PREVENTIVE DETENTION IN EMERGENCY AND ARTICLE 9 OF ICCPR: THE CASE OF INDIA

*K.Mahesh**

I. INTRODUCTION

After 11 September 2001 attack on the world trade tower, the new paradigm of "war against terrorism" has emerged. It has been recognized that terrorism is a special situation allegedly requiring special measures to deal with it. The ideological motivation and global network of terrorism makes prevention and detection difficult. In some extreme situations terrorism may even constitute a threat to the life of the nation, justifying derogation from States full human rights obligations[1]. In this scenario, the balancing of measures to deal with this threat with international human rights law becomes very important so that the measures do not become counterproductive by alienating the people most affected. The Security Council in its Resolution 1269 (1999) has expressed concern over the increase in acts of international terrorism endangering the lives and well being of individuals worldwide as well as the peace and security of all States. Following the 11 September 2001 attacks in America, Resolution 1373 was adopted on 28th September 2001 under Chapter VII of the UN Charter placing obligations on States to take measures against terrorism in the form of criminalizing the collection of funds for terrorist acts and freezing the assets of terrorists; refraining from providing any support to entities or individuals involved in terrorist acts; preventing terrorist acts through early warning and exchange of information with other States; criminalizing terrorists acts and prosecuting terrorist acts, etc. However, in combating terrorism, the need to protect human rights and fundamental freedoms is of paramount importance and General Assembly adopted a resolution to this effect on 18th December 2002(A/RES/57/219). According to this, the States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law.

A similar resolution was adopted by the Commission on Human Rights on 25th April, 2003, at the 59th session (E/CN.4/RES/2003/68). The report submitted by the policy-working group on the United Nations and Terrorism

* LL.B 3rd year Student, Law Centre-II, Faculty of Law, University of Delhi, Delhi.

[1] Scheinin, Martin, *Human Rights and Counter Terrorism: International Monitoring System* at ICJ Seminar, Geneva October 2003.

(A/57/273-S/2002/875) states

> "the United Nations must ensure that the protection of human rights is conceived as an essential concern. *Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights* the fight against terrorism must be respectful of international human rights obligations."

International human rights law has tried to balance the State's legitimate right to protect its existence and the right of an individual to be protected from human rights abuses by recognizing these states of emergencies and providing for derogations under international supervision which establishes a legal regime regulating the respect of human rights in times of emergency.

Against this background, where the exigencies of general security outweigh the traditional theory of criminal law, Preventive Detention (PD) is often resorted to in almost all countries today and is considered a necessary evil. The question however is when it should be resorted to? And what safeguards should be there to prevent its abuse? Is preventive detention compatible with human right law? Is there a correlation between the right to derogation and corresponding right to resort to preventive detention? Or can it be resorted to at any time irrespective of situation? These issues will be examined in this paper with reference to Article 9 of the International Covenant on Civil and Political Rights, 1966 (ICCPR), in the Indian context where PD is incorporated and authorized by the India Constitution itself [2] even in peacetime[3]. The study will concentrate only on the National Security Act, 1980 (NSA) as it specifically deals with preventive detention on grounds of national security and public order and is applicable throughout India sans Jammu and Kashmir, which has its own Act, the J & K Public Safety Act,1978 on the same lines.

II. Concept of Emergency within Article 4 Of ICCPR

Under Article 4 of ICCPR, the States have a right to derogate from the provisions of the Covenant and/ or to limit the rights subject to the strict

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2 Article 22, Constitution of India.

3 Preventive detention is allowed in COFEPOSA (The Conservation of Foreign exchange and Prevention of Smuggling Activities Act, 1974), the Prevention of Black-marketing and Maintenance of Essential Commodities Act, 1980; The Smugglers and Foreign Exchange Manipulators Act, 1976; Assam Preventive Detention Act, 1980, The Bihar Control of Crimes Act,1981; Jammu and Kashmir Public Safety Act,1978; the Maharashtra Prevention of Communal, Anti–social and other Dangerous Activities Act, 1980; UP Control of Goondas Act,1970 etc.

conditions of proportionate response to a serious public emergency, consistent with other international obligations. It lists definite circumstances constituting *Public emergency threatening the life of the nation* to prevent the abuse of derogation provision by the States, which justify derogations. Article 4 of the ICCPR reads as follows:

> "1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
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> 2. No derogation from Articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
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> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."

The Human Rights Committee (HRC) in its general comment (GC) 29 on Article 4 stated that when proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional laws and other provisions of law that govern such proclamation and the exercise of emergency powers. If States Parties consider invoking Article 4 in situations other than armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances. Derogations must be limited to the extent strictly required by the exigencies of the situation with respect to the duration, geographical coverage and material scope of the state of emergency.

Though HRC has not laid down any specific guidelines on what constitute a 'public emergency threatening the life of the nation', it has while considering the State reports commented on the proclamation of emergency in certain situations as unjustified e.g. in case of Argentina[4], the State was

[4] GAOR,A/45/40,Report HRC, 49-50.

questioned on justification of declaration of emergency on mere probability of internal disturbances; UK[5] was asked about the territorial application of emergency measures with respect to Northern Ireland; in response to Bolivian authorities ground for proclamation due to serious political and social disturbances the HRC observed that protest movement or general strike did not fulfill the conditions for proclamation[6]; in case of Chile, the HRC stated that ' latent subversion' did not authorize derogation under Article 4 of the ICCPR[7]; in Cameroon, the high crime rate was held not to warrant the proclamation of emergency on its own[8]. The European Court of Human Rights (ECHR) dealt with this issue in Lawless case[9] and stated that

(i) the crisis or danger must be "exceptional" and "imminent"

(ii) it should affect the "whole population" (or of one section of the State community[10]);

(iii) it must constitute "a threat to the organized life of the community"

The Greek Case added a fourth point:

(iv) the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.

However, the court gave the States the margin of appreciation in taking into account any situation of emergency[11] subject to international supervision. Further, in *Cyprus* v *Turkey*[12] the Commission held that the formal and public act of derogation was essential for application of Art of the ECHR.

The Inter-American Court and Commission on Human Rights has not had to interpret these terms either but have made general statements in their advisory opinion on the conditions justifying suspension of rights and freedoms under the American Convention. In the Habeas Corpus in *Emergency Situation*[13] case, the court held that the "suspension of guarantees lacks all legitimacy whenever it is resorted to for the purposes of undermining the democratic system".

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5 GAOR, A/33/40, Report HRC, 32.

6 GAOR, A/44/40, Report HRC, 95.

7 GAOR, a/34/40, Report HRC, page 18.

8 GAOR, A/44/40, Report HRC, 103.

9 *Lawless Judgement*, Series A, No.3 of ECHR.

10 *Irish Case* ECHR, Series A, No.25).

11 *Ibid.*

12 ECHR Application Nos. 6780/74 and 6950/75.

13 Advisory Opinion OC-8/87, Series A, No.8, page 38.

III. Various Emergencies Like Situations In India

Since the early-1980s there has been a dramatic rise in violence engineered by organized groups fighting secessionist campaigns in different parts of India, notably in Punjab, Kashmir, and Assam and the other northeastern states. This has led to the enactment of special security laws, which have been seen by many to constitute a defacto emergency situation. These situations will now be analyzed to establish whether they meet the criteria of states of emergencies under international law.

A. Cross Border Terrorism in the State of Jammu and Kashmir

The conflict in Kashmir has its roots in the accumulated grievances and subsequent alienation of the post-independent generation of Kashmiris, which in subsequent years intensified into a strident secessionist campaign and led to widespread violence, including repeated clashes between such extremist groups as the Jammu and Kashmir Liberation Front (JKLF) and Indian security forces who have been deployed in increasing numbers since 1988-89 (India has always claimed that these are terrorists organizations being aided and abetted by outside forces, namely Pakistan to wrest the control of J & K from India). They are estimated to number about 150,000 and are in addition to some 17,000 members of the state police force. At present there are two main sources of armed opposition to the security forces: groups fighting for an independent Kashmir and those demanding the accession of Kashmir to Pakistan. Kashmir was brought under President's Rule[14] on 19th July 1990. This was preceded by a six-month-long period of "Governor's Rule". Democratically elected Government is working in Jammu and Kashmir at present.

By February 2003 the number of terrorist incidents in the state was 56,259 with 11,092 civilians killed; 3,537 security personnel killed; 16,236 terrorists killed and 2910 foreign militants killed[15] Since 1989, the reimbursement of security related expenditure by Central Government to the State Government has been to the tune of Rs.2357.85 crore. Over 56246 families, majority being Kashmiri Pandits and Sikhs have been displaced and are living in camps in Jammu and Delhi.

At present the whole of Jammu division and six districts of Kashmir valley along with the 20km belt along the line of control are declared as a 'Disturbed Area' under the Armed Forces (J & K) Special Powers Act, 1990.

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[14] Under Article 356 of the Indian Constitution where the executive and legislative control shifts to central government due to State's inability to function in accordance with provisions of the Constitution.

Nine militant outfits have been proscribed under the POTA, 2002. The Jammu and Kashmir Public Safety Act, 1978 permits the detention without charge or trial for up to one year of any person deemed likely to act in a manner prejudicial to " the security of the state or the maintenance of public order".

Incident of hijacking of Indian Airlines flight 813 to Afghanistan, attack on Indian Parliament, occupation of Pakistani regulars in the Kargil areas are linked to this conflict.

B. Terrorism in Punjab

There has been a significant reduction in the terrorist-inspired violence in Punjab since early 1994. Except for sporadic and rare incidences the situation is under control and thus cannot be termed as 'emergency' situation now though the situation was within the definition in the late 1980's.

C. Insurgency in the North-Eastern Parts of India

The seven north-eastern states – Assam, Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland and Tripura – contain substantial numbers of hill tribes who are ethnically, economically and socially distinct from the rest of the Indian population. They have, over the years, complained of neglect and exploitation by the Indian Government and some have organized themselves into armed insurgent groups demanding autonomy or independence. The population of Assam has also in recent years protested against the unchecked flow of illegal immigrants from neighbouring Bangladesh who, they believe, have taken away many of the local jobs. There has been a sharp increase in the level of political violence in the region as a whole since 1985 with increased deployment of central security forces to contain the situation.

At present 13 organizations have been declared 'Unlawful Associations' under the Unlawful Activities (Prevention) Act, 1967. In year 2002 the total number of terrorist related incidents have been 1319 in which 563 extremists were killed and 1070 arrested. Along with 454 civilians, 147 security forces personnel were also killed in the same year[16] .

The most serious militant affected States/areas viz, the whole of Manipur, Nagaland and Assam, Tirap and Changlang districts of Arunachal

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[15] Government of India, INDIA ANNUAL REPORT 2002 – 2003, New Delhi.

[16] *Ibid.*

Pradesh and a 20 km belt in the states having common border with Assam have been declared as 'disturbed areas' under the Armed Forces (Special Powers) Act, 1958 as amended in 1972. The Government of Tripura has also declared the area under 22 police stations and part of areas under 5 police stations as 'disturbed areas'[17]. In addition NATIONAL SECURITY ACT, 1980 along with other legislations are also in force.

The threshold of insurgency has peaked many a time to an extent to a level of an armed conflict followed by the special operations launched by security forces to control the situation and thereafter a lull in the terrorist activities. In these periods the situation can be warranted as an emergency situation.

D. Left Wing Extremist Violence in A.P., Chattisgarh, M.P., Orissa and Bihar

Left wing violence is prevalent in 53 districts in 9 States with Andhra Pradesh, Chattisgarh, Bihar, Jharkhand and Orissa worst affected. During the year 2002 there were 1465 incidents of violence with 482 deaths. Following police action by the State Governments, 121 extremists were killed and 2523 extremists were arrested in the same year. Special Service Bureau (SSB) has been deployed in these areas and two organizations have been notified as terrorist organization under POTA 2002[18]. However, the situation has not reached the threshold of "emergency".

IV. CAUSES AND EFFECT OF NON-DEROGATION UNDER ARTICLE 4 OF THE ICCPR

India has always maintained that no emergency situation exists but acknowledges the terrorist violence requiring special measures to deal with it[19]. Though it has accepted that some areas have been declared 'disturbed' but 'emergency' has not been declared. It is difficult to say whether the difference is of nomenclature alone or the domestic definition of emergency is interfering with the international one. Further, incorporating strict security laws in the ordinary legislation has helped India deal with its security problems and at the same time obviated the need for formal declaration of emergency, thus eliminating the question of international supervision. Joan Fitzpatrick[20] while explaining internal security laws in countries, which were under the British Empire, has pointed out the provision of emergency powers

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17 *Ibid.*

18 *Ibid.*

19 CCPR/C/37/Add.13,Para 57 of India's SECOND PERIODIC REPORT under Article 40 of ICCPR and CCPR/C/76/Add.6, the THIRD PERIODIC REPORT, para 37.

20 Fitzpatrick J, HUMAN RIGHTS IN CRISIS, (Pennsylvania Press) at 16-17.

in the constitution. She has rightly stated that in the time of stress, these Governments have a choice between imposing formal emergencies under their constitutions and implementing emergency legislation, or simply invoking the provisions of their permanent national security laws. This seems to be the case of India viv-a-vis preventive detention under the NSA and now the POTA and Armed Forces (Special Powers) Act.

The principle effect of non-derogation is that India is being judged by the International standards applicable in a situation as if no emergency exists, calling for extra measures to deal with it. Higgins (as a member of HRC), on the special legislation resorted to deal with problems of terrorism stated that NSA and TADA could be justified only with reference to the exigencies of the situation within the meaning of Article 4 of the Covenant[21] The HRC in its concluding observations on India's third periodic report stated that it remained concerned at the continuing reliance on special powers under legislation such as the Armed Forces (Special Powers) Act, the Public Safety Act and the National Security Act in areas declared to be disturbed and at serious human rights violations, in particular with respect to Articles 6,7,9 and 14 of the Covenant, committed by security and armed forces acting under these laws as well as by paramilitary and insurgent groups[22]. The Committee regrets that some parts of India have remained subject to declaration as disturbed areas over many years – for example the Armed Forces (Special Powers) Act has been applied throughout Manipur since 1980 and in some areas of that State for much longer – and that, in these areas, the State party is in effect using emergency powers without resorting to Article 4, paragraph 3, of the Covenant[23].

V. Scope of Permitted Derogation Under Article 9 of ICCPR

During the situations of crisis, the States can limit their obligations under international law by way of limitation clauses prescribed within the instruments as well as by derogation. Even when circumstances exist in which a State may derogate from its obligations, it still remains subject to three major constraints[24]:

(i) no derogation is permitted in non-derogable rights,

(ii) no derogation inconsistent with other international obligations is permitted,

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21 CCPR/C/SR. 1042 at Para 14.

22 CCPR/C/79/Add.81,Para 18.

23 *Id.* para 19.

24 Hampson Francoise, Study On Human Rights Protection During Situations Of Armed Conflict, Internal Disturbances And Tension, at paras 21-25.

(iii) the State is not free to simply suspend the right but can modify the scope of its application proportional to its need.

Article 9 of the ICCPR relates to the right to liberty and security of a person containing the procedural guarantees where it has to be derogated or curtailed. Though not an absolute right and subject to derogation and restrictions, Para 1 gives substantive guarantee that arrest or detention will not be arbitrary or unlawful and paras 2-5 provide the procedural guarantees for the same. Article 9 reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
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> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
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> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
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> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
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> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

The HRC[25] in GC 8[26] states that Article 9 is applicable to all deprivations of liberty, whether in criminal cases or in other and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. Furthermore, States Parties have in accordance with Article 2(3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his

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[25] Human Rights Committee set up under the ICCPR.

[26] General Comments though not binding are explanations as set out by the HRC.

liberty in violation of the Covenant. Adding further that, if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (Para.1), information of the reasons must be given (Para 2) and court control of the detention must be available (Para 4) as well as compensation in the case of a breach (Para.5). And if, in addition, criminal charges are brought in such cases, the full protection of Article 9(2) and (3), as well as Article 14, must also be granted.

With regards to the requirement of legality and prohibition of arbitrariness HRC stated that

1. the arrest and detention must be specifically authorized by law;
2. law itself must not be arbitrary;
3. enforcement of this law must not be arbitrary[27].

In *Van Alphen v. The Netherlands,*[28] the HRC held that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. In *A v. Australia*[29], the HRC recalled that the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Every decision to keep a person in detention should be open to review periodically so that a judicial body can assess the grounds justifying the detention and should not continue beyond the period for which the state can provide appropriate justification. In concluding comments on New Zealand[30], the imposition of punishment in respect of possible future offences was held to be inconsistent with Article 9 and 14 of the ICCPR.

On Article 9(2), the right to be informed of a criminal charge, the substance of the reasons for the arrest must be given[31] promptly[32] is applicable even in cases of administrative detention. With respect to Article 9(3), GC 8 states that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power and must not exceed a few days.

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[27] Joseph, Schultz, Castan, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (OUP) at 211.

[28] 305/88.

[29] 560/93.

[30] Undoc.CCPR/C/79/Add.47,para.14.

[31] *Drescher Caldas* v. *Uruguay* (43/79), Para 13.2; *Grant* v. *Jamaica* (597/94).

[32] *Kelly* v. *Jamaica* (253/87).

Article 9(4) entitled any person who has been arrested or detained for whatever reason to challenge the lawfulness of his/her detention in a court without delay[33]. In *Hammel* v. *Madagascar* (155/83), the incommunicado detention for three days making it impossible for the author to gain access to a court to challenge his detention was held to be a breach of Article 9(4) of the ICCPR. In *Berry v Jamaica*[34], the HRC held that it is virtually impossible for people to challenge their detention without legal representation.

In *Torres* v. *Finland,*[35] the HRC held violation of Article 9(4) in that, a detained person must be able to take proceeding before the court, in order that that court may decide without delay on the lawfulness of his detention as review of the detention was possible only after 7 days when the detention was confirmed by order of the minister.

In *Vuolanne* v. *Finland*[36], the HRC stated that most of the provisions of Article 9 apply to all deprivations of liberty and whenever a decision depriving a person of his liberty is taken by an administrative body or authority Article 9(4) obliges the State party concerned to make available to the person detained the rights of recourse to a court of law.

In *A* v. *Australia,*[37] the committee in the course of examining the issue of effectiveness of right to challenge detention stated that 'lawfulness' in Article 9(4) means 'lawfulness' under the Covenant, rather than 'lawfulness' in municipal law[38]. Mr.Bhagwati elucidating this point stated that

> The interpretation contended for by the State (narrow interpretation of lawfulness limited merely to compliance of the detention with domestic law) will make it possible for the State to pass a domestic law virtually negating the right under Article 9(4), and making nonsense of it broad interpretation on the word 'lawful' which would carry out the object and purpose of the Covenant 9(4) requires that the court be empowered to order release 'if detention is not lawful', that is, the detention is arbitrary or incompatible with the requirement of Article 9(1) or with other provisions of the Covenant' lawfulness' which calls for interpretation in Article 9(4), occurs in the Covenant and must therefore be interpreted in the context of the provisions of the Covenant and having regard to the object and purpose of the Covenant.

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33 Nowak Alfred, UN COVENANT ON CIVIL AND POLITICAL RIGHTS.

34 330/88.

35 291/88.

36 265/87.

37 560/93.

38 *Supra* n. 27 at 241, para 11.56.

In concluding comments on Ukraine[39], the HRC condemned the practice of 'administrative detention' of vagrants. The HRC also criticized laws in Peru[40] which authorized the 'preventive detention' of persons for up to fifteen days, with a possibility of extension by another fifteen days, in cases of suspected terrorism, espionage, and illicit drug trafficking.

Thus derogation should be proportionate to the exigencies of the situation, in no case arbitrary and without procedural safeguards under subsections 2-5.

VI. Preventive Detention

A. When can Preventive Detention be Resorted to?

One of the most serious defects in existing international standards governing states of emergency is the absence of precise and agreed limits on the derogability of the right of personal liberty. Secondly, international norms are equally ambiguous on the question whether preventive/ administrative detention is ever permissible in a non-emergency context[41]. The ICCPR is silent on the circumstances under which administrative detention would be tolerated or the mandatory safeguards to prevent abuse. The Human Rights Committee in GC 8 simply stated that "preventive detention....for the reasons of public security...must not be arbitrary, must be based on grounds and procedures established by law, information of the reasons must be given and court control of the detention must be available as well as compensation in the case of a breach". Article 9 acknowledges the detention in cases other than criminal but does not specifically mentions preventive or administrative detention. Alfred Nowak[42] on Article 9 states that the basic right of personal liberty does not strive towards the ideal of a complete abolition of state measures that deprive liberty; rather, it merely represents a procedural guarantee obligating State's legislature to define precisely the cases in which deprivation of liberty is permissible and the procedure to be applied and to make it possible for the independent judiciary to take quick action in the event of arbitrary or unlawful deprivation of liberty by administrative authorities or executive officials. Although the right of liberty of person may be restricted in the case of a public emergency within the meaning of Article 4, it is not forfeitable pursuant to Article 5(1).

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[39] UN doc. CCPR/C/79/Add.52, para.13 (1995).

[40] UN doc. CCPR/C/79/Add.67, para 18.

[41] *Supra* n. 20 at 38.

[42] *Supra* n. 33.

Even the European Convention is silent on this issue. In *Brogan case*[43], the ECHR on administrative detention held that suspect be brought "promptly" before a judicial authority. However, it failed to address the question of justification of administrative detention in non-emergency context.

Special Rapporteur on States of Emergency in his report[44] to the sub-commission in 1989 stated that administrative detention was the only possibility of holding people for any length of time without a charge being made against them, but a state of emergency had to have been publicly proclaimed in such cases.

The ECHR while addressing the issue in *Ireland* v. *UK*[45] stated that a State struggling against a public emergency threatening the life of the nation would be rendered defenseless if it were required to accomplish all safeguards at once, and the interpretation of Article 15 must leave a place for progressive adaptations. However, the measure taken must not exceed the 'extent strictly required'.

Thus in situations of emergencies where the normal procedures of investigation and criminal prosecution are inadequate and the ability to secure criminal conviction due to general atmosphere of intimidation making it impossible to obtain sufficient evidence, preventive detention can be resorted to as a special measure subject to safeguards to prevent its abuse.

B. What Safeguards are Required for Preventive Detention?

No right can be abrogated to an extent that it becomes redundant. Therefore infringement of rights of an individual should be subjected to safeguards. Article 4 obliges the State Parties to provide careful justification not only for their decision to proclaim state of emergency but also for any specific measures based on such proclamation. Committee on prevention of torture has also stated a link between arbitrary detention and torture, therefore need for safeguards to prevent ill-treatment, the length of detention, discrimination in implementation have to be considered.

Due to the relationship of Article 9 with other non-derogable rights, the Siracusa Principles[46] (though not legally binding reflect the opinion of the world community) hold the rights in Articles 9 and 14 to be non-

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43 *Brogan* v. *United Kingdom*, 145 ECHR(1988).

44 U.N.Doc.E/CN.4/Sub.2/1989/SR.32.

45 *Supra* n.10.

46 UN DocE/CN.4/1985/4 (1985).

derogable. Principle 11 of the Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment[47] has stated that an effective opportunity to be heard promptly by a judicial or other authority must be given to the detained person and he shall have the right to defend himself or to be assisted by counsel as prescribed by law. He shall receive prompt and full communication of any order of detention, together with the reasons therefore and a judicial or other authority shall be empowered to review as appropriate the continuance of detention.

C. Justification of Preventive Detention

Due to the transnational nature of the terrorist activities in India leading to difficulties in obtaining evidence, which can be held admissible in the court of law, preventive detention appears to be the only resort for the authorities to control terrorism.

Due to the problems of terrorism and insurgency, India is entitled to derogate with respect to situation in the Northeast and Kashmir. The transnational nature of terrorism and the ease with which they are able to infiltrate into India, the difficulties faced in procuring evidence, preventive detention has to be resorted to. The derogation required for the purposes of protection of life, property, prevention of public disorder, exercise of power of arrest and detention and exclusion may be with respect to:

1. adding ground to preventive detention;
2. increasing time requiring a judicial review of detention;
3. increasing time for investigation and thus pre-trial detention;
4. increasing the time before which a person has to be produced before a magistrate after arrest;
5. special measures to protect witnesses requiring in-camera proceedings etc.

D. Validity of Preventive Detention under NSA and J & K Special Powers Act

India has time and again resorted to preventive detention to deal with various internal disturbances and war situations. In fact, the laws on preventive detention are not limited to exceptional situations, but are applicable even in peacetime. However, the maximum criticism of this provision has been with respect to the National Security Act, 1980 which

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[47] GA Resolution 43/173 of 1988, U.N.Doc.A/43/49 (1989).

allows for preventive detention for a period of 12 months in accordance with the measures mentioned in Article 22(3) to (7) of the Constitution, on grounds of National Security and Public Order.

The National courts, without any clear guidance from the Act on what constitute 'threat to national security and public order', have applied the test of 'subjective satisfaction' of the detaining authority, to govern its application. The review made by the Advisory Board of the procedure as prescribed by the Act is basically an executive review of executive decision-making. It affords no legal representation to the detainee, or opportunity of cross-examination is closed to public and its report is confidential. Further, the Board can only appreciate the grounds of detention and not rule on the need for such detention (justified or not). There is no provision for consideration of a detainee's case by the Advisory Board more than once. Yet periodic review is an indispensable protection to ensure that detention is 'strictly required' and fairly administered. The information on the grounds of detention can be withheld for up to 10 days and even then some information can be withheld on grounds of security reasons.

Right to liberty is not an absolute right, but any limitation imposed must be in conformity with the fundamental principle laid down in Article 5(1) of the Covenant i.e., any act aimed at destruction of any of the rights and freedoms recognized in the Covenant is prohibited[48] and conformity of any restriction to the provision of a covenant is not a domestic matter but a question of international law.

The HRC has also criticized this Act as not fulfilling the requirements of due process and principle of proportionality under Articles 9 and 14 of the ICCPR[49] holding five day period for informing detainees of the grounds for their detention and a three week period for bringing them before the Advisory Board were incompatible with Article 9(2) and (3) of the Covenant adding that Advisory Board could not be considered as a judge within the meaning of Article 9 of the Covenant. The seven-week period for deciding on the legality alone gave executive excessively broad discretionary powers and provided opportunity for arbitrariness. Further, pre-trial detention orders

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[48] 56/1979 HRC, Mr. Christian Tomuschat's individual opinion. Article 5 is a provision designed to cover instances where formally rules under the Covenant seem to legitimize actions which substantially run counter to its purposes and general spirit. Thus, Governments may never use the limitation clauses supplementing the protected rights and freedoms to such an extent that the very substance of those rights and freedoms would be annihilated".

[49] CCPR/C/SR.1606,Para 16, 31,41.

could not be appealed against and even where it was established that the order had been arbitrary, the victim could not claim compensation. The Committee further recommended that the requirements of Article 9, paragraph 2, of the Covenant be complied with in respect of all detainees. The question of continued detention should be determined by an independent and impartial tribunal constituted and operating in accordance with Article 14, paragraph 1, of the Covenant[50].

India has maintained that pre-trial detention orders were not part of the judicial procedure and as such the rights set forth in the Covenant did not apply during that form of detention[51] and that India has a reservation under Article 9. However, in light of Article 5(1) and in the absence of any of the safeguards, the NSA falls short of its validity, at the international plane even in an emergency situation.

India has however, justified the act on grounds of its reservation to Article 9 of the ICCPR.

VII. Reservation to Article 9 of Iccpr

The permissibility of reservations in international treaty law essentially represents a compromise between the normative strength of a treaty and the maximization of ratification to a treaty[52]. If the reservations are contrary to object and purpose of the covenant, i.e., contrary to the provisions reflecting *jus cogens*, or provisions contrary to the charter of the UN, they cannot be held to be valid. Is it possible that if derogations are not permitted, reservations are not permitted either?

A. Text of India's Reservation to Article 9 ICCPR

While ratifying the ICCPR, India made the following *reservation* with respect to Article 9:

> "With reference to Article 9 of the ICCPR, the Government of the Republic of India takes the position that the provisions of the Article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of Article 22 of the Constitution of India. Further, under the Indian legal system there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State."

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50 CCPR/C/79/Add.81, Para 24

51 CCPR/C/SR 1604, Para 55.

52 *Supra* n. 27.

According to clauses (3) to (7) of Article 22 of the Constitution of India the safeguards of detention namely, right to be informed of grounds of detention, to consult and to be defended by a legal practitioner, to be produced before a magistrate within 24 hours. of arrest are not applicable in preventive detention cases. Text of clauses 3-7 being:

(3) Nothing in clauses (1) and (2) shall apply-

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless-

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause(7): or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers being against the public interest to disclose.

(7) Parliament may by law prescribe-

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause(a) of clause (4);

(b) the maximum period for which any person may in any class or

classes of cases be detained under any law providing for preventive detention; and

(c) The procedure to be followed by an Advisory Board in an inquiry under sub-clause(a) of clause(4).

B. Effect of Reservation

While placing limits to a State's freedom to enter reservation, HRC giving reference to Article 19(3) of the Vienna Convention on the Law of Treaties in GC 24, stated that " A State may make a reservation provided it is not incompatible with the *object and purpose* of the treaty". Further in paragraph 8[53] it states that reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant.

Considering the special nature of the human rights treaties however, HRC stated that the application of Vienna Convention with respect to inter-state reciprocity has no place in it. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant[54] and it is for the Committee to judge the validity of reservation. And finally, the normal consequences of an unacceptable reservation are not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation[55] (ECHR also in *Louzidou* v. *Turkey* held certain reservations invalid, finding them incompatible with ECHR)[56].

Due to the dynamic and evolving nature of the human rights, their interpretation cannot be static. This involves constant review of the reservations to human rights treaty to test them on the threshold of compatibility with the 'object and purposes' principle. Thus when a treaty establishes enforcement/monitoring body, this body can determine the scope of validity of the reservation. Though Human Rights Committee in GC 24 stated that the effect of invalid reservation is severable, it has been suggested that the three options available to the monitoring body are[57]:

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[53] US and France however, objected to addition of so many propositions as customary international law.

[54] UK (Observations on GC24 (1995) 3 IHHR 261 and France {Observations on General Comment 24(1997) 4IHRR 6} have disputed this contention of non-applicability of Vienna Convention.

[55] UK, France and US have objected to this assertion regarding the effect of any invalid reservation.

[56] *Supra* n. 20 at 618.

[57] Hampson Francoise, RESERVATIONS TO HUMAN RIGHTS TREATIES, E/CN.4/SuB.2/1999/28.

(i) Severance of invalid reservation or any invalid application of reservation, leaving the ratification, including any other reservation intact.

(ii) Body to ask State what it proposed to do about the reservation found to be invalid.

(iii) In case of general/sweeping reservation, it can question whether it is a valid reservation at all.

Thus a reservation does not stop the HRC from addressing the issue of preventive detention. In fact the HRC despite India's reservation to Article 9 has commented on the preventive detention as justifiably applicable only under Article 4 of the Covenant, it was disturbing that in India it was authorized under an Act with general application[58]. Stating further, with reference to GC 24 it said that it was not possible to make reservations incompatible with the object and purpose of the treaty. The reservations entered by the Government of India were precisely of that nature and should be withdrawn[59].

C. Validity of India's Reservation and Issue of Derogation

The HRC's General Comment 24 confirms that State Parties can enter reservation upon ratification which reduces their ICCPR obligations. However, incompatible 'reservations' are actually ineffective, and thus have no impact on the actual extent of the reserving State's ICCPR obligations[60]. The decision in *Kennedy* v. *Trinidad and Tobago* (845/99) has further elaborated this point. Para 20 of GC 24 on invalid reservations states that "such reservation will generally be severable. Covenant will be operative for reserving party without benefit of reservation"[61]. Supporting the non-applicability of Vienna Convention on Law of Treaties, the ECHR in *Belilos case*[62] stated "the silence of the depository and Contracting States does not deprive the Convention organs of the power to make their own assessment

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[58] CCPR/C/SR.1603, THIRD PERIODIC REVIEW, Para 31.

[59] *Id.*, para 34.

[60] *Supra* n. 37 at 620, para 25.36.

[61] US objected to it as being "completely at odds with established legal practice"(the Vienna convention on the Laws of Treaties) and the UK memorandum stated" severability would have to entail exercising both the reservation and the parts of the treaty to which it applies".

[62] Case 20/1986/118/167, judgement of 29/4/88, para 47.

(of the validity of the reservation)". Susan Mark[63] has rightly said that "Reservations ought only to be tolerated up to a point. Far reaching reservations may negate the value of adherence or even act counterproductively, encouraging the reserving State to rest on the supposed laurel that participation in the treaty itself confers".

Considering the case law of the regional treaties, the main point that emerges is the 'object and purpose' rule and core obligations from which derogations is not allowed. In *France and Others* v. *Turkey*[64], the ECHR held that Convention enshrined obligations essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves. American Court of Human Rights adopting a more conciliatory attitude towards reservations in an Advisory Opinion[65] on reservation made by Guatemala when ratifying the American Convention stated that "reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and consequently, not permitted by it. The situation would be different if the reservation sought merely to restrict aspects of a non derogable right without depriving the right as a whole of its basic purpose".

Over the years there has been widening of the non-derogable rights, especially with respect to Articles 2, 9 and 14 of the ICCPR[66]. In resolution 1992/35, the UN Commission on Human Rights[67] called upon the States-

> "To establish a procedure such as *habeas corpus* by which anyone who is deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful all States to maintain the right to such a procedure at all times and under all circumstances, including during state of emergency'.

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63 J.P.Gardner, (ed.), *Three Regional Human Rights Treaties and Their Experience of Reservation* in HUMAN RIGHTS AS GENERAL NORMS AND A STATES RIGHT TO OPT OUT.

64 1986, 6 EHRR 24.

65 OC-3/83(1983) 23 (LM 320.

66 Svenson-McCarthy, *The Widening Field of Non-derogability* in THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION.

The Human Rights Committee has also stated that it was satisfied that States Parties generally understood that the right to *habeas corpus* and *amparo* should not be limited in situations of emergency[68] and that the remedies provided in Article 9, paragraphs 3 and 4, read in conjunction with Article 2 were *inherent to the Covenant as a whole.*

The Report of the Sub-Commission on Prevention of discrimination and protection of minorities on its Forty-Sixth Session 1994[69] reaffirmed that Articles 2(3), 9(4) and 14 "are inherent in the Covenant as a whole and should accordingly be considered to be non-derogable, particularly because they are necessary to protect other non-derogable rights".

Article 2 of the ICCPR places an obligation on the state to implement the Covenant in domestic legislation. The aim being to achieve improvement in protection of human rights. However, the reservation which protects the existing legislation, as entered by India with reference to Articles 9, restricts the impact of the Covenant.

In the concluding observations to India's third periodic report, the HRC summed up the preventive detention in the following words:

> "It is regretted that the use of special powers of detention remains widespread. While noting the State Party's reservation to Article 9 of the Covenant, the Committee considers that this reservation does not exclude the obligation to comply with the requirement to inform promptly the person concerned of the reasons for his or her arrest. Preventive detention is a restriction of liberty imposed as a response to the conduct of the individual concerned, and the decision as to continue detention must be considered as a determination falling within the meaning of Article 14, paragraph 1, of the Covenant, and proceedings to decide the continuation of detention must, therefore, comply with that provision. Therefore, the Committee recommends that the requirements of Article 9, paragraph 2, of the Covenant be complied with in respect of all detainees. The question of continued detention should be determined by an independent and impartial tribunal constituted and operating in accordance with Article 14, paragraph 1, of the Covenant. Furthermore it is recommended, at the very least, that a central register of detainees under preventive detention laws be maintained and that the State Party accept the admission of the

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[67] UN dec.E/1992/22 (E/CS.4/1992/84), p. 92.

[68] GAOR, A/49/40(I), Report HRC, 4, para 23.

[69] UN doc.E/CN.4/Sub.2/1994/56.

> International Committee of the Red Cross to all types of detention facilities, particularly in areas of conflict[70]"

India's reservation far exceeds what can be allowed and has rightly been criticized by HRC in this regard. In view of the above the reservation is invalid and instead of resorting to it India should validly do so through derogation by placing the safeguards in its preventive detention regime.

The question India has failed to address is the National Justification v the International Justification of the Acts. Though a particular Act is justified under the national Constitution does not mean that it is internationally justified. Thus India's contention of relying on the reservation of Article 9 to justify its preventive detention regime is ineffective.

VIII. CONCLUSION

Gardiner Committee appointed by UK on Northern Ireland stated in paragraphs 148 and 149[71].

> "detention cannot remain as a long term policy. In the short term, it may be an effective means of containing violence, but the prolonged effects of the use of detention are ultimately inimical to community life, fan a widespread sense of grievance and injustice, and obstruct those elements in Northern Ireland society which could lead to reconciliation".

Few if any of the human rights recognized by ICCPR are absolute. Many of them are subject to derogation in time of public emergency. Many are subject to limitations in public interest at any time[72]. The basic right of personal liberty does not strive towards the ideal of a complete abolition of State measures that deprive liberty; rather, it merely represents a procedural guarantee. The restriction on liberty of person by an administrative act is permissible only when this takes place in enforcement of a law that provides for such interference with adequate clarity and regulates the procedure to be observed[73]. The law itself must not be arbitrary and the enforcement also must not be arbitrary. The cases of deprivation of liberty provided for by law must not be manifestly unproportional, unjust or unpredictable, and the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the

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[70] A/52/40 vol.I (1997) 67 at para.439.

[71] *Supra* n.10 at para 74.

[72] Alexandrwe Charles Kiss, *Permissible limitations on Rights* in Louis Henkin. (ed.), THE INTERNATIONAL BILL OF RIGHTS (Columbia University Press, 1981).

[73] *Supra* n. 33 at 171-74.

circumstances of the case[74]. Preventive Detention is inherently unjustifiable on its own but the severity and scale of terrorism in the past decade has made it indispensable in providing human and national security.

When it is resorted to in the name of 'national security', the problem emerges when it is construed as the interest of a Government, regime or power group. It is at times like this that it becomes an instrument of abuse thus requiring certain safeguards. In India despite the Parliamentary system of governance, independent judicial system and separation of powers enshrined in the Constitution itself acts as a check against the arbitrary exercise of power by any of the wings of the government, it saw erosion of fundamental rights and independence of judiciary in the third emergency proclamation in 1975, promulgated on grounds of 'internal disturbances'. Thousands of people were detained under the preventive detention laws for months together and even the right to judicial review in the form of 'habeas corpus' was withdrawn. In the light of this recent history it is all the more important that the legislations giving special powers to the executive may not be internalized in the system but resorted to only when the exigencies of the situations so demand. They must hold well on the proportionality test with respect to area of application, time frame and severity established under Article 4 of the ICCPR.

However, the preventive detention as it exists under NSA reflects the derogation with respect to procedural safeguards in Article 9 against the principle of Article 5(1)[75] of the ICCPR. Complete withdrawal of judicial review will go against the very principle of Article 9 of the ICCPR. India's justification of these acts against the backdrop of its reservation is not acceptable on its own. However, what should be the threshold beyond which reservation should not be tolerated is peculiar to a particular situation at a particular time. A balance has to be struck between the legitimate interest of the State and the effect on the human rights of the individuals. One must not outweigh the other. A state thus cannot reserve the right to resort to preventive detention without any of the safeguards enshrined in the Covenant by resorting to reservations and as such the validity of such a reservation is open to review.

Thus preventive detention regime though not consistent with Article 9 on its own is justifiable only in case of emergency subject to safeguards to prevent its abuse. Any reservation has to be justified based on the 'object and purpose' criteria.

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[74] See *Van Alphen* v. *The Netherlands*, *supra* n. 28.

[75] Any act aimed at the destruction of any of the rights and freedoms recognized in the covenant is prohibited.