



Preventive Detention as a Tool of State Power: Evaluating Its Use and Abuse

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ABSTRACT

Preventive detention represents one of the most controversial exercises of state power, permitting the detention of individuals without formal trial on the basis of anticipated threats to public order, national security, or state stability. While governments justify such laws as necessary instruments for maintaining security and preventing disruptive activities, their implementation frequently raises serious concerns regarding constitutionalism, human rights, and the rule of law. This research paper critically examines preventive detention as a mechanism of state authority by evaluating both its legitimate purposes and its potential for misuse. The study analyses the historical evolution, legal foundations, and constitutional framework governing preventive detention, with particular emphasis on democratic systems and the Indian legal context under Articles 21 and 22 of the Constitution of India. The paper further explores the tension between individual liberty and collective security, highlighting how preventive detention laws often operate in exceptional circumstances but risk becoming tools of political suppression, arbitrary detention, and executive overreach. Through judicial interpretations, landmark case laws, and comparative perspectives, the research evaluates the safeguards designed to prevent abuse and assesses their practical effectiveness. The study also investigates contemporary



challenges, including prolonged detention, lack of procedural transparency, limited judicial review, and the impact on civil liberties. By adopting a doctrinal and analytical approach, the paper argues that although preventive detention may serve legitimate state interests in extraordinary situations, unchecked or excessive use undermines democratic accountability and fundamental rights. The research concludes that stronger procedural safeguards, judicial scrutiny, and adherence to constitutional principles are essential to ensure that preventive detention remains an exceptional measure rather than a routine instrument of governance.

INTRODUCTION

The magnitude of the task of the governance of a nation cannot be comprehended. A huge responsibility that involves multiple aspects to its fulfilment involves the talent and brain of numerous people working behind it. It is natural that all the people involved in this process carry a level of power too whether it is the power to enact laws or execute or interpret them or deciding the removal of certain laws. In the midst of such coexistence of power and responsibility comes the contrasting concepts of liberty and security. It is understandable that maintaining a balance between individual liberties and national security is not an easy task. An imbalance on either side can pose serious issues in the country. This makes it important to understand the relations between the two and analyses what is more relevant with regards to the modern democratic state. Through this paper, the author aims to present a true picture of the concept and prevalence of preventive detention. It examines whether the preventive detention laws are achieving what they seek to achieve and if they are achieving it, whether they are in alignment with the democratic values in India. It presents the practical applicability of these laws in India since their enactment. Maintaining security laws in a way that upholds and keeps safe the individual freedoms and rights, is the problem of nearly every democratic state. Some countries like Japan have even chosen to discontinue such legislations in the modern times. While India has chosen to maintain loyalty to these laws, it is crucial to see whether it is successful in using them appropriately and fairly.

Preventive detention laws were first introduced in the country to fight terrorist activities considering the disturbing environment during partition. It was genuine to legislate in that direction and try to find a solution to the then prevailing violence and riots. The founding fathers of our constitution felt that the problem could not be solved with regular provisions of criminal procedure and a special legislation was



required. They were well acquainted with the fact that curbing terrorism needs severe deterrence which could not be achieved in the absence of strict legislation. This gave birth to Acts like the Preventive Detention Act, 1950, the Defense of India Act, 1962 ; the Maintenance of Internal Security Act, 1971. These were the initial enactments post-independence to deal with the violence at that time.

Acknowledging the purpose and requirement of these laws at a certain point of time, their relevance in the modern era is highly doubtful. Such laws have been described as antagonistic and detrimental to a democratic state so their use must be restricted to exceptional circumstances like war or external aggression. Therefore, the fact that they are still being used by the Indian government in many ways and at many occasions makes it important and urgent to study the significance of the anti-terrorism laws in the light of the modern democratic philosophy and comprehend the connection between the two.

Preventive detention is a concept that aims at detention of individuals who are likely to commit any acts of violence or terrorism. The key word here is likely implying the anticipatory nature of the concept. This means that the detention here is the result of some form of suspicion and not an actual overt act. Such suspicion has to be in relation to some terrorist activity which would result in detaining such a person as a preventive measure. The details of such detention regarding the time period and the procedure would depend on the laws of a particular country .

The purpose of such detention is to combat terrorism by incapacitation of potential offenders. One of the main and the most controversial features of such detention is that it does not involve a trial. This means that a person detained under this would not be given the right to out forth his contentions in front of a neutral adjudicating body regarding the matter

A terrorist activity can be said to mean any such unlawful activity which is aimed at intimidating or coercing a person or a group of persons or the government to cater to the demands of the doer of such activity by the unlawful use of force or violence. The aim or objective of a terrorist activity could be in furtherance of any personal or community interest or mere show of power

BACKGROUND OF PREVENTIVE DETENTION LAWS

Origin in England

The roots of preventive detention can be traced to English legal history. During periods of war and political unrest, the British Crown frequently exercised extraordinary powers to detain individuals suspected of threatening state security.



One of the earliest examples was the suspension of the Habeas Corpus Act in England during the 18th and 19th centuries. Habeas corpus is a legal safeguard against unlawful detention, but Parliament occasionally suspended it during emergencies, allowing detention without trial.

Preventive detention gained further prominence during World War I and World War II under laws such as:

- Defence of the Realm Acts (DORA), 1914
- Emergency Powers (Defence) Acts, 1939

These laws empowered the government to detain individuals suspected of espionage, sabotage, or activities threatening national security.

Preventive Detention During British Rule in India

Preventive detention was extensively used by the British colonial administration in India to suppress nationalist movements and political dissent.

Bengal State Prisoners Regulation, 1818

One of the earliest preventive detention laws in India was the Bengal State Prisoners Regulation III of 1818. It authorized the British government to detain individuals without trial if they were considered dangerous to British rule. The law granted sweeping powers to the executive and denied detainees ordinary judicial protections.

Rowlatt Act, 1919

A major milestone in the history of preventive detention in India was the Rowlatt Act of 1919, officially known as the Anarchical and Revolutionary Crimes Act. The Act empowered the government to:

- Arrest individuals without warrant
- Detain persons without trial
- Restrict freedom of expression and assembly

The Rowlatt Act was widely criticized as “Black Law” because it violated civil liberties. Massive protests erupted across India under the leadership of Mahatma Gandhi, eventually contributing to the rise



of the non-cooperation movement. The enactment of the Rowlatt Act and the subsequent Jallianwala Bagh massacre demonstrated how preventive detention could be misused for political repression.

Preventive Detention in Independent India

Constitutional Recognition

After independence, the framers of the Indian Constitution faced the difficult challenge of balancing individual liberty with national security and public order. Although India adopted democratic values and fundamental rights, the Constitution also incorporated provisions permitting preventive detention.

Article 22 of the Constitution of India

Article 22 specifically deals with protection against arrest and detention. Clauses (1) and (2) provide safeguards such as:

- Right to be informed of grounds of arrest
- Right to consult a legal practitioner
- Production before a magistrate within 24 hours

However, clauses (3) to (7) create exceptions for preventive detention. The Constitution allows Parliament to enact preventive detention laws and prescribes limited safeguards, including:

- Communication of grounds of detention
- Opportunity to make representation
- Advisory Board review

The inclusion of preventive detention in the Constitution was controversial. Many members of the Constituent Assembly argued that such powers were incompatible with democracy and civil liberties. Nevertheless, leaders like Dr. B.R. Ambedkar justified preventive detention as necessary for maintaining security in a newly independent and partition-affected nation.

MAJOR PREVENTIVE DETENTION LAWS IN INDIA

Preventive Detention Act, 1950



This was the first preventive detention legislation enacted after independence. It was introduced primarily due to concerns regarding:

- Partition violence
- Communal tensions
- Internal security threats

The Act allowed detention to prevent activities harmful to:

- National defense
- Foreign affairs
- Public safety
- Maintenance of public order.

The law remained in force until 1969.

Maintenance of Internal Security Act (MISA), 1971

MISA granted broad powers of detention to the government. During the Emergency (1975–1977), it was widely used to detain political opponents, journalists, and activists without trial. The abuse of MISA during the Emergency became a significant example of the dangers associated with preventive detention laws. The Act was repealed in 1978 after strong criticism regarding violations of civil liberties.

National Security Act (NSA), 1980

The National Security Act, 1980 is one of the most important preventive detention laws currently in force in India. Under the NSA, a person may be detained to prevent activities prejudicial to:

- National security
- Public order
- Essential supplies and services

The law permits detention for up to 12 months under certain conditions. Critics argue that the NSA is often misused against political dissenters and marginalized groups.



Other Preventive Detention Laws

India has also enacted several special laws with preventive detention features, including:

- Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA), 1974
- Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980
- Terrorist and Disruptive Activities (Prevention) Act (TADA)
- Prevention of Terrorism Act (POTA)
- Unlawful Activities (Prevention) Act (UAPA)

JUDICIAL APPROACH TOWARDS PREVENTIVE DETENTION

A.K. Gopalan v. State of Madras (1950)

The Supreme Court upheld the validity of the Preventive Detention Act, 1950, adopting a narrow interpretation of personal liberty under Article 21.

ADM Jabalpur v. Shivkant Shukla (1976)

During the Emergency, the Supreme Court controversially held that the right to seek judicial remedy against unlawful detention could be suspended. This judgment was heavily criticized and later effectively overruled.

Maneka Gandhi v. Union of India (1978)

The Court adopted a broader interpretation of personal liberty and established that laws affecting liberty must be “just, fair, and reasonable.” This case strengthened procedural safeguards against arbitrary detention.

CRITICISM OF PREVENTIVE DETENTION LAWS

Violation of Fundamental Rights

These laws restrict:

- Personal liberty



- Freedom of movement
- Right to fair trial

Possibility of Executive Abuse

Broad discretionary powers may lead to:

- Political misuse
- Arbitrary arrests
- Suppression of dissent

Weak Judicial Oversight

Since detention occurs without trial, judicial scrutiny is often limited.

Conflict with Democratic Principles

Critics argue that detention without conviction contradicts the rule of law and presumption of innocence.

Justifications for Preventive Detention

Supporters argue that preventive detention is necessary because:

- National security threats require immediate action
- Terrorism and espionage cannot always be addressed through ordinary criminal law
- Preventive action may avert serious violence and disorder

Governments often defend preventive detention as an exceptional but necessary mechanism in times of crisis.

Preventive Detention as a Tool of State Power

Preventive detention significantly strengthens executive authority by allowing detention based on suspicion rather than evidence tested through trial. This creates several concerns.



Expansion of Executive Discretion

Preventive detention laws rely heavily on the “subjective satisfaction” of executive authorities. Courts traditionally avoid examining the adequacy of evidence, limiting judicial oversight. This concentration of power weakens checks and balances.

Circumvention of Criminal Justice

Preventive detention is frequently invoked when ordinary criminal law cannot secure conviction or prolonged custody. This undermines the presumption of innocence and due process.

Normalization of Exceptional Powers

Scholars argue that preventive detention has shifted from an extraordinary emergency mechanism to a routine governance tool.

HUMAN RIGHTS CONCERN

Preventive detention raises profound human rights concerns because it authorizes the State to curtail personal liberty without the safeguards ordinarily associated with criminal justice. Since detention occurs without conviction and often without a full judicial trial, it creates a tension between collective security and individual freedoms. Human rights scholars, constitutional experts, and international organizations have repeatedly criticized preventive detention laws for enabling arbitrary state action and weakening democratic accountability.

The following are the major human rights concerns associated with preventive detention:

1. Violation of the Right to Personal Liberty

The right to personal liberty is recognized as one of the most fundamental human rights in democratic societies. In India, Article 21 of the Constitution guarantees that no person shall be deprived of life or personal liberty except according to a procedure established by law. Similarly, Article 9 of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) prohibit arbitrary arrest and detention. Preventive detention directly affects this right because individuals may be detained not for a proven offence, but merely on suspicion or anticipation of future conduct. The absence of a criminal trial before deprivation of liberty raises concerns regarding fairness, justice, and abuse of power. Critics argue that preventive detention reverses the presumption of



innocence by treating individuals as potential threats rather than requiring proof of guilt beyond reasonable doubt.

2. Arbitrary Exercise of State Power

One of the most serious criticisms of preventive detention laws is that they permit arbitrary detention. Terms such as “public order,” “state security,” or “national interest” are often broad and vague, allowing authorities to interpret them expansively. Because detention orders are generally based on the “subjective satisfaction” of executive authorities, there is considerable scope for misuse. In many cases:

- Detailed evidence is not disclosed to the detainee,
- Authorities rely on confidential intelligence reports,
- Judicial review remains limited.

This concentration of discretionary power in the executive threatens the rule of law and creates opportunities for political misuse. Human rights organizations have repeatedly warned that vague detention laws encourage arbitrary arrests, discrimination, and selective targeting.

3. Denial of Fair Trial Rights

Fair trial rights are central to democratic legal systems. Preventive detention weakens these safeguards in several ways:

(a) Absence of Immediate Judicial Trial

Unlike ordinary criminal proceedings, preventive detainees may remain imprisoned without formal charges or trial.

(b) Restricted Access to Legal Representation

Article 22(3) of the Indian Constitution limits certain procedural protections available to preventive detainees, reducing effective legal defense.

(c) Limited Disclosure of Evidence

Authorities may refuse to disclose all materials relied upon for detention on grounds of public interest or national security.



4. Psychological and Social Impact on Detainees

Preventive detention can cause severe psychological trauma and social disruption. Since detainees are imprisoned without conviction, uncertainty regarding the duration and justification of detention creates anxiety and emotional distress. Common psychological effects include:

- Depression,
- Fear and insecurity,
- Social stigma,
- Mental stress caused by indefinite uncertainty.

Families of detainees also suffer social and economic hardship, especially when the detained individual is the primary earner. Children and dependents may face financial instability, educational disruption, and social isolation. The human cost of preventive detention extends beyond the detainee and affects entire families and communities.

5. Political Misuse and Suppression of Dissent

Preventive detention laws have frequently been criticized for being used against political opponents, journalists, activists, protestors, and minority groups. Historically, such laws have often been invoked:

- During political unrest,
- Against protest movements,
- To suppress criticism of the government,
- To control opposition activities.

During the Emergency period in India (1975–1977), thousands of political opponents were detained under the Maintenance of Internal Security Act (MISA). The misuse of detention laws during this period remains a major example of how preventive detention can undermine democracy and civil liberties. Critics argue that when preventive detention becomes a political weapon, it transforms from a security measure into an instrument of authoritarian control.



6. Weak Judicial Oversight

Although courts possess the power of judicial review, preventive detention cases often receive limited scrutiny because courts traditionally avoid questioning the “subjective satisfaction” of the executive authority. Judicial review is usually confined to procedural compliance rather than examining:

- Whether detention was truly necessary,
- Whether evidence was credible,
- Whether less restrictive measures could have been used.

This weak oversight reduces accountability and increases the possibility of unlawful detention. Human rights advocates argue that stronger judicial intervention is necessary to protect constitutional liberties.

7. Erosion of Democratic Values and Rule of Law

Democracy is based on principles such as:

- Rule of law,
- Accountability,
- Transparency,
- Protection of individual freedoms.

Preventive detention threatens these principles because it allows punishment-like consequences without criminal conviction. Excessive use of detention powers may normalize exceptional measures and weaken constitutional culture. Scholars argue that the routine use of preventive detention creates a “culture of suspicion,” where executive convenience takes precedence over civil liberties. The normalization of such extraordinary powers risks transforming democratic governance into executive-centered governance.

COMPARATIVE PERSPECTIVE OF PREVENTIVE DETENTION IN DIFFERENT COUNTRIES

India

India has one of the broadest preventive detention systems among democratic nations. Preventive detention is constitutionally permitted under Article 22 of the Constitution. Laws such as the National



Security Act (NSA), COFEPOSA, and various state “Goondas Acts” allow detention without trial on grounds of national security, public order, and smuggling prevention. The executive enjoys wide discretionary powers, while judicial review is comparatively limited. Critics argue that preventive detention is often misused against political opponents, protestors, and marginalized communities.

United Kingdom

The United Kingdom uses preventive detention mainly during emergencies and anti-terrorism operations. During World War II, Regulation 18B allowed detention without trial. In recent years, anti-terror laws such as the Anti-terrorism, Crime and Security Act, 2001 introduced preventive measures against suspected terrorists. However, preventive detention in the UK is subject to strong judicial oversight and human rights protections under the Human Rights Act, 1998 and the European Convention on Human Rights (ECHR).

United States

The United States generally emphasizes due process and individual liberty. Preventive detention is allowed only in exceptional situations such as terrorism, immigration control, or wartime detention. After the September 11 attacks, laws like the USA PATRIOT Act expanded executive detention powers. Cases such as Guantanamo Bay detentions raised global human rights concerns. However, the U.S. Supreme Court has repeatedly affirmed the importance of habeas corpus and judicial review to prevent arbitrary detention.

France

France permits preventive detention and restrictive measures mainly in response to terrorism and national emergencies. Following terrorist attacks, the government imposed emergency laws allowing house arrests, searches, and movement restrictions. French courts and the European Court of Human Rights supervise these measures to ensure they remain temporary and proportionate.

China

China has extensive preventive detention powers under national security and administrative laws. Authorities may detain individuals for political dissent, activism, or alleged threats to state security. Judicial independence is weak, and executive authorities exercise broad control over detention decisions. International organizations have criticized China for arbitrary detention, lack of due process, and suppression of human rights. A comparison of these countries shows that democratic systems like the



United Kingdom, United States, and France generally impose stronger judicial safeguards and human rights protections on preventive detention. India allows broader preventive detention powers during normal times, while China represents a system with extensive executive control and limited judicial oversight. The comparison highlights the importance of balancing national security with constitutional liberties and human rights safeguards.

CRITICISM AND REFORMS

Preventive detention has been widely criticized by legal scholars, human rights activists, and constitutional experts because it allows detention without trial and gives extensive powers to the executive. The major criticisms are as follows:

1. Violation of Fundamental Rights

Preventive detention directly affects the right to personal liberty guaranteed under Article 21 of the Indian Constitution. Since individuals can be detained without conviction, it weakens the principles of natural justice and due process.

2. Arbitrary Use of Power

The laws often rely on the “subjective satisfaction” of executive authorities. Broad terms such as “public order” and “state security” are vague and may lead to arbitrary or politically motivated detention.

3. Weak Judicial Oversight

Courts generally review only procedural aspects rather than examining whether detention was actually necessary. This limited judicial scrutiny increases the risk of abuse by the executive.

4. Political Misuse

Preventive detention laws have frequently been used against political opponents, activists, journalists, and protestors. During the Emergency (1975–1977), thousands of people were detained under MISA, showing how such powers can suppress democratic dissent.

5. Denial of Fair Trial

Preventive detainees may not receive full access to evidence, legal representation, or the opportunity to cross-examine witnesses. This undermines the principles of a fair and transparent legal process.



6. Conflict with Human Rights Standards

International human rights instruments such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) prohibit arbitrary detention and emphasize fair trial rights. Critics argue that preventive detention laws often fail to meet these standards.

7. Psychological and Social Harm

Detention without trial causes mental stress, social stigma, and economic hardship for detainees and their families. Long periods of uncertainty can severely affect human dignity and well-being.

Reforms Suggested for Preventive Detention Laws

1. Narrow and Clear Definitions

Terms such as “public order” and “security of the State” should be clearly defined to reduce arbitrary interpretation by authorities.

2. Stronger Judicial Review

Courts should examine not only procedural compliance but also the necessity, proportionality, and reasonableness of detention orders.

3. Time-Bound Detention

Preventive detention should remain temporary and exceptional. Strict limits should be imposed on the duration of detention without trial.

4. Greater Transparency

Authorities should provide detailed reasons for detention and maintain transparency regarding detention procedures and statistics.

5. Protection of Fair Trial Rights

Detainees should have better access to legal representation, evidence, and an effective opportunity to challenge detention orders.

6. Independent Oversight Mechanisms



Independent review boards or human rights commissions should regularly examine preventive detention cases to ensure accountability.

7. Compensation for Wrongful Detention

Individuals unlawfully detained should receive compensation and legal remedies for the violation of their rights.

CONCLUSION

Although preventive detention may be necessary in exceptional situations involving national security and public safety, its broad and frequent use threatens constitutional liberties and democratic values. The major criticisms include arbitrary executive power, weak judicial safeguards, political misuse, and violation of human rights. Therefore, meaningful reforms such as stronger judicial oversight, transparency, accountability, and protection of fair trial rights are essential to ensure that preventive detention remains an exceptional measure rather than a routine tool of governance.

Preventive detention represents one of the most debatable legal mechanisms as maintaining state security against the individual freedom's issues. This study shows that preventive detention is to ensure public order by offering assurance against threats; however, its execution in India ends up in arbitrary detention, executive excess and violation of fundamental rights. The executive has been given broad discretionary powers under Article 22 of the Indian Constitution as well as various other statutes like the NSA, UAPA and COFEPOSA, and people have been detained without being given proper judicial oversight. Lack of transparency, procedural safeguards, and accountability mechanisms have further deepened the problem, where misuse is being done against political opponents, activists, and groups marginalized. Judicial review of preventive detention continues to be erratic, with courts deferring most of the time to executive determinations instead of doing substantive review of detention orders. The result has been such that all individual rights can be impugned under the pretext of national security. Immediate legal reforms are needed to prevent further misuse, including compulsory judicial review and stricter procedural safeguards. There must also be a more transparent process by which detention is executed. Without such changes, laws pertaining to preventive detention will, for the foreseeable future, remain a dangerous threat to democracy and human rights, as they seek to obliterate the very foundation of justice, fairness, and rule of law.



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