Co-operation among the three organs of the government to preserve the individual liberty.

The only reason behind the incorporation of 'due process of law' was to protect the individual from arbitrary arrest & imprisonment in criminal matters.

III. PROCEDURE ESTABLISHED BY LAW: PRE-MANEKA ERA & POST-MANEKA ERA

It is settled proposition that the law passed by the parliament shall be final. This can be interpreted from the words 'procedure established by law' enumerated under Article-21 of the Constitution. However, it absolutely restricts the arbitrary actions of the authorities. For example, right to privacy (part & parcel of right to life) can't be taken away in the name of 'procedure established by law'. So, it is the constitutional duty of the court to safeguard the fundamental rights of the individuals in fair and reasonable manner. The same can be understood by analysing the pre-Maneka and post-Maneka as follows:

(A) Pre-Maneka Era

The constitution assembly was curious about the excessive abuse or supremacy of judicial review if someone life & liberty gets curtail[31]. That's why they had kept this power within the guise of legislature in the form of 'preventive detention' by the parliament[32]. However, Dr. B.R. Ambedkar has said:

> *"The question of 'due process' raises, in my judgment, the question of the relationship between the legislature and the judiciary to decide whether any particular law passed by the legislature is ultra vires or intra vires in reference to the powers of legislation which are granted by the Constitution to the particular legislature….. The 'due process clause', in my judgment, would give the judiciary the power to question*

[30] 111 United State 701 (1884).
[31] *Keshavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.
[32] G.P Tripathi, *Constitutional law: New Challenges*, Central law publications, 1st etd., 2013.

> *the law is in keeping with certain fundamental principles relating to the right of the individual. In other words, the judiciary would be endowed with the authority to question the law not merely on the ground whether the law was good law, apart from the question of the powers of the legislature making the law… The question now raised by the introduction of the phrase 'due process' is whether the judiciary should be given the additional power to question the laws made by the State on the ground that they violate certain fundamental principles."*

It indicates that the Constitutional assembly has kept such statute out of the sweep of judiciary. That's how the most valuable fundamental Right to life & liberty became the subject-matter of discretion of the legislature. The same was pragmatically experienced in the *Gopalan case* where the validity of Preventive Detention Act, 1950 as an extraordinary measure was challenged. The Apex Court adopted the meaning of the word 'law' u/A 21 as the '*jus' (law)* over '*lex' (justice).* It was contended & adopted by Fazal Ali, J.(dissenting), that the principle of natural justice on the analogy of 'due process of law' as interpreted by the U.S Supreme Court demarcates that no one shall be condemned unheard was part of the general law of the land. He further stated that it would not be revolutionary to include the notion 'procedure established by law' in the realm of natural justice principles mandating serving of notice, Right to be heard, appearance before the impartial tribunal and compliance of predefined course of procedure [33]. Conclusively, the Apex Court observed that it shields against the executive actions instead of legislative actions. The Court gave three reasons that firstly, the word 'due' is absent and secondly, the 'procedural due process' was rejected by the constitution framers and thirdly, the 'due process' would restrict the police power[34]. Being a crusader of personal liberty Justice Vivian Bose (dissenting) observed that the Constitutional framers never intended to guarantee a meaningless and illusory liberties of the general masses. Further, he observed[35]:

> "*…I am placing myself in the position of the detenu and looking at it through his eyes. The niceties of the law do not matter to him. He does not care about grammar. All that matters to him is that he is behind the bars and that Parliament has not fixed any limit in his kind of case and that local authorities tell him that they have the right to say how long he shall remain under detention. I cannot bring myself to think*

[33] D.D Basu, *The Shorter Constitution of India,* Lexis Nexis, 14th edition, vol.1, Reprint, 2012.
[34] S.P. Sathe; "*Judicial Activism in India Transgressing Borders and Enforcing Limits*", Oxford University press, 2nd etd., 2002.
[35] S. Krishnan Koths v. State of Madras, AIR 1951 SC 301.

that this was intended by the Constitution."

Similarly, a liberal approach for the interpretation of the fundamental rights in the realm of balancing personal liberty and the necessity to curtail the same was adopted by Justice *Patanjali Shastri* and he observed [36] that 'law' under Article-21 refers only the positive or state-made law not jus natural of civil law 'principle of natural justice'. Further, he stated that the same issue was again raised in the case of *ADM Jabalpur (*famously known as *Habeas Corpus Case)* wherein it was contended that being the executive action whether presidential order under Article-359 (promulgation of national emergency) should be subjected to judicial review or not[37]. The majority in the case unlike *Makhan Singh Case*[38] laid down that such order is made under Defence of India Act (MISA) & rules having general nature & no scope for judicial review even if breaches someone personal liberty irrationally. So, the notion of 'procedure established by law' must be liberally construed in order to cover all essential aspects of 'due process of law'[39]. Further, the Supreme Court[40] has referred the words of *Lord Atkin* as made in *Liversidge v. Anderson*[41] that "*....amid the clash of arms the laws are not silent, that they may be changed, but they speak the same language in war and peace, reverberated in their ears".* Therefore, if justice is endangered or the peril is created to this sacred human right in the name of public order, then the individual can resort to the four corners of Article-22 of the Constitution for the fullest protection. This could be called as the maintenance of cherished right by the judicial application to control the MISA Act via Article 22 of the Indian Constitution. It may because of the reason that the chances of serious invasion to one's personal liberty are high where the constitutional safeguards are improperly enforced[42].

(B) Post Maneka Gandhi Era

The most pioneered judgment of Maneka Gandhi[43] adopted the great cannon of 'due process of law' as the guiding factor by expanding the simple meaning of 'procedure established by law'. The Hon'ble court held that this concept demarcates a procedure which must be followed i.e. prescribed by the statute or the law of land. It has three-fold notions namely, a valid law should be applicable, such law must be justified in its application if intervene with the person's life or personal liberty, and there should be a strict compliance with the procedure as mentioned

[36] Supranote,5.
[37] Judicial Activism and the world judges conference, (1984) 3 SCC J-1.
[38] *Makhan Singh v. State of Punjab,* AIR 1952 SC 27.
[39] M.P. Jain, '*Indian Constitutional law'*, Lexis Nexis, 5th edition, 1260-1263, 2011.
[40] *Bhut Nath Mete v. State of W.B.*, (1974) 1 SCC 645.
[41] *Liversidge v. Anderson*, (1941) 3 All ER 338.
[42] *Dr Ram Krishan Bhardwaj*v. *State of Delhi,* 1953 SCR 708.
[43] Supranote,6.

by such law. If such law does not prescribe such procedure then, the executive authorities shall exercise the same keeping in mind the notion of 'just, fair & reasonable'. A beautiful interpretation has been made by the Bhagwati, J.:

> *"The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."*

It implies that the natural justice is all about 'fair play in action'[44]. This proposition was observed in the landmark ruling of Sunil Batra Case. This case also echoes the core of locus standi as well as the judicial activism vis-à-vis personal liberty of an individual. Precisely, the preventive detention laws should be implemented in consonance with the core values of the Constitution.

IV. PREVENTIVE DETENTION LAWS: ENDANGER PERSONAL LIBERTY OR NOT

The idea behind the preventive detention is not to punish a detained person but to prevent him or her from acting contrary to the compulsive factors[45]. It is only to assist the executive to take action in case of reasonable likelihood of the repetition of an offence on the basis of previous antecedents of the detenu. The confusion arises that such action must be taken only after the prosecution proceedings (punitive action) & detention order (preventive action) as per the law[46]. Article-22(5) of the Constitution of India opens avenues for the State to legislate preventive laws in the larger public interest wherein detention of a person without a formal charge and any conviction by the court of law can be done by the State. It is pertinent to note that a liberty to every detenu to make his or her representation must be ensured otherwise such detention order becomes invalid. It implies that the authorities must observe that such impugned order meticulously accords with the 'procedure established by law' otherwise a judicial scrutiny must be conducted. The Hon'ble Court set a warning as[47]:

> *"It may perilously hover around illegality, if a single act of theft or*

[44] V.R. Krishna Iyer, *A Constitutional Miscellany*, Eastern Book Company, 2nd etd., 2003.
[45] *Pushpa Devi M. Jatia v. M.L. Wadhawan*, (1987) 3 SCC 367.
[46] *Haradhan Saha v. State of W.B.*, (1975) 3 SCC 198.
[47] *Rameshwar Lal* v. *State of Bihar*, (1968) 2 SCR 505, 511: AIR 1968 SC 1303.

> *threat, for which a prosecution was launched but failed, is seized upon after, say, a year or so, for detaining the accused out of pique. The potential executive tendency to shy at Courts for prosecution of ordinary offences and to rely generously on the easier strategy of subjective satisfaction is a danger to the democratic way of life. The large number of habeas corpus petitions and the more or less stereotyped grounds of detention and inaction by way of prosecution, induce us to voice this deeper concern."*

It is pertinent to note that the bail provision of Code of Criminal Procedure, 1973 has no application to the prevention detention laws such as Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. So, it invites more awareness and rational decision of the concerned authorities. The Supreme Court has observed that[48]

> *"...Mere presence near the place of occurrence or telephonic conversation with co-accused persons, even believed to be true, may give rise to mere suspicion but would not justify a prima facie case of conspiracy so as to deny the petitioner's liberty, at this stage in spite of the statutory restrictions under Section 37 of the NDPS Act".*

It is implicit that at numerous instances judiciary has recognised such laws as lawless-law. The irrational application of such laws occasionally make mockery of the notion 'justice' & 'rule of law'. Interestingly, the court has made an exceptional explanation of objective behind every preventive detention statute that[49]:

> *".... A note of caution, however, needs to be struck since absolute scrupulousness is expected of authorities exercising this exceptional power. This is not a power to put behind bars anyone you regard as dangerous or rowdyish or irrepressible or difficult of being got rid of by proof of guilt in Court. This is an instrument for protecting the community against specially injurious types of anti-social activity statutorily enunciated. If extraneous motives adulterate the use of power, the Court must nullify it."*

It demarcates that the detention power should be exercised in rational manner in order protect the maintain peace and harmony in the society without undermining the fundamental freedom

[48] Tofan Singh v. State of Tamil Nadu, 2020 SCCOnline SC 882.
[49] *M.S. Khan* v. *C.C. Bose* (1972) 2 SCC 607.

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of an individual as guaranteed in the Constitution.

V. CONCLUSION

The author concludes that 'due process of law' consists of two ingredients firstly procedure established by law and inherent fairness of the law. It is well known fact that the constitutional assembly dropped the idea of 'due process of law' after B.B. Rao was advised by Justice Frankfurter (U.S Supreme Court). The primary concern was that incorporation of this concept would make justice subjective & political. Hence, the assembly adopted the limited version of 'procedure established by law'. This notion was observed by the Supreme Court in Maneka Gandhi case which established the notion 'procedural due process'. The Apex Court also observed the significance of the application of principles of natural justice in the preventive detention proceedings however, the concept of 'procedure established by law' has a narrow meaning. It means that if a law prescribes a procedure then the judiciary cannot hold that the law is unreasonable, unjust or unfair. However, the Supreme Court has observed the 'procedural due process' under Article 21 in the form of judicial creativity & activism. So, the application of preventive detention laws, upliftment of civil liberties as well as maintenance of law and order to be rationally balanced for the accomplishment of the objective of the Constitution.

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