MISUSE OF PREVENTIVE DETENTION LAWS IN INDIA: A CONSTITUTIONALITY ANALYSIS UNDER ARTICLE 22

Deepanshu Chauhan, LL.M., SRM University, Delhi NCR.

Dr Shalini Saxena, Associate Professor at SRM University, Delhi NCR.

ABSTRACT

Preventive Detention represents one of the most contentious powers vested in the most controversial powers vested in the state, as it authorises deprivation of personal liberty without trial. Unlike punitive detention, which follows the commission of an offence, preventive detention is based on the anticipation of future conduct. In India, preventive detention finds legitimate sanction under Article 22 of the Indian Constitution, making India one of the rare democratic nations to fundamentally sanction such a power. While the prominent of the constitution uphold this exception to personal freedom on the basis of national security, social order, and sovereignty, the continual misuse[1] of preventive detention statue has raised serious legitimate and human rights grievance.

This research paper examines the misuse of preventive detention laws in India with a specific focus on Article 22 and its safeguards. It identifies the core constitutional problem: whether preventive detention laws, despite procedural safeguards, undermine the fundamental right to personal liberty under Article 21. This paper adopts a dogmatic and logical research approach, relying on legislative provisions, judicial judgments, law commission reports, and juristic writings. Through an interrogation of case law and modern practices, the study highlights how preventive detention has generally been used irrationally, unreasonably, and for political or regulatory convenience. The document deduces recommendations for rectify, rectification the need for stronger judicial supervision, legislative revision, and a justifiable interpretation of Article 22.

Keywords: Preventive detention, National Security, Fundamental rights, Protest.

[1] Upendra Baxi, *Preventive Detention and Constitutional Guarantees in India*, 15 J. Indian L. Inst. 1 (1973).

Introduction

Life, liberty, equality are fundamental rights of human being. Among them, liberty is primitive right essential for maintaining order in society, and personal liberty is the cornerstone of a democratic society governed by rule of law. The framers of the Indian constitution gave constitutionality sanctity to preventive detention laws under article 22[2]. The preventive detention act was introduced in 1984 whose objective is to intercept and detain individuals before they commit an offence when the government showed that their release could cause harm to a society or an individual. It is precautionary that a society embraces preventive detention without necessary safeguards, sacrifices individual liberty often based on suspicion, allowing detention without trial for national concern. It is devastating blow to the freedom of an individual there by ensuring false sense of safety.

Lately, preventive detention became an atrocious in the domain of personal liberty when the law authorizes individual without trial, or reasonable probability of the person committing an offence. Article 22 occupies a unique and controversial position in Indian constitutional law. While most fundamental rights were inspired by liberal democratic[3] values, preventive detention was retained due to socio-political tension, including communal violence, external aggression and internal instability. India is the only democratic country, where it guarantees personal liberty under article 21 and provides for preventive detention under article 22 of the constitution. Other than India, no democratic civilized country has granted preventive detention as ordinary legislative power during peacetime.

Preventive Detention is a serious invasion of fundamental right to personal liberty, recognized worldwide. Such laws were forcefully hostile by freedom fighters before independent. Since independence, the legislature has enacted several preventive detention laws from time to time such as the National Security Act, 1984 (NSA), the Conservation of foreign Exchange and prevention of Smuggling Activities Act, 1974 (COFEPOSA), and various state-level statutes.

Personal liberty has traditionally been considered as the grounds of republican governance and the rule of law. Political philosophers such as John Locke highlighted liberty as a natural right intrinsic to human presence,[4] while A.V Dicey confirmed personal freedom as a basis principle

[2] M.P. Jain, Indian Constitutional Law (8th ed.2018).
[3] A.G. Noorani, *Preventive Detention and the Supreme Court,*34 Econ. & Pol. Wkly. 2203 (1999)
[4] John Locke, Second Treatise of Government § 6 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

of constitutionalism under the rule of law.[5] In contemporary fundamental democracies, dispossession of liberty is legitimate only through legal integrity and judicial determination. Preventive detention, however, display a remarkable departure from these doctrines, as it statutes incarceration based on intuition and speculate conduct rather than proven liability. This exceptional nature of preventive detention[6] claim strict rigorous judicial review, impartiality, and liability.

The conflict between individual autonomy and collective security lies at the core of preventive detention jurisprudence. While the state upholds a legitimate authorized to protect public order and state security, this accountability cannot override constitutionality ethics. Excessive dependence on preventive detention risks regularizing extraordinary powers, thereby undermine democratic protection. In recent decades, the frequently expanding of preventive detention orders has presented concerns that the state is prioritizing administrative efficiency over legitimacy discipline. This tendency regulates the urgency of re-evaluating preventive detention laws within the comprehensive framework[7] of Article 14, 19, and 21 of the constitution.

Research problem

The primary research problem inscribe in this paper is whether preventive detention laws weaken person liberty in spite of the safeguards issued under article 22 of the constitution.

Historical Background of Preventive Detention in India

I. Pre-independence India- The preventive detention in India has its roots dates back to the days of British colonial regime, where the British government was empowered to arrest anybody for mere suspicion. In the pre-independence era, the British administration frequently enacted several preventive detention laws to supress political protest and nationalized movements, laws such as Bengal Regulation III of 1818, the Defence of India Act 1915, and the Rowlatt Act 1919 and the Emergency Powers (Defence) Act 1939 empowered the colonial government to detain the person without trial. These laws were widely criticized by freedom fighters for violating basic civil rights and for their arbitrary nature. Ironically, despite the vehement oppose

[5] A.V. Dicey, Introduction to the Study of the Law of the Constitution 123 (8th ed. 1915).
[6] Kamaleshwar S. & Sarah Rose P., *Balancing Security and Liberty: A Critical Examination of Preventive Detention Laws in India,* 4 Indian J. Integrated Rsch. L. 18 (2023) ISSN 2583-0538.
[7] Gautam Bhatia, Preventive Detention and the Constitution, Indian Const. L.& Phil. Blog (May 10, 2020).

of such laws by the freedom fighters, the preventive detention laws were retained in independent India.

II. Post-independence- The Preventive Detention Act 1950 (PDA) was first preventive detention law, enacted under this provision and this law was allowed to continue till 1969. In famous case of A.K Gopalan VS. State of Madras[8], AIR 1950 SC 27, the validity of preventive detention law was upheld by Supreme Court of India. Since then, several other preventive detention laws periodically enacted overtime. The post-independence era witnessed the use of preventive detention during periods of political protest, insurgency and emergency. During the national emergency, the infamous Maintenance of Internal Security Act, 1971 (MISA)[9] was used in course of emergency to arrest thousands of opposition leaders without trial. This period marked the bottom point in the safeguard of civil liberty, as a result, excluding the year 1970 to 1971 and 1978to 1980. India has constantly at least one preventive detention law in place.

III. Contemporary Trend- In contemporary India, preventive detention continues to be used extensively, under National Security Act (NSA) 1980 and state-level laws. Further they also amended various laws[10] such as Prevention of Terrorism Act, 2002. Foreign Exchange Regulation Act, 1973, Foreign Exchange Regulation Act, 1973, the Conservation of Foreign 1974 often used against political dissenters, habitual offenders, and marginalised groups. The increasing normalisation of preventive detention raises serious constitutional concerns.

Literature Review

Preventive Detention has remained as one of the most contentious point of Indian constitutional law. Different from punitive detention, which follows judicial determination of guilt, preventive detention permits confinement based on the prediction of future direction. Article 22 of the constitution of India present the constitutional structure to preventive detention, establish exceptions to fundamental procedural defence such as the right to legal counsel, the right to be informed of grounds of arrest, and the right to be procedural before a magistrate within 24 hours. Scholarly publications has frequently questioned regardless this constitutional arrangement has resulted in systematic misuse and undermining of personal liberty.

[8] A.K. Gopalan v. State of Madras, AlR 1950 SC 27.
[9] Maintenance of Internal Security Act, 1971, No. 26, Acts of Parliament, 1971 (India).
[10] A.G. Noorani, *Preventive Detention and the Supreme Court,*34 Econ. & Pol. Wkly. 2203 (1999)

Early legal scholars inspect article 22 highlight its distinctive nature and colonial lineage. Studies draw the historical context of preventive detention declare that the creators of the constitution hold on to these provisions carefully, determined by colonial emergency laws such as Britain's Defence of India Act 1915 or Bengal Regulation III 1818, Rowlatt Act 1919[11]. Intellectual note that while the constituent assembly talk about the moral justifiable of preventive detention, national security concerns eventually outweighed civil liberty rights. A substantial body of research focuses on the judicial interpretation of article 22 and its failure to act as an effective safeguard. Scholars writing in constitutional laws journals argue that courts have mostly adopted a procedural approach over substantive scrutiny.

Another eminent subject in exiting articles is the misuse of preventive detention for common law-and-common issues. Scholars examining statues such as National Security Act (NSA) 1978, Unlawful Activities Prevention Act (UAPA) 1967, the Terrorist and Disruptive Activities Prevention Act 1985 (TADA) repealed and Prevention of Terrorism Act (POTA) 2001. Judicial interpretation has also played a important role in framing preventive detention jurisprudence. Early judgement of the supreme court adopted a systematic approach, emphasizing procedural compliance over substantive equality. However, post-Maneka Gandhi, the court gradually expanded the scope of article 21, obliquely influencing the explanation of preventive detention laws. Scholar's research provides a more comprehensive doctrinal, these works methodically analyse regulatory framework, constitutional debates and judicial precedents, concluding that the protection under article 22[12] are largely imaginary in practice.

Some scholars argue that increasing use of preventive detention against defenders, reporter and reformers reflects a diminishing space for arguing in India. Researchers note that state government usually employ preventive detention as a public instrument, raising concerns about despotic state action and disintegration of federal constitutional values. Overall, the present study is explained due to the continued the applicability of preventive detention and the increasing gap between constitutional theory and the actual practice.

Research Methodology

The research approves a doctrinal and scientific methodology. The primary sources include laws and judicial pronouncement of the supreme court and high court. The secondary sources

[11] Faizan Mustafa, *Article 22 and the Failure of Constitutional Safeguards,*6 NUJS L. Rev. 45 (2013).
[12] Shylashri Shankar*, Judicial Review of Preventive Detention in India*, 7 Asian J. Comp.L.1 (2012)

include records, books, scholarly writing, journal articles, law commission reports, and international human rights treaties. The study closely analyse enactments, regulations and judicial reasoning to determine the misuse of preventive detention law.

Research Objectives

- To examine the judicial framework governing prevention detention in India.
- To investigate statutory construction of article 22 and preventive detention laws.
- To closely evaluate the misuse of preventive detention by the administrative.

Article 22: - A dual scheme

Statutory Provision for Preventive Detention in Indian Constitution is Article 22 provides rights against false imprisonment and detention but creates a distinct regulation for preventive detention.

The right of a person arrested are protected through 22 (1) & (2), which guarantees: -

1. The person should be informed about the reasons for arrest as soon as possible.
2. The right to be consult and represent legal attorney.
3. The right to be produced within 24 hours before a magistrate.

But article 22 (3) gives protection in the case of preventive detention. Then, article 22 (4) to (7) lay down specific safeguards, including the requirement[13] of an advisory board, and communication of grounds are procedural and limited in nature as:

1) No law provides more than 3 months of detention unless an advisory board, consisting of high court judges.
2) The person who is detained is to be informed him on which ground the order has been made and providing him the opportunity of making a representative against the order but this can be

[13] Preventive Detention under the NSA, Live Law.

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 the time that a person may be detained.

Table 1: - Legal Framework of preventive detention laws under article 22

Article 22 Provisions	Content	Critical Observation
Article 22 (3)	It eliminates preventive detention law from common arrest and security.	It excluded the right to legal counsel from the subsequent clauses.
Article 22 (4)	Advisory Board cannot hold a person over reasonable time that's for over 3 months[14].	This board is non judiciary and limited procedural safeguards.
Article 22 (5)	The individuals must be informed of the grounds for their detention and given opportunity to represent against it.	The safeguards are minimal and mere protection for individual freedom.
Article 22 (6)	It protects individual from arrest and detention and should be informed for the arrest.	It allows the state to detain individual purely on suspicion.
Article 22 (7)	It provides power to the parliament to make laws for preventive detention.	It allows legislature expansion of detention.

Judicial Interpretation and Case Law Analysis

The area of preventive detention is very much dominated by administration. The law of preventive detention has been so formulating as to leave very broad circumspection with governmental authorities to order preventive detention of a person, and abandon only a limited margin for judicial review. However, the courts have been aware of the fact that preventive detention affects one of the most esteem rights of a human being, specifically, the freedom of his individual and have consequently evolved a few fundamental to control governmental

[14] Misuse of Preventive Detention and Human Rights (LL.M. Dissertation NALSAR Univ. of L. 2017).

discretion in the area in the order to protect the people's freedom from unjustifiable misuse of power.

In A.K Gopalan VS State of Madras (1950),[15] the supreme court held the validity of preventive detention act 1950. The court assume a narrow interpretation of article 21, deciding that 'procedure established by law' solely required an authenticity enacted law, regardless of its justice or reasonableness, regardless of its justice or reasonableness. The judgment successful legalize wide executive discretion and set a guideline for nominal judicial intervention. A major shift happened with Maneka Gandhi VS Union of India (1978)[16], where the supreme court effectively overruled the Gopalan 'doctrine of compartmentalization'. The supreme court ruled that the procedure under article 21[17] must be fair, just and reasonable. Even though the case did not quickly concern preventive detention, its influence on detention jurisprudence was abstract. It paves the way for challenging preventive detention laws on the basis of unjustifiable and unreasonableness.

In R.C Cooper VS Union of India 1970,[18] the court had earlier suggested at this shift by highlighting that fundamental right are interrelated. This judgement mutually strengthened judicial review over preventive detention. In A.K Roy VS Union of India[19], the supreme court justified the validity of the national security act but appreciated the fragile balance between liberty and security. The court highlight that Advisory Boards must act separately, though in exercise their functioning remains opaque. The practice of issuing successive detention orders has also come under judicial review. In T.A Abdul Rahman VS State of Kerala 1989[20], the supreme court held that successive detention orders derived from the same grounds are prohibited unless fresh truth arise.

Misuse of Preventive Detention

Preventive Detention, though fundamentally authorized under article 22 of the Indian constitution, has frequently been slammed for its common misuse by the administrative jurisdiction. Instead of being engaged as a special measure to prohibit genuine harm to state

[15] A.K. Gopalan v. State of Madras, AIR 1950 SC 27 (India).
[16] Maneka Gandhi v. Union of India, AIR 1978 SC 597 (India).
[17] Pooja Rajawat & Jayam Jha, Reflections on India's Preventive Detention Laws: Need for Judicial Scrutiny of the Administratively Steered Mechanism, SCC ONLINE BLOG (Dec. 9, 2022).
[18] R.C. Cooper v. Union of India, AIR 1970 SC 564 (India).
[19] A.K. Roy v. Union of India, AIR 1982 SC 710 (India).
[20] T.A. Abdul Rahman v. State of Kerala, AIR 1990 SC 225 (India).

security, public peace, or state sovereignty, preventive detention laws are progressively used as tools of accommodation and control, thereby prejudicial personal liberty and the rule of law.

One of the significant forms of misuse is confinement without adequate or rational grounds. Individuals are frequently confine on vague, equivocal, or speculative accusation, without any compelling evidence of impending orders are passed simply on the basis of prior conduct, political protest, or ordinary law and public order situations, which could in other circumstances be addressed under uniform criminal law. This transform preventive detention from a preventive mechanism into a disciplinary one, which is constitutionally impermissible.

Another serious misuse lies in the non-communication or delayed communication of grounds of detention. Article 22 (5)[21] mandates that the detenu must be informed of the grounds of detention as soon as possible to enable them to make an effective representation. However, in practice, authorities often supply grounds in an unclear, incomplete, or excessively technical manner, defeating the very purpose of this safeguard. Courts have repeatedly held that such procedural lapses render the detention illegal.

Preventive Detention is also misused through mechanical approval and prolonged detention. Detention authorities frequently act in a routine manner, without independent application of mind. Advisory Boards, which are meant to act as a safeguard against arbitrary detention, often function as rubber stamps, approving detention orders without rigorous scrutiny. This results in individuals being detained for long periods without trial, violating the principle that liberty is the norm and detention is an exception.

In addition, preventive detention laws are misused to supress political dissent and democratic freedoms. Journalists, activities, protestors, and opposition voices have at times been detained under preventive detention statutes for expressing views critical government. Such use directly infringes upon the freedoms guaranteed under article 19 and 21[22] and weakens democratic institution by creating a chilling effect on free speech and peaceful assembly.

Another area of concern is the use of preventive detention for ordinary law and order issues. The Supreme Court has consistently distinguished between “law and order” and “public order”.

[21] K.R. Raja, *An Analysis of Preventive Detention Cases in the State of Tamil Nadu,* 7 Int'l J. for Multidisciplinary Rsch. (IJFMR) (2025).
[22] Abhinav Sekhri, *Article 22 - Calling Time on Preventive Detention,* The Proof of the Pudding (2021).

Despite this, preventive detention is often involved in cases involving petty minor offences, local disputes, and chronic offenders, where ordinary criminal law is sufficient. This expansion dilutes the exceptional nature of preventive detention and promotes executive arbitrariness.

The lack of transparency and effective remedies further aggravates misuse. Since preventive detention operates largely on executive satisfaction, judicial review becomes limited and delayed. By the time courts intervene, the detenu may have already suffered substantial loss of liberty, livelihood, and reputation, making the remedy largely illusory.

While preventive detention is constitutionally sanctioned, its frequent misuse reflects a disturbing imbalance between state security and individual liberty. The arbitrary application, statutory violations, suppression of protest, and over-reliance on executive discretion have transformed preventive detention have transformed preventive detention into a tool of abuse rather than necessity. Therefore, strict judicial scrutiny, accountability of detaining authorities, and adherence to legal protections are essential to prevent its misuse and to hold the principle and values of constitutional democracy.

Critical Analysis

There occurs a consequential gap between doctrine and practice in preventive detention. Formal conformity with article 22 often masks substantial arbitrariness. Advisory boards seldom act as effective checks, and legal regard to executive fulfilment weakens accountability. Political situation and emergency like position further enable misuse. Preventive Detention becomes a tool of comfort rather than necessity, subvert constitutional morality and democratic values.

Comparative and International Perspective

A comparative and international perspective release that India's preventive detention foundation stands in the sharp distinct to the approach by most democratic fundamental systems, where personal liberty is treated as the norm and detention without trial as a broadly modify exception. In India, preventive detention enjoys distinct constitutional concession under article 22 and can be implicated even in ordinary situation, whereas administration such as the United Kingdom, the United States, Canada and European states, preventive detention is either fundamentally disapproved or allowed only during exceptional emergencies and under

harsh judicial control. In the United Kingdom, preventive detention has cautiously shifted from governmental-driven custody to a rights-based model conforming the incorporation of the European Convention on Human Rights through the Human Rights Act 1998[23]. The landmark Belmarsh case[24] conclusively held that ambiguous detention without trial, convincing the state to replace detention with less obtrusive measures subject to constant judicial supervision.

Similarly, in the Unites States, statutory guarantees of due process and habeas corpus act as powerful protection against unreasonable detention. The preventive detention in the United States is thus restrained to extraordinary situation and is never engaged as a routine law-and-order mechanism. European jurisdiction, regulated by article 5 of the European convention on human rights, permit preventive detention only during a public emergency threaten the life of the nation and held upon strict necessity, equitability, and periodic judicial review, as reflected in the jurisdiction of the European court of human rights. At the international level, instruments such as the International Covenant on civil and political rights vehemently dissuade preventive detention and prohibit unreasonable deprivation of liberty, allowing abrogation only in strict defined emergencies and subject to rigorous oversight. When evaluate against these modified and international standards, India's preventive detention reign appears excessively governmental, minimal procedural fairness and constitutionality vulnerable to misuse. This discrepancy underscores the critical need for India to rectify its preventive detention law under control with international human rights norms and fundamental democracies, confirm that the national security concerns do not lapse the foundational value of personal liberty.

In compare, representative democracies such as Canada and South Africa enforce strict restrictions on detention without trial. The Canadian Charter of Rights and Freedom directive immediate judicial review and commensurability in any confiscation of liberty. South Africa's post-apartheid constitution, framed by historic abuse of detention powers[25], authorize preventive detention only under limitedly defined emergencies, subject to stringent judicial supervision. These frameworks establish that security concerns can be disclose without compromising fundamental rights.

[23] D r. Lohit Sardar, Misusing Preventive Detention in Security Legislations: A Historical Analysis from the Lens of Personal Liberty, 5 Shodh Kosh: J. Visual & Performing Arts 507 (2024).
[24] A and others v. Secretary of State for the Home Department [2004] UKHL 56.
[25] Preventive Detention Laws in India and Violation of Human Rights: A Study with Special Reference to Article 22 of the Indian Constitution (LL.M. Dissertation, Nat' I L. Univ. & Judicial Acad., Assam)

Table 2: - Comparative evaluation of India and other jurisdiction: -

Jurisdiction	**Legal Basis**	**Nature of preventive detention**	**Safeguards and Judicial control**
India	Article 22 of the constitution of India	Executive's power to arrest and hold individual without trial.	Informing detainees of grounds, right to representation, limited judicial review, and an Advisory Board.
United Kingdom	Under scrutiny from the European Convention on Human Rights (ECHR) & Human Rights Act, 1998	Holding suspected terrorists without charge for public safety.	Ensuring detainees know their grounds for detention and challenge it.
United States	From federal and state laws, constitution ("due process" clause 5th to 14th and habeas corpus)	If individual deemed a fight, risk or danger to the community.	Involve constitutional due process (5th / 14th amendments), judicial review, and right to challenge detention.
European States	It hinges on the European Convention on Human Rights (ECtHR), especially under article 5.	Only during the public emergency[26].	Judicial control under article 5 of European Convention on Human Rights (ECtHR), strict necessity, and procedural safeguards.

[26] *Preventive Detention: An Evil of Article 22,* 6 J. Emerging Techs. & Innovative Rsch. 424 (2019).

Canada	It strictly defined by the Canadian Charter of Rights and Freedoms	It involves individual with history of serious violent offences, like dangerous offenders (Dos) or serious violent offenders (SVOs)	The safeguards on the Charter of Rights and Freedoms, particular under section 9 to section 7.

Suggestions and Recommendations

On the basis of above study, I would like to propose the following suggestions: -

- The government should take measure to hold initiative through various discussion like electronic media, public hearing so that people will know about the laws and their repercussions.
- The government should also approach statutory amendment to limited the scope of preventive detention laws.
- Further, clear instruction must be arranged to prevent unreasonable use, and remuneration should be provided for unlawful detention.

Conclusion

Man is born free, the right to personal liberty is a birth right, provided to every individual constitutional democracy. Preventive detention, particularly as a peacetime measure, initiate an fundamentally harsh and remarkable power that permits detention without trial and stands in pressure with guiding principle and values of article 14 & 21 of the constitution. Preventive detention as guaranteed under article 22 strikes a disastrous blow to personal liberties. This study, consequently clear that preventive detention is disruptive to a secular democracy like India as it is severely dangerous to personal liberty. As the existing laws are more than enough to take care of any wrong, the government must honestly consider to amend all preventive detention statutes which have been constantly reveal the slipshod investigative skill of the allotting authority.

The constant misuse of preventive detention indicates of a failure to incorporate constitutional equality within government practice. Judicial protection, though theoretically robust, remain

inadequate due to unreasonable compliance to governing authority. Except if preventive laws are interpreted amicably with Articles 14 and 21, the guarantee of personal liberty will remain undone.

A pivotal re-evaluation of article 22 is necessary to restore legitimate balance. Preventive detention must be treated as a final resort, matter to strict judicial analysis, accountability, and clarity. Only through such rectification India can resolve the demands of national defence with the constitutional value of autonomy and justice.