

The logo of the University of Delhi is a circular emblem. It features a central yellow elephant standing on a purple base. Above the elephant, the words "UNIVERSITY OF DELHI" are written in a circular path. Below the elephant, the Sanskrit motto "वैदिकं विद्यायां श्रेष्ठम्" is inscribed. The entire emblem is set against a light purple background.

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Section 1: Introduction.

Preventive detention laws were used for the first time in the Indian context by the Colonial British government in 1784. Even after independence, preventive detention laws have been used in India. The Indian State's rationale for using these laws is based on the need for securing national interest. However, the history of use of preventive detention laws in India has been replete with instances of misuse in terms of violations of individual freedom, and due process of law.

It is important to point out that preventive detention is applied to a person when it is anticipated that she/he may commit a crime in the future. It is different from punitive detention which is imposed on someone by a court of law if that person has committed a crime.

Preventive detention laws have been used as tools by States, including democratic States to anticipate threats to national security. In more recent times preventive detention has also been used as a method in counter-terrorism strategies.

In the following chapter, preventive detention in the Indian context will be elaborated upon. In the second section an attempt will be made to examine the origins of preventive detention in the context of British rule in India. In the third section, a discussion will ensue on the debates held during the Constituent Assembly and in section four there will be a discussion on the provisions present in the Indian Constitution which make preventive detention a possibility. Section five will elaborate upon certain preventive detention laws and their functioning in the Indian context. Section six will examine the role of the judiciary in the case of preventive detention. Finally, section seven will offer some conclusions.

Section 2: Origins of Preventive Detention during Colonial Rule.

Question.

When was Preventive Detention used for the first time by the Colonial State in India?

In the Colonial State, Preventive detention was used for the first time in 1784.

It has been argued that preventive detention was used during the First and Second World Wars as a tool in war. Subsequently, as it has been mentioned above under colonial rule in India preventive detention was used for the first time in 1784 (Abraham, 1993). The British East India Company Act was formulated such that it allowed the Governor General to detain someone in case if he/she was suspected for committing any action which would go against the interests of British settlements in India.

What is Preventive Detention?

Preventive detention is applied to a person when it is anticipated that she/he may commit a crime in the future

What is Punitive Detention?

Punitive detention which is imposed on someone by a court of law if that person has committed a crime

In 1818, the Bengali State Prisoners Regulation made it possible for the British in India to detain people if they were suspected for having caused damage in the realm of foreign affairs and internal security in the British colony. Such regulations were also created in the Bombay and Madras, whereby the executive was given the power to detain on discretionary grounds without the need to conform to legal procedures.

After the outbreak of the First World War, the British introduced the Defense of India Act in 1915 which had the provisions allowing preventive detention. In 1919, under the ambit of the Rowlatt Act the executive in the Colonial State was granted extensive powers to detain and/or arrest in peacetime.

At the time of the Second World War also, the Defense of India Act 1939 was introduced which had provisions for preventive detention for anyone suspected of acting in a manner that would harm the Colonial State.

Section 3: Debates held in the Constituent Assembly of India.

Despite the experience of witnessing the use of preventive detention laws during the Colonial rule, the Constituent Assembly considered keeping provisions pertaining to preventive detention in the Constitution (Austin, 1966). The debates on the right to individual liberty and provisions against arrest and detention were part of Articles 15 and 15 (A) during the functioning of the Constituent Assembly.

The Constituent Assembly faced a dilemma. On one hand the need was felt for providing the most extensive individual liberty in independent India and on the other hand the need was felt for creating a strong government which could take care of the crisis present during independence. Several members of the

Constituent Assembly expressed their concern regarding the potential misuse of preventive detention. The experience of Colonial rule had made it apparent that governments and members of the executive could misuse preventive detention. This could severely inhibit personal liberty and would also hinder the application of due process of law.

What would make the use of preventive detention different in independent India as compared to Colonial times?

The Colonial State had used preventive detention to mainly imprison freedom fighters during the struggle for independence in India. The Colonial State had arbitrarily used preventive detention. But after independence, the democratic Indian State was expected to use Preventive Detention with utmost discretion. It was hoped that the independent Indian State would not use preventive detention arbitrarily and would safeguard the rights of detainees.

The experience of the partition of India and Pakistan made many members of the Constituent Assembly agree to the need for stringent provisions in the Constitution, including provision for preventive detention. It was felt that the independent democratic Indian State would be vastly different from the Colonial State in its functioning.

Since India would function as a democracy after independence, the potential for misuse of power and the potential for the misuse of preventive detention would be very low. The democratic state would do its utmost to respect and further individual liberties. Yet, in order to safeguard national interest, it was important to have provisions such as preventive detention.

One of the members of the Constituent Assembly in 1949 pointed out that no other democratic State had made a Constitutional provision for enacting preventive detention, unless it was a matter of national emergency (Austin, 1966).

In response to this it was argued that the security threats that India faced at the time of independence were too grave to be ignored and hence provisions such as preventive detention were necessary. It was also suggested that procedural protections would be provided in order to check for the potential misuse of preventive detention.

It has been argued that the justification for including the provisions on preventive detention in the Indian Constitution rested on the anxieties present at the time of independence (Noorani, 2012). These anxieties were a product of the violence faced during partition and the political fragility of independent India. Given these circumstances it was considered viable to have a provision for using preventive detention even during peace-time.

Why would there be a need for the use of preventive detention in independent India?

- The Indian State faced many security threats immediately after independence, especially in the context of partition between India and Pakistan. There also existed separatist movements which wanted to break away from the Indian State.
- In this context, it was argued that provisions pertaining to preventive detention were necessary to ensure the security of the newly independent State. It was also argued that the rights of the detainees would be safeguarded.

Another important debate was held in this context with regard to the 'due process of law' and the 'procedure established by law'. This debate related to whether the legislature or the judiciary was to be trusted more as being the protector of individual liberty.

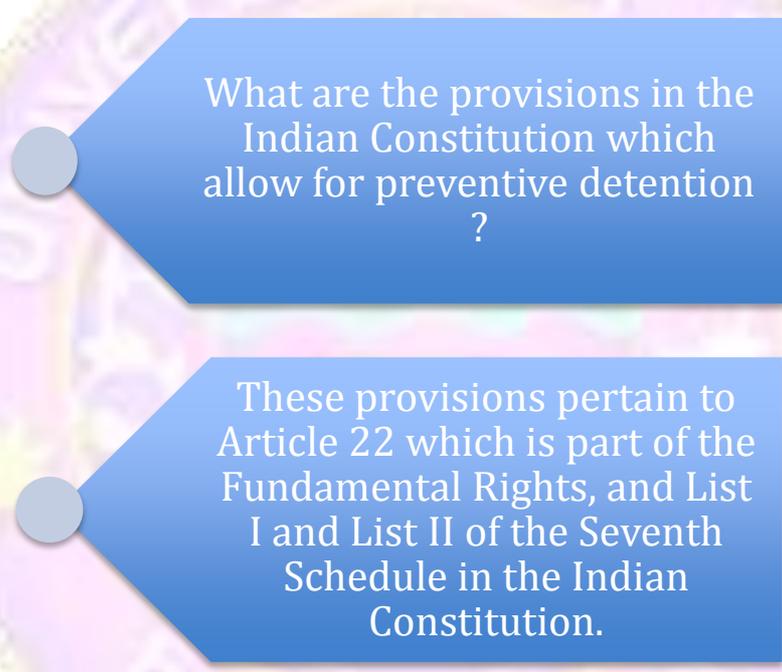
Due process of law would enable the judiciary to be the interpreter and protector of individual rights whereas procedure established by law, would empower the legislature to have the last word on the matter. When the matter was put to vote, the phrase 'procedure established by law' was chosen by the Constituent Assembly (Noorani, 2012). By so doing the power of the judiciary was reduced in the context of questioning the validity of the law with respect to due process.

Dr. Ambedkar proposed that the article in the Indian Constitution pertaining to arrest should have minimum safeguards for personal liberty. He argued that it was critical that the person being arrested must be informed about the grounds on which the arrest was being made. Additionally, the person being arrested was to have the right to have a legal attorney of their choice and to be produced before a magistrate within 24 hours of arrest.

It was also argued that extra-ordinary times would require extra-ordinary provisions (Austin, 1966). Simultaneously, it was argued that the provisions pertaining to preventive detention were not to have such extensive safeguards.

The presence of an advisory board was suggested which could look into the matters of preventive detention and decide case to case the duration for detention. When the matter was put to vote in the Constituent Assembly, it was decided that the detainee would be informed of the causes for arrest 'as soon as possible' and would be granted the right to prove his/her case against the charges filled against him/her.

Section 4: Provisions present in the Indian Constitution pertaining to Preventive Detention.



What are the provisions in the Indian Constitution which allow for preventive detention ?

These provisions pertain to Article 22 which is part of the Fundamental Rights, and List I and List II of the Seventh Schedule in the Indian Constitution.

At present the provisions pertaining to preventive detention in the Indian Constitution are contained in Article 22 (see Annexure 1) and in List I and List III of the Seventh Schedule.

The first two provisions of the Article 22 are to be applied in cases of general rights of arrested persons. Both these parts provide that the arrested person should be informed about the reasons for arrest as soon as possible, such person will have the right to consult a legal attorney and within 24 hours will have to be produced before a magistrate.

However, part 3 of Article 22 provides that the safeguards and provisions presented in the first two parts of Article 22 are not to apply to people who are arrested under any preventive detention laws. This implies that the persons who will be detained under preventive detention will not immediately have the right to know the reasons for the detention (unless decided otherwise), nor will they have

the right to have an attorney and nor will they be produced before a magistrate within 24 hours of arrest.

Some provisions under the ambit of Article 22 also provide for protection for people arrested under preventive detention. Part 4 of Article 22 provides for the process by which a person can be detained for a period of more than three months. In this manner a procedural safeguard is created whereby it is required for an Advisory Board to review preventive detention.

Part 5 of Article 22 does state that those who are arrested under preventive detention should be informed as soon as possible about the reasons for arrest and is to be allowed to be able to make a presentation against these reasons for arrest.

However, part 7 of Article 22 provides for the Parliament to be also to make laws determining the maximum period for which a person can be detained in preventive detention, and the groups of people who can be detained.

It needs to be pointed out that this means that the Indian Parliament has the power to adopt laws which have provisions for preventive detention for any possible period of time without having to justify this time period to any advisory board.

Additionally, it needs to be pointed out that under the ambit of the seventh Schedule of the Indian Constitution the Union and state government shave the power to enact preventive detention legislations.

Section 5: Working of Preventive Detention in India.

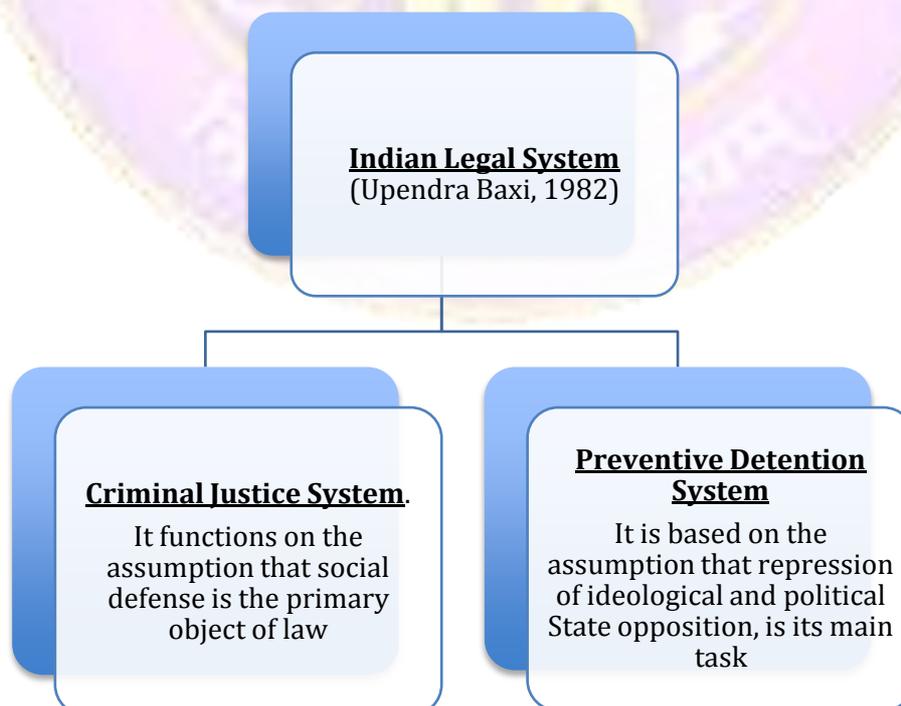
Within a month of the enactment of the Indian Constitution in 1950, the Preventive Detention Act 1950 was introduced. Since then Indian democracy's history has been replete with the use of laws containing preventive detention clauses. The Preventive Detention Act (PDA) 1950 was formulated to take requisite State action against communists in Telengana.

When and Why was the first preventive detention law used in independent India?

After independence, the first time that a preventive detention law was used in India was in 1950. In 1950, in order to respond to the security threats posed by the Telengana struggle, the Preventive Detention Act 1950 was formulated.

This was enacted as an emergency provision and was expected to lapse after a short duration of time. However, the Preventive Detention Act remained in force for about two decades after it was enacted.

Taking from the work of Upendra Baxi (1982), Singh (2007) has argued that it is important to understand the different registers present within the legal system in India. After the enactment of the Preventive Detention Act 1950, it can be argued that there has existed the Preventive Detention System within the legal system in India and this has run parallel to the Criminal Justice System. Baxi (1982) suggests that these two systems are different in terms of their object, standards of justice and the manner of power sharing.



The Preventive Detention System is based on the assumption that repression of ideological and political State opposition, is its main task. It exists on providing minimum adherence to due process of law and gives more importance to decisions made by the executive part of the government. The legislation and use of extra-ordinary laws and provisions comes under the Preventive Detention System.

On the other hand, the Criminal Justice System functions on the assumption that social defense is the primary object of law. It uses due process of law as its strategy. Additionally, it gives importance to the judiciary in interpretation of laws and legal procedures, as it is pro-accused in its outlook. It has been argued that both these systems comprise the legal system in the Indian context as they symbolize the contradictory pulls and pressures present within the Indian legal system.

In the context of the war between India and China in 1962, the Defense of India Act (DSA) 1962 was introduced. This also had provisions for preventive detention. Singh (2007) has argued that this gave the Central government the power to create rules for ensuring the security, public order, military operations of the State. Even during the wars with Pakistan in 1965, and 1971, the Indian State continued to detain people under the Defense of India Act 1962.

Next, the Unlawful Activities Prevention Act (UAPA) was passed in 1968. Within the ambit of this law the Indian State could declare any organization illegal and could imprison anyone for interrogation if the said organization or person critiqued/questioned Indian sovereignty territorially.

In 1969, the Preventive Detention Act lapsed as it did not get the requisite support from the then Prime Minister Indira Gandhi. After this for a period of two years, no Central government initiated preventive detention laws were enacted though different states still had their own preventive detention laws.

The Maintenance of Internal Security Act (MISA) was passed in 1971. It was framed along the contours of the Preventive Detention Act 1950. Singh (2007) suggests that MISA had provisions which were based on Article 22 (4) and (5) of the Indian Constitution. These concerned stringent provisions for detention and the opportunity to respond legally to the accusations made against the detainee.

The Defense of India Act 1971 introduced some provisions in MISA making it even more stringent. During the period of National Emergency in India from 1975-77, MISA was used as one of the instruments by the executive to extensively detain people who did not support the Indian government (Noorani, 2012).

With the 39th Amendment and the 42nd Amendment to the Indian Constitution, MISA was strengthened and was made a part of the Indian Constitution itself. In 1976, the Supreme Court also held the validity of MISA. The powers of the Central government were strengthened to create further such laws.

In 1977, the Janata Party government repealed MISA. At the same time the Janata Party government did not repeal other extra-ordinary laws such as Armed Forces Special Powers Act and the UAPA. In 1978, the 44th Amendment was introduced to the Constitution which made it harder for the government to use extra-ordinary provisions.

Name some of the preventive detention laws formulated by the central government in India

The Preventive Detention Act 1950.

The Defense of India Act 1962.

The Maintenance of Internal Security Act 1971.

The Unlawful Activities Prevention Act 1968.

It was made more difficult for subsequent governments to declare emergency, the government's power to infringe upon fundamental rights was restricted and minimum protection accorded under the ambit of preventive detention laws was

expanded. Although both the houses of the Indian parliament passed this Amendment, the provisions mentioned were not officially notified. This made it possible for preventive detention legislations to still be passed.

Noorani (2012) has argued that preventive detention provisions in subsequent legislations continued to become more stringent. For instance, the National Security Act 1980 was amended in 1984 and 1987 in order to respond to the political turmoil in Punjab and in this process the protections accorded to detainees were thinned down further.

With the above-mentioned amendments, people could be detained for up to six months without seeking permission/approval for the detention from an Advisory Board. These amendments also made it difficult for the courts of law to invalidate detention orders.

The anti-terror laws which have been introduced subsequently, including Terrorist and Disruptive Activities (Prevention) (TADA) Act 1985 and Prevention of Terrorism Act (POTA) 2002 had provisions for preventive detention. Under these laws, a person could be detained for up to a period of 180 days or under TADA for a period of up to even one year. It has been argued that these laws were misused to target minorities and disadvantaged groups in some states in India.

TADA and POTA were repealed but most of their provisions live on in different versions of the UAPA. The UAPA has been recently amended in the wake of the terror attacks in Mumbai in 2008. Under the ambit of this law it is possible to detain a person for upto 90 days without charge and further it is possible to detain a person for up to 180 days if the Public Prosecutor is able to prove that the investigation has not been completed.

Name some of the preventive detention laws formulated by different state governments in India

Jammu and Kashmir
Public Safety Act
1978

Assam Preventive
Detention Act 1980

It needs to be pointed out that in addition to these Central government laws, there have also existed state laws in India, which have had provisions for preventive detention. For instance the Jammu and Kashmir Public Safety Act (PSA) 1978 has severely restricted the rights of the detainees. Under the ambit of this law a person can be detained for a period of up to a year if it is deemed that she/he can act to disturb public order, and can be detained for up to two years if his/her actions are deemed to upset the security of the state.

The PSA also allows the detaining authorities discretion in terms of deciding the manner in which the person has to be detained, in other words the detaining authorities can decide upon the severity of circumstances under which a person is being detained and the manner in which the investigation has to be carried out. An Advisory Board is to be approached within a period of eight weeks each time a person is detained in order to get approval for the detention.

It has been argued that the actual implementation of the PSA has been even worse than its inherent provisions permit (Noorani, 2012). For instance, authorities have many times not informed the detainees of the reasons for which they are being detained. Further those held under preventive detention have faced torture in different forms. The government authorities have even used the provisions of PSA to detain political opponents. For instance, in 1999 most of the leaders of the All Parties Hurriyat (Freedom) Conference were held under detention.

Similarly in the context of Assam, the Assam Preventive Detention Act 1980 has been in force. This law is similar to the PSA in many ways and allows for protracted period of time for keeping someone in preventive detention. This act allows for keeping someone in detention on vague grounds.

Thus, both at the level of the Central government and at the level of the state governments preventive detention laws have been formulated since independence in the Indian context.

Section 6: Role of Judiciary in case of Preventive Detention.

Noorani (2012) has argued that the judiciary has played a limited role in enforcing procedural protections present in Article 22 of the Indian Constitution. The courts have not been able to effectively challenge the powers of the legislature in formulating and implementing preventive detention laws.

The Supreme Court has held that the detainees must be informed about the grounds on which they are being held in detention. The detainee must be provided all the required information based on which the detainee can make a case to defend himself/herself. No grounds, or facts are to be withheld from the detainees with regard to the reasons for which they are being withheld.



Further the Supreme Court has held that the detaining authority must work hard to clearly define the grounds on which a person is being held in preventive detention. It is considered illegal for the detaining authority to withhold someone on vague or irrelevant grounds. It has also been argued that a detention order can be held invalid in case insufficient information is provided for proving the grounds for the detention.

The Court has also stated that the detention order can be invalidated in case it is found that the detaining authority has mala fide intentions for detaining the person for reasons other than those stated for the detention. Additionally, the Supreme Court has also held that it is a prerequisite that the detainees must be informed about the reasons for her/his detention within the specified time.

Even though the Supreme Court has attempted to provide safeguards to those held in preventive detention, the Court has not been able to provide protection of individual rights on many accounts. For instance the Court has stated that it does not have the authority to comment on the propriety or sufficiency of the grounds on which a person is being held in preventive detention.

It also needs to be pointed out that the Court has not been able to take sufficient action against those people/authorities who have abused the provisions of preventive detention. For instance, in 2009 in the case of Shri Pawan Kharetilaa Arora vs Shri Ramrao Wagh, someone was held in preventive detention under 24 false charges for a period of nine months.

Noorani (2012) suggests that the Bombay High Court struck down the preventive detention in this case and asked the concerned authorities to pay compensation to the person falsely accused but the amount of compensation accorded was very limited.

The Supreme Court has not been able to effectively question the need for preventive detention in a democracy. For instance in the A. K. Gopalan vs State of Madras case in 1950, the Supreme Court ruled against the use of preventive detention in the said case but at the same time upheld the validity of the use of preventive detention in other contexts.

It also needs to be pointed out that not only have the courts not adequately questioned the use of preventive detention, the orders passed by the courts questioning preventive detention have not been adequately implemented.

Section 7: Conclusion.

Provisions for preventive detention were provided in the Indian Constitution as emergency provisions to be used in dire circumstances. However, over a period of time the use of preventive detention laws or the presence of provisions for preventive detention in extra-ordinary laws seems to have become a regular feature in India.

It can be argued that there is merit in the argument that preventive detention needs to be present in order to ensure the security of the Indian State and citizens. However, it is important to ensure that there exist sufficient safeguards for those held under preventive detention. It is critical to ensure that the provisions for preventive detention are not misused.

Safeguards to be provided to detainees in a democracy

Must be informed of the reasons for arrest as soon as possible.

Preventive detention for long periods of time (for instance three months and longer) should not be allowed without permission from a legal authority, and without proof against the person detained.

Detainees must not be tortured and their human rights should be respected.

must be produced in front of a legal authority in the shortest possible period of time.

Detainees held under preventive detention must not be tortured and must exist sufficient safeguards to ensure that their basic rights are not infringed upon. Detainees need to be informed about the reasons for their detention.

Importantly, preventive detention laws must be reviewed by the legislature within specified period of time. Periodic reviews of preventive detention orders also need to be made by Advisory Boards.

The detaining authorities must be held accountable for their conduct and they must be answerable for the reasons for which they hold someone in preventive

detention. In conclusion, it can be argued that the use of preventive detention needs to be held in check in order to avoid abuse.



Exercise

- 1. What is preventive detention? Did the Colonial State in India use preventive detention, why? What were the debates regarding this in the Constituent Assembly?**
- 2. Write an essay on the use of preventive detention in India.**
- 3. What were the debates held during the Constituent Assembly in India on the issue of preventive detention? What are the provisions present in the Indian Constitution which deal with preventive detention?**
- 4. What role has the Indian Supreme Court played in the debates on use of preventive detention in India ?**
- 5. Critically analyze the use of preventive detention in India. What are the limitations of the use of preventive detention in a democracy?**

Bibliography

1. Abraham, C. M. 1993. India: An Overview. In: Harding, A. and Hatchard, J. eds. 1993. *Preventive Detention and Security Laws: A Comparative Survey*. London: Martinus Nijhoff Publications. Also Available online at-
<http://books.google.co.in/books?id=J0eBd0JDvRQC&pg=PA59&lpg=PA59&dq=text+of+the+preventive+detention+law+in+india&source=bl&ots=IhGmYW4-pe&sig=EaqMeIJ26NUyU2kL11NhsmoF04I&hl=en&sa=X&ei=iaJpVPnxLMbJuASwqYHQDg&ved=0CB4Q6AEwAA#v=onepage&q=text%20of%20the%20preventive%20detention%20law%20in%20india&f=false>. As viewed on 12th November 2014.
2. Austin, G. 1966. Fundamental Rights II: Social Reform and State Security Versus 'Due Process'. In: Austin, G. 1966. *The Indian Constitution: Cornerstone of a Nation*. Oxford: Oxford University Press.
3. Baxi, U. 1982. *Crisis of the Indian Legal System*. Delhi: Vikas Publication.
4. Kalhan, A., Conroy, G. P., Kaushal, M., Miller, S. S., and Rakoff, J. S. 2007. Colonial Continuities: Human Rights, Terrorism and Security Laws in India. *Columbia Journal of Asian Law* 20 (1). Columbia: Columbia Journal of Asian Law. Also available online at-
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=970503. As viewed on 15th November 2014.
5. Noorani, A. G. and South Asia Human Rights Documentation Centre. 2012. Preventive Detention. In: Noorani, A. G. and South Asia Human Rights Documentation Centre. 2012. *Challenges to Civil Rights Guarantees in India*. New Delhi: Oxford University Press.
6. Ray, A.K. 2003. Human Rights Movement in India: A Historical Perspective. In: *Economic and Political Weekly*, Vol - XXXVIII No. 32, August 9, 2003. Mumbai: Sameeksha Press.
7. Singh, U. K. 1998. *Political Prisoners in India*. New Delhi: Oxford University Press.
8. Singh, U. K. 2007. Delimmas of Democracy or Reasons of State: Extraordinary Laws in India. In: Singh. U. K. 2007. *The State, Democracy and Anti-Terror Laws*. New Delhi: Sage Publications.
9. Singh, U. K. 2008. The Silent Erosion: Anti-terror laws and shifting contours of Jurisprudence in India. In: Tarabout, G. and Samadar, R. eds. 2008. *Conflict, Power, and the Landscape of Constitutionalism*. London: Routledge.

10. The Constitution Of India: Bare Act. 2011. New Delhi: Universal Law Publishing Co. Pvt. Ltd.

