
ABSENCE OF ESSENTIAL SAFEGUARDS: A DISCUSSION ON PREVENTIVE DETENTION IN INDIA

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ABSTRACT

Today a free man and tomorrow caged for no provable reason of his crime but on mere suspicion of potentially committing one. On the surface, one would interpret Preventive Detention laws to be as such. However, its complexity runs deep and so does its merits and damage. Justifying the detention of an individual on suspicion cannot be carried out arbitrarily but rather is to be subject to strict guidelines, legal procedures and review. Implementation of these laws is a tightrope walk while balancing national security and also individual liberty as guaranteed by the same legal framework that now seemingly seems to curtail is dramatically.

From pre-independent colonial laws to the modern Indian legal framework, Preventive Detention has existed for a long while and continuously evolved and at every point it has been controversial, sparking an everlasting discussion of where an individual's rights end and where communal protection begins. Article 22, in present times has been the poster child of many such discussions. Especially when it comes to how it walks the tightrope, often tilting away from individual rights.

Preventive Detention is not exclusive to Indian law and observed in other democracies as well. Almost seen as a necessary provision in the name of national security and integrity. However, comparisons are to be made to other democracies in many instances to check our spots for improvement. Much emphasis is placed on preventing exploitation of human rights under preventive detention and many guidelines present in international democracies seek to achieve so.

This is not to say that we do not have safeguards placed in our framework for detention. The issue arises with how well these are implemented and how the safeguards itself can be improved.

This article aims to discuss and highlight these issues and understand our nation's current standing on Preventive Detention.

PRE – INDEPENDENCE BACKGROUND

Preventive Detention in present India has undergone a long evolution since its colonial days and today bears much similarity with and differences from those historical laws.

The Bengal Regulation Act of 1818 (Regulation 3 of 1818) marks one of the early provisions for Preventive Detention in a pre-independent India in the presidencies of Calcutta, Bombay and Madras.¹

The Defence of India Act 1915 (Act IV of 1915) enacted with respect to the prevailing conditions of World War I, gave powers to the colonial authorities to try suspects who have been arrested and imprisoned without following the legal procedures that is to be generally carried out under normal circumstances.

The Rowlatt Act of 1919 adopted under the British Raj adopting some of the clauses of the earlier concluded Defence of India Act of 1915. Not only did it provide for the arresting and imprisoning of any person without a trial, but also allowed for them to be subjected to preventive detention upto a period of two years.²

Government of India Act 1935, later forming one of the sources of our post independent Constitution, also contained in it the provisions for Preventive Detention.³

The Defence of India Act 1939, similar to the Defence of India Act 1915, was an emergency provision during the Second World War⁴ with similar powers given to the government authorities to perform actions as done under the 1915 Act.

POST – INDEPENDENCE DEVELOPMENTS

The relatively lengthy Article 22 of the Indian Constitution includes under it the clauses which delineate concisely the provisions for and safeguards against Preventive Detention starting from clause 22(3) to clause 22(7). In the interest of public order and national security, a person

¹ Shazia Ahad Bhat, *SPECIAL LAWS IN INDIA: COLONIAL AND POST COLONIAL DEVELOPMENTS*, 10 IJRAR 517, 517 (2023).

² Aqib Yousuf Rather & Peer Amir Ahmad, *A Critical Study of the Rowlatt Act and Its Aftermath*, 2 HRJHA 29, 31 (2024).

³ Etisa Debbarma, *A LEGAL ANALYSIS ON PREVENTIVE DETENTION LAWS IN INDIA*, 3 IJLSS 433, 434 (2025).

⁴ Neha Singhal, *Preventive Detention Laws in India*, 12 JOURNAL OF INDIAN LAW AND SOCIETY 50, 52 (2021).

suspected to be a threat may be detained up to 3 months unless advised for the detention's extension by an Advisory Board composed of members eligible under the provisions as provided for in the sub-clause (a) of clause 4. Substantial power is vested upon the Legislature under this Article with respect to the procedure prescribed under provisions pertaining to Preventive Detention laws.

In 1950, the country adopted and enacted its own Preventive Detention Act (now repealed). Similarly, India also brought into existence in 1962, a Defence of India Act of its own.⁵

The Armed Forces (Special Powers) Act of 1958, Maintenance of Internal Security Act (MISA) of 1971, the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA) of 1974, the National Security Act 1980, Terrorist and Disruptive Activities (Prevention) Act (TADA) of 1985, Prevention of Terrorism Act (POTA) of 2002, Unlawful Activities (Prevention) Act (UAPA) of 1967 are other such provisions made for the purpose of preventive detention. Even with Acts like MISA and POTA repealed in 1977 and 2004, respectively, and TADA reaching its timely end in 1995 (initially was to end in 1987 but was revised and reintroduced and had its time extended every two years until 1995), Acts like COFEPOSA and UAPA are still active.⁶

INTERNATIONAL STANCE ON PREVENTIVE DETENTION

Amongst other nations, the United States of America, United Kingdoms, Australia, Canada and such⁷, like India, include in their legal code, the mention for preventive detention which can be seen in both theory and practice. U.S. PATRIOT ACT (2001) in the United States and the UK Anti- Terrorism, Crime, and Security Act (2001) in the United Kingdom form some examples of preventive detention laws in other democracies which tend to show a superior judicial oversight and transparency of their advisory boards⁸.

⁵ Bhat, *supra* note 1, at 518

⁶ Anjali Anjali, *Preventive Detention in India: Laws, Article 22, Cases & Human Rights Debate*, Legal Service India (July 1, 2026, 01:44 PM), https://www.legalserviceindia.com/Legal-Articles/preventive-detention-in-india-laws-article-22-cases-human-rights-debate/#Terrorist_and_Disruptive_Activities_Prevention_Act_TADA_1985.

⁷ Vijay Kumar Vimal & Pawan Kumar, *Comparative Analysis of Preventive Detention Laws in Different Legal Systems: A Critical Appraisal*, 3 INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES 143, 146–151 (2020).

⁸ Kandregula B.B. Rao & K. Sita Manikyam, *Indian Preventive Detention Laws: Balancing Individual Rights and National Security*, 14 Journal of Neonatal Surgery 841, 844-845 (2025).

The International Covenant on Civil and Political Rights (ICCPR), under Article 4 avails the State Parties to the given Covenant the option to derogate from their obligations as long as the prescribed conditions are followed such as maintaining consistency with other international laws and preventing discrimination solely on the basis of race, colour, sex, language, religion or social origin. However, the provisions of ICCPR are not explicitly clear on the guidelines under which such derogation is to be followed and even many States Parties have failed to follow up with their commitments.⁹

The European Convention on Human Rights (ECHR) is a better model of providing for and implementation of Preventive Detention with respect to the best possible protection of Fundamental Rights of individuals.¹⁰ The necessary taken derogation measures in accordance with the exhaustible situations given under Article 5 of ECHR are subject to judicial review of a greater magnitude than what is practised in India¹¹

UN Human Rights Council (2021) has expressed worrying concerns about Preventive Detention laws in India, urging for reforms. The 2022 Amnesty International Report too has urged for reforms or even a repeal, stating Preventive Detention Laws in India to be the most misunderstood in the world.¹²

NEGATIVE RESULTS OF CURRENT IMPLEMENTATION

Reasons of national importance, namely security of the state, maintenance of public order, maintenance of supplies and essential services, foreign affairs and security of the nation¹³ form the basis of reasoning for the importance of Preventive Detention in our legal framework.

However its clash with the guaranteed right to life and personal liberty under Article 21 of the Indian Constitution is a subject of much debate for no objective solution is available in such situations. It seems to be a matter of increased legal awareness and understanding. From the majority judgement in *A.K. Gopalan*¹⁴ of refusing to interpret rights under Article 19 along with rights under Article 21 for all fundamental rights are distinct, to a majority holding in

⁹Vimal & Kumar, *supra* note 7, at 153

¹⁰*Id.* at 154

¹¹Rao & Manikyam, *supra* note 8, at 845

¹² Kandregula B.B. Rao & K. Sita Manikyam, *Preventive Detention And Human Rights: A Doctrinal Study Of Human Rights Violations In India*, 14 Journal of Neonatal Surgery 1058, 1067 (2025).

¹³Vimal & Kumar, *supra* note 7, at 145

¹⁴*AK Gopalan v State of Madras*, AIR 1950 SC 27

*Maneka Gandhi*¹⁵ of concluding that all fundamental rights are interdependent. This means that, respectively, from a literal interpretation of ‘procedure established by law’ in Article 22 to interpreting the phrase to carry with it the spirit of fairness, justiciability and reasonableness¹⁶ is a testament to such a sort of evolution. However, scope for more such evolutions is necessary and lack of awareness cannot be an excuse to uphold any more given that models of better implementation do exist.

FADING AWAY OF INDIVIDUAL PROTECTION

Intensely glaring out of all issues surrounding the controversy with Preventive Detention in India is the low levels of safeguards guaranteed, not only in comparison with other democracies as discussed before but also with respect to other safeguards provided to those undergoing arrests as provided for in clause (1) and (2) of Article 22. The first two clauses give to the arrested, a sure right against the framework under which they are arrested, namely the right to be informed about the grounds for arrest and also the right to consult a legal practitioner and also a speedy time period within which they are to be presented before the magistrate (within 24 hours) for further processing. However, within Article 22 itself, clauses (3) to (7) provide for exceptions to these safeguards when it comes to preventive detention thus forming a much weaker set of remedies at the disposal of the detainee to question the law under which they are detained.¹⁷ Limiting one’s access to legal support and thus limiting judicial intervention itself is a strong violation of one’s entitlement to their liberty and fundamental rights, at least to the extent that the Constitution guarantees its Indian citizens.

While access to the primary remedy of habeus corpus is available, studies show that such writs, which can be worked on within two weeks by the Supreme Court, extend to as long as nine months which is a long overdue compared to the three month time period of prescribed Preventive Detention.¹⁸

¹⁵ *Maneka Gandhi v Union of India*, (1978) 1 SCC 248

¹⁶ T. Jayaprakash, *EVOLUTION OF PREVENTIVE DETENTION AND PERSONAL LIBERTY IN INDIA*, 13 International Journal of Academic Research 8, 9-11 (2026).

¹⁷ Arpit Kumar Yadav & Jyoti Yadav, *COMPARATIVE STUDY OF PREVENTIVE DETENTION AND HUMAN RIGHTS IN INDIA AND UNITED KINGDOM*, 5 IJLR 704, 712 (2025).

¹⁸ *Judicial Scrutiny and Preventive Detention in India: Key Decisions and Implications*, TheLaw.Institute (July 3, 2026, 01:45 PM), <https://thelaw.institute/challenges-to-criminal-justice-system/judicial-scrutiny-preventive-detention-india-key-decisions/#preventive-detention-is-not-a-substitute-for-bail-cancellation>.

DELAYED EXECUTION OF REASONABLENESS

And finally reaching the topic of the ‘three month’ time period, a major question arrives on the Parliament’s delay in implementation of Section 3 of the 44th Amendment in 1978 of Article 22 of the Indian Constitution which seeks to reduce the detention period from three months to two months. Such actions point to potential abuse of such laws which was not only a scenario feared by many in the drafting committee during the Constitutional Assembly debates but also became a reality during the Emergency period from 1975 to 1977 wherein the powers of MISA was abused to suppress political opposition¹⁹ or during the repealing of Article 370 of the Indian Constitution resulting in arrest of political leaders in Jammu and Kashmir²⁰. A much recent example of this being the arrest of Umar Khalid under UAPA in 2020 in relation to the Delhi riots of 2020 and yet in 2026, a chance for a fair trial awaits.²¹

EMPIRICAL OBSERVATION OF MISUSE²²

Lack or poor intervention of judicial review or in look is of the prime focus of this discussion. Studies and observation by the likes of National Crimes Record Bureau (NCRB) display a below subpar implementation of Preventive Detention in India.

About 60% of the detainees have been kept for over six months. A quarter of the of the detainees have been denied judicial relief which is enough reason alone to call out this piece of law to be directly against human rights. Even when these detention cases were put before the Advisory Board consisting of the most qualified legal professionals of all, 90% of them are approved but no inquiries were made into these cases after this review.

CONCLUSION

Aiming to discuss specific issues related to human rights when it comes to detained individuals just on the mere suspicion of their potential to commit a crime, this article points out an immensely grave tool of abuse within out legal framework. Though it may form a valid reason,

¹⁹ V Ananth Krishna, *The Constitutional Sanction for Preventive Detention Reeks of a Fear of Freedom*, Supreme Court Observer (July 3, 2026, 01:42 PM), <https://www.scobserver.in/journal/the-constitutional-sanction-for-preventive-detention-reeks-of-a-fear-of-freedom/>.

²⁰Rao & Manikyam, *supra* note 12, at 1064

²¹ Sarthak Gupta, *Umar Khalid bail case: Constitutional abdication, not judicial restraint*, Supreme Court Observer (July 6, 2026, 06:30 PM), <https://www.scobserver.in/journal/umar-khalid-bail-case-constitutional-abdication-not-judicial-restraint/>.

²²*Id.* at 1063

which is when it comes to safety of the majority or the nation, compromises are to be made to maintain a balance between individual rights and public security, one cannot help but want to question and check those bearing the power to make such a compromise. Fear of its misuse will run high amongst those subject to such power. It is replete with much arbitrariness, such kind of which should not be present in a democratic society such as ours.

Taking away an individual's access to justice or even their tool to reason with the government at large can be without a debate be considered one the most egregious violation of human rights. Under such conditions, mishandling of these laws is nothing far-fetched and is in fact, an observable reality. For a tool claiming of safety, more often than not, we see it as a tool of oppression. The reasons for such are not to be allowed to cower in a shadow of ignorance but rather be subject to the light of questions which demand answers to result in positive growth and reformation.