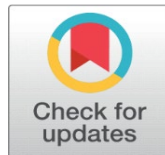
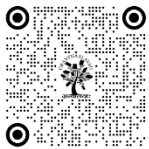


PREVENTIVE DETENTION IN INDIA: HISTORICAL BACKGROUND AND CONTEMPORARY ISSUES

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ABSTRACT

Aspects of law and Constitution which are contentious in India is preventive detention. From its colonial roots, its evolution apart from independence has mirrored that delicate tension between the liberty of the individual and the security requirement of the state. Highlights The historical origin of preventive detention from British colonial laws like the Defence of India Act, 1915 and the Government of India Act, 1935 to its constitutional adoption under Article 22. I understand that it was rolled out as urgent measure to ensure public order and national security however, the ongoing use of it even in peacetime poses big questions about the possibility of civil liberties and democratic accountability. Today, preventive detention laws like the National Security Act, 1980 and several state-specific ones are misused to house individuals without any charge or trial, often targeting the weaker sections of the society. The judiciary here is a mixed bag sometimes limiting executive excess but too often ruling detention is legal on technical grounds. This tension between national security and fundamental rights has become even more acute in the recent years with widespread concerns about arbitrary detention, abuse of power, and ineffective remedying mechanisms. Through a legal and political analysis, this article provides an overview of the human rights implications of the use of preventive detention in India. This demands a re-evaluation of the practice itself to bring it in line with both constitutional values and international human rights standards, and call for more transparency, judicial checks and balances and legislative reform as the case may be.

Keywords: Preventive Detention, Article 22, National Security Act, Civil Liberties, Human Rights

1. INTRODUCTION

Preventive detention is the State keeping a screening of a person without formally charged or trialled that he or she may have potential to continue act prejudicial to public order or security in result in the future. Preventive detention is not punitive detention where a person is subjected to punishment for having committed a crime in the past in accordance with the law through a judicial process. It is a measure like no other, an inherently controversial and autonomous measure, one which is fundamentally at odds with the essence of natural justice, natural liberty, and rule of law, including the due process of law.

Preventive detention is legally sanctioned in India, specifically in the Constitution under Article 22, a so-called limited fundamental right. This exception is specifically carved out in Article 22(3); thus, Article 22(1) and (2) does not hold true to an individual who is going to be detained without trial, under the triggering conditions of Article 22(3). Further, the preventive detention scheme is also supported by certain laws such as the National Security Act, 1980 and the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA), 1974 and certain state laws.

The rationale for preventive detention is the essence of the sovereign state which is the power of the State to protect the citizens, maintain public order and internal security. Proponents say that in situations of imminent threat, such as terrorism, communal violence or economic sabotage—they render unnecessary the means to defend against that threat, that preventive detention is a legitimate administrative option in order to remove the danger before it arises. It is preventive logic instead of corrective logic. But such rationale yields egregious discretionary authority to the executive at the expense of normal judicial protections.

The same rationale will underlie the powers of the parliament and state legislatures underlying Entry 9 of the Union List and Entry 3 of the Concurrent List in the Seventh Schedule of the Constitution relating to preventive detention. This delegation of power is, nonetheless, checked. And, the Articles 22(4) to (7) says that more than three months' time, such a detention cannot continue without the approval of High Court judges constitute an Advisory Board.

Notwithstanding these procedural requirements, the preventive detention law in India has evoked criticism from civil liberties groups, jurists, and international human rights organisations. It is a legal paradox in a democratic republic; valid under the constitution, but significantly straying from due process and rule of law. Therefore, the entry of preventive detention in the constitutional and legal framework of India occupies a rather highly charged overlap involving at the regional level the ideal of governance in a democracy, civil liberty, and state sovereignty.

Preventive Detention Analysis Sequence

1	Introduction Defining the concept and legal basis
2	Historical Evolution Tracing the legacy from colonial times
3	Constitutional Provisions Examining constitutional articles and interpretations
4	Contemporary Laws Analyzing current preventive detention laws
5	Challenges Addressing human rights and misuse issues
6	Reforms and Way Forward Proposing reforms for a balanced framework

Figure 1 Preventive Detention Analysis Sequence

Source Author's own creation

2. HISTORICAL DEVELOPMENT: FROM COLONIAL DEVELOPMENT TO CONSTITUTIONAL DEVELOPMENT

Preventive detention in India has their historical background in the British Government when it was used as a political weapon and a means of social control. The first significant example was the Defence of India Act, 1915 during World War I, which allowed for arrest without trial of anyone suspected of being anti-British. It paved the way for subsequent laws enabling suspicion-based detention, as per or no basis.

However, this was not the only law as a systematic and longer term preventive detention law came to be introduced in Bengal with the passing of Bengal Regulation III of 1818, which empowered the government to detain individuals indefinitely on mere suspicion of entering intent or threatening public peace. Though it was technically drafted to maintain public order, this law was used to crush political dissent and freedom fighters, beginning the process of sowing arbitrary state power in the Indian legal psyche.

The British took the DIR, 1939 to the next, shocking scale during World War II, imprisoning thousands of Indian nationalists, including top leaders like Jawaharlal Nehru, Subhas Chandra Bose and others. This oppressive experience with preventive detention laws continued to affect constitutional debates in India after independence.

Although an independent India held such great promise for liberty and constitutional government, preventive detention was not abandoned. Rather, the Constitution-makers, as they were fondly known, embraced the interstitial nature of the post-Partition society, and as such, fashioned a provision, Article 22, that stood between individual liberty and national security. Although members of the Constituent Assembly, including Dr. B.R. Ambedkar, reportedly felt uncomfortable with the postulate of preventive detention in a democracy, however, they wrote in this regard exception clauses and retained a few provisions of preventive detention in the Constitution itself. Dr Ambedkar himself recognised that, in Article 22, there was a — "necessary compromise between liberty and the necessity of the State".

After independence, the first paradigm legislation for preventive detention was the Preventive Detention Act, 1950 which provided for up to 12 months detention without trial. Even though initially put as a temporary measure, the law remained in effect and not repealed until 1969 showing the apparent normalisation of such powers within the Indian governance. Experiences of the violence of Partition, threats from across the border and internal security crises ensured that preventive detention remained a last resort.

Follow-up legislations like the MISA (Maintenance of Internal Security Act) 1971, increased the powers of preventive detention by the State even further. MISA was used most infamously during the Emergency (1975–77) to silence political opponents and critics, and was thus prone to gross abuse. Thousands were locked up without trial in an act that was condemned both at home and abroad.

The National Security Act (NSA) was enacted in 1980 soon after the repeal of MISA, and continues to be in place till date. It permits preventive detention based on airy charges like "acting in any manner detrimental to the interest of the state or the public order" and has drawn widespread criticism for allowing arbitrary detentions.

The history of preventive detention in India depicts a straight line: colonial repression, constitutional compromise, post-independence abuse. The changeover illustrates the methods by which laws that may have originated as temporary emergency measures can become permanent fixtures, uncovering critical questions about how well democratic institutions can withstand the burden of a national crisis and yet still protect civil liberties.

3. CONSTITUTIONAL TEXT AND JUDICIAL INTERPRETATION

One of the limited exceptions in the Indian Constitution to the proviso for the suspension of due process rights is preventive detention in well-defined circumstances. Article 22 contains the principal constitutional protections of procedure and the exceptions to preventive detention.

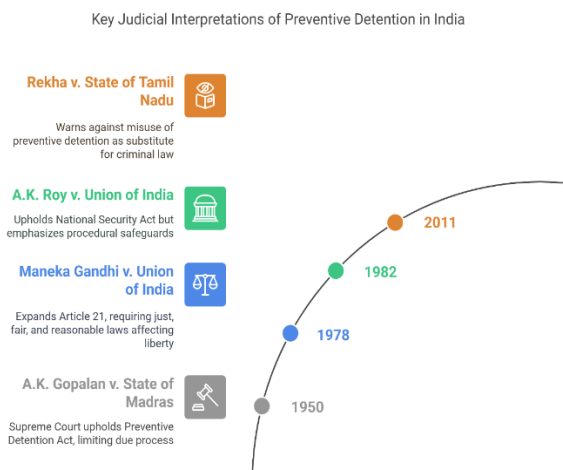


Figure 2 Key Judicial Interpretations of Preventive Detention in India

Source Author's own creation

Article 22: A Dual Scheme

- 1) The rights of a person arrested are protected through Article 22(1) and (2), which guarantees:
- 2) The right to know the reasons for arrest,
- 3) The right to be consulted and represented by a lawyer,
- 4) The right to be produced before a magistrate within 24 hours.

But Article 22(3) gives protection in the case of preventive detention. Then, Article 22(4) through (7) tries to impose some procedural safeguards on the enforcement process, including but not limited to,

- 1) No more than three months of detention without trial unless approved by an Advisory Board, composed of High Court judges;
- 2) The detainee is to be informed of "the nature of such order" "as soon as may be" but this can be denied in the interests of national security.
- 3) Parliament can prescribe the circumstances in which a person may be detained for the see an upper limit to the length of time that a person may be detained.

Thus, these provisions create a different legal structure, in which basic rights are watered down, in what is essentially the name of an apparent necessity of being ahead of the problem affecting public order or national security.

3.1. INTERPRETATION OF THE LAW: A TUG OF WAR BETWEEN LIBERTY AND SECURITY

Preventive detention has had a mixed record in interpretation by Indian judiciary as well. That has at times claimed to be the guardian of constitutional rights and freedoms but has refused to invalidate detentions on substantive constitutional grounds, thus granting the executive expansive deference.

The Preventive Detention Act, 1950, was challenged before the Supreme Court in *A.K. Gopalan v. State of Madras* (1950), and the Court in a narrow interpretation of fundamental rights upheld the Act and rejected the "due process" principle. It was the lowest ever in this regard in independent India.

This tide shifted in the case of *Maneka Gandhi v. Union of India* (1978), where the interpretation of Article 21 (Right to Life and Personal Liberty) was expanded and contained the expression that any law that would affect liberty must be just, fair and reasonable. This case did not overrule *Gopalan*, but opened up the doors for a more liberal jurisprudence.

The National Security Act was challenged directly in *A. K. Roy v. Union of India* (1982), where the constitutionality of the law itself was affirmed, but the necessity of strict adherence to procedural safeguards was stressed. Nonetheless, the courts remained deferential to the executive branch in defining what constitutes a threat to public order, meaning that judicial review has generally remained procedural rather than substantive.

In recent times, there have been rising judicial anxieties over the abuse of preventive detention legislation. The Supreme Court in *Rekha v. State of Tamil Nadu*, 2011 cautioned that preventive detention was not intended to be a replacement for ordinary criminal law, particularly where the acts alleged are such as can be prevented / punished in accordance with an existing legal paradigm.

However, to a large extent, courts have relinquished judicial review of what constitutes a sufficient basis for the subjective satisfaction of the detaining authority. Doctrinal looseness in what the standard of proof is for preventive detention as opposed to criminal law remains one of the chief horrors to the design of constitutional safeguards.

4. THE MODERN LAWS ON PREVENTIVE DETENTION

Preventive detention continues to be a significant instrument of statecraft in modern India, deployed so that the state can control public order, protect national security, and deter crimes from being committed. Preventive detention laws which were meant to be resorted in exigent circumstances are being used routinely across the country, many times in violation of the very legality, proportionality and due process that the laws seek to uphold.

Framework of Major Laws in Place on Preventive Detention

Preventive detention is presently governed under several statutes at the Central and State levels in India:

- 1) **National Security Act (NSA), 1980:** One of the most misused preventive detention laws, NSA can detain any person without going for a charge for a period of 12 months on the grounds of endangering national security, public order or interfering with public services. Authorities such as District Magistrates or the State Government can order the detention, but it has to be reviewed by an Advisory Board in three months.
- 2) **COFEPOSA Act, 1974** – The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act allows preventive detention for economic offences and is targeted at persons who may have violated the law against smuggling and/or the provisions of the foreign exchange law.
- 3) **Jammu and Kashmir Public Safety Act (PSA), 1978:** After the abrogation of Article 370, the PSA remains broadly deployed for civil detentions, especially against political leaders and activists, on imprecise grounds of acts endangering public order or security of the state.
- 4) **State-specific laws:** Some states have framed laws based on preventive detention in the context of bootleggers, human traffickers, land grabbers, cyber criminals, etc.

4.1. APPLICATION AND TRENDS

In reality, preventive detention laws have been used for many purposes that go well beyond what their drafters intended. Such laws are even more misused but authorities are always on the same page for this and choose these laws. Many existing penal codes and criminal procedures could have been applied more appropriately. Detention is commonly used:

- 1) Against protestors and activists (anti-CAA protests, farmers protests etc.)
- 2) In situations in which you are talking to a group — or in, a group that is politically weighted,
- 3) To get around flimsy criminal cases immune from piercing the lawsuit in district courts.

Detainees are often denied access to legal representation and, when they receive such access, the reasons for their detention are rarely disclosed in full and timely manner. The Advisory Board is required by the Constitution to review the detention, but its reviews are typically summary in nature and conducted exclusively on the basis of the executive record.

- 1) Arguably the worst aspect of this is the complete secrecy and impunity that is involved. The state can refuse to disclose the content of the 'national interest' justification to the detainee, and even if the case is taken for judicial review, that review can only consider the procedural correctness of the case, leaving wide swathes for arbitrary use.
- 2) For the last 8 years, data from the National Crime Records Bureau (NCRB) indicates a near-doubling of preventive detention cases. Over 24,500 cases of preventive detention were registered in 2022, most of them under NSA and also under some state laws, data given by NCRB in 2022 report shows.
- 3) Detention orders have been struck down in many a high-profile case on grounds of non-application of mind or procedural lapses. Nevertheless, those judicial interventions tend to come only after long periods of detention have been served, providing a form of remedy long after the fact.

Thus, the modern-day use of the preventive detention laws in India is symptomatic of the drift towards a concerning trend, the normalisation of extraordinary powers in everyday governance and always at the expense of civil liberties and justice.

5. HUMAN RIGHTS, MISUSE, MARGINALIZATION: CHALLENGES

India is facing unprecedented multipronged attack on human rights, constitutional guarantees, and democratic values through forms of preventive detention. Although national security and public order are recognized as legitimate state interests, the broad powers conferred by preventive detention legislation can and are often abused to violate the rights of individuals, especially those belonging to marginalized groups.

- 1) Breach of your Right to Due Process, Breach of the Legal Protections
- 2) Preventive detention thus violates the principles of natural justice and due process, and this is one of its core criticisms. Detainees are:

- 3) Without a right to have a lawyer at the Advisory Board,
- 4) Often also not fully aware of the reasons for their detention,
- 5) The right to be able to contest their detention quickly and fairly.

Such conditions breach international human rights standards, including those established in the International Covenant on Civil and Political Rights (ICCPR) of which India is a party. In practice, rights to liberty, fair trial, and protection against arbitrary detention are undermined.

No doubt: The in-camera (non-public) nature of Advisory Board proceedings and executive control over detention decisions render these laws vulnerable to abuse — and even unchecked abuse.



Figure 3 Preventive Detention Impacts Human Rights in India

Source: Author's own creation

- 1) Focus on Marginalized Communities
- 2) Both empirical research and anecdotal reports have shown preventive detention laws disproportionately impact marginalized communities, such as:
- 3) Caste and religious minorities,
- 4) Political dissidents,
- 5) Populations of Scheduled Tribes as well as of Dalits,
- 6) Weaker sections of the society.

In states such as Uttar Pradesh, Tamil Nadu and Jammu & Kashmir, instances of preventive detention have repeatedly been employed against activists, journalists, and student leaders. These arrests are frequently made without real evidence and are used to politically repress individuals.

Shahid Shafi Shabaz Khan In 2019, the abrogation of Article 370 was followed by the arrests of hundreds of political leaders and civilians in Jammu and Kashmir under the controversial Public Safety Act (PSA) prompting national and international outcry. Often, individuals were booked again and again with the same result—practices known as 'revolving-door detention'—to keep their detention going even after courts ordered relief.

The judicial reluctance and not-great remedies

The judiciary has sometimes intervened to prevent egregious miscarriages; however, it has generally been hesitant to intervene with any substance into the task of secondary inquiry into executive subjective satisfaction. The vast majority of petitions for habeas corpus are either long overdue, or dismissed before the charges can be laid on procedural grounds

No actionable compensation for wrongful detention, no immediate judicial review and no accountability for the authorities detaining them continues to sap the hope in the system. Even when quashed, detention is a traumatic experience for the individual and the family, accompanied by lasting social, psychological and economic consequences.

This absolute disregard for constitutional rights and dignity of a person shows that preventive detention operates in a legal vacuum in India where the two party system of politics conveniently subjugates constitutional values at the altar of administrative convenience and political expediency.

6. CONCLUSION

The frequent criticism and rampant misuse of the law of preventive detention in India necessitate urgent, comprehensive legal and institutional reforms. These reforms must strive to strike a reasonable balance between national security imperatives and civil liberties concerns. While it is unarguably necessary to permit preventive detention to help forestall and neutralize genuine threats to public order or national security, it is equally important to ensure that the exercise of such extraordinary powers is subject to ample regulation, transparency and constitutional scrutiny. One of the most vital areas for reform is the improvement of existing procedural safeguards that often offer inadequate protection to the detainees and therefore invariably end up being misused more than being used. To address this concern, every detainee must be assured the statutory right to legal representation during the proceedings of the Advisory Board. The grounds of detention must be supplied to the detainee or his advisor, except in wholly exceptional circumstances where the availability of such information would threaten the public interest seriously. Every detention must be mandatorily reviewed by a judicial authority and the period of detention must be limited and circumscribed to prevent indefinite incarceration. The law should also provide for compulsory compensation in cases of unlawful or wrongful detention. The implementation of these reforms will help bring Indian law of preventive detention into conformity with its international human rights obligations and substantially reduce the likelihood of its misuse.

Additionally, the judiciary must play a more proactive and robust role in overseeing preventive detention practices and protecting the constitutionally mandated values. Historically, the courts limited their review to “judicial pronouncement of the satisfaction or the reasonableness of the satisfaction and the subjective satisfaction of the authority”. However, a more progressive role is needed whereby the higher judiciary begins to examine the substantive reasons and justification for the detention. This must include reviewing the law enforcement authorities to determine the misuse of power and diligently developing an extensive body of judgements on the issues of necessity and proportionality. This will have the twin effect of reintegrating the idea of liberty being the rule and the preventive detention being the necessary exception and affirming it through frequent reinforcement. A final area of reform is the data and public accountability. It is necessary to create a national level framework for monitoring and auditing the preventive detention practices. This must involve the publication and annual release, in the public domain, of national statistics of detention, showing vital demographic details like age, gender, religion, caste etc. The data of Advisory Board submissions and outcomes must also be made public. Additionally, an independent audit by statutorily created human rights bodies like the National Human Rights Commission in addition to periodic audits by State Human Rights Commissions must be made compulsory. These will be effective in monitoring and curbing the prevalent abuse and misuse of the law, ensuring institutional accountability, and fostering public confidence in the legal administration system.

CONFLICT OF INTERESTS

None.

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