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# **A LEGAL ANALYSIS ON PREVENTIVE DETENTION LAWS IN INDIA**

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## **ABSTRACT**

Preventive Detention Law in India have been a subject of controversy, as they allow for detention without trial, sparking debated about individual liberties versus state security concerns. this provides a comprehensive analysis of the historical background. Constitutional provisions, and laws related to Preventive Detention in India. It also examines the tension between National Security and Human Rights, highlighting the potential for misuse of Preventive Detention Laws. A critical evaluation of landmark judicial pronouncement sand legislative provisions is undertaken to understand the complexities of Preventive Detention. The argument for balanced approach, emphasizes the need for effective Judicial Review, Transparency and Accountability mechanisms to prevent the misuse of Preventive Detention Laws.

## **INTRODUCTION**

Preventive Detention is a complex and contentious issue that has sparked intense debates in India. The provision, which allows for the detention of individuals without trial, has been justified by the state as a necessary measure to maintain National Security, Public Order and other interests. However, critics argue that Preventive Detention Laws violate individual liberties, Human Rights, and the principles of Natural Justice.

The Indian constitution, while guaranteeing the “Right to Life and Personal Liberty under Article 21”, provides for “ Preventive Detention under Article -22”. These provisions has been the subject of intense Judicial scrutiny, with the supreme court delivering several landmark verdicts on the issue.

This paper seeks to examine the concept of Preventive Detention in India Constitutional provisions and legislative framework. To critically evaluate the tensions between individual liberties

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and state security concerns, highlighting the need for a balanced approach that upholds the principles of Justice, Equality and Human Rights.

## **HISTORICAL EVOLUTION OF PREVENTIVE DETENTION LAWS IN INDIA**

The historical evolution of preventive detention laws in India is a complex and multifaceted topic that spans several decades. To understand the development of these laws, it is essential to examine their colonial origins and the debates that took place during the Constituent Assembly<sup>2</sup>.

### **COLONIAL ORIGINS OF PREVENTIVE DETENTION LAWS**

Preventive detention laws have their roots in the British colonial era. The British government used these laws to suppress dissent and maintain control over the Indian population. Some of the key laws that were enacted during this period include:

1. Defence of India Act: This law was enacted during World War I and allowed the British government to detain individuals without trial or conviction.
2. Government of India Act, 1935: This law provided for the detention of individuals without trial or conviction, and was used to suppress dissent and maintain control over the Indian population.
3. Rowlatt Act: This law was enacted in 1919 and allowed the British government to detain individuals without trial or conviction.

These laws were used to suppress the Indian independence movement and maintain British control over India.

### **CONSTITUENT ASSEMBLY DEBATES AND THE INTRODUCTION OF ARTICLE 22**

The Constituent Assembly debates provide valuable insights into why Article 22 was introduced in the Indian Constitution. Dr. B.R. Ambedkar, the Chairman of the Drafting Committee, played a crucial role in shaping the provision.

1. Dr. Ambedkar's Rationale: Dr. Ambedkar recognized the need for preventive detention laws to maintain public order and national security. However, he also acknowledged the potential for abuse of these laws and the need for safeguards to protect individual liberties.

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<sup>2</sup> Drishti IAS, <https://www.drishtiias.com/daily-updates/daily-news-analysis/preventive-detention-4>, (last visited June 18, 2025).

2. Debates in the Constituent Assembly: The Constituent Assembly debates reflect the complex and nuanced nature of preventive detention laws. Members of the Assembly debated the need for such laws, as well as the potential risks and challenges associated with their implementation.

3. Introduction of Article 22: Article 22 was introduced in the Indian Constitution to provide a constitutional basis for preventive detention laws. The provision allows for the detention of individuals without trial or conviction, subject to certain safeguards and conditions.

## **KEY FEATURES OF ARTICLE 22**

Article 22 provides a constitutional basis for preventive detention laws in India. Some of the key features of this provision include:

1. Preventive Detention: Article 22 allows for the detention of individuals without trial or conviction, subject to certain safeguards and conditions.
2. Safeguards: The provision includes several safeguards to protect individual liberties, including the right to be informed of the grounds for detention and the right to make a representation against the detention order.
3. Advisory Board: Article 22 provides for the establishment of an Advisory Board to review detention orders and ensure that they are in accordance with the law.

## **IMPLICATIONS FOR FUNDAMENTAL RIGHTS**

However, Preventive Detention raises significant concerns about the erosion of Fundamental rights, particularly the Rights to Liberty. Detaining individuals without trial or conviction can lead to:

- Arbitrary Detention: Individuals may be detained without sufficient evidence or due process.
- Denial of fair trial: Detainees may be denied the right to a fair trial, Violating the principles of Natural Justice.
- Prolonged Detention: Detainees may be held for extended periods without charge or trial.

## **BALANCING STATE INTERESTS AND INDIVIDUAL RIGHTS**

The challenges lies in striking a balance between the state's need to safeguard public order or national security and the individual's Right to Liberty' this requires:

1. Due process: Ensuring that detainees are informed of the grounds for their detention and have access to legal representation.
2. Judicial oversight: Providing for regular Judicial review of detention orders to prevent abuse of power.

## **TYPES OF DETENTIONS**

1. **PREVENTIVE DETENTION:** Preventive Detention means a person's incarceration in advance to prevent any further possibility of the commitment of crime or its engagement. Preventive detention is, therefore, an action taken on the basis of apprehension that the person in question might do some wrongful act.

### **The key characteristics of Preventive Detention are:**

- Suspicion – based detention: The police detain an individual based on a suspicion that they might commit a crime or cause harm to society.
- No trial or conviction: The individual is detained without being tried or convicted of a crime.
- Police discretion: The police have the authority to detained without a warrant or a magistrate's authorization in certain cases.

### **EXAMPLES**

- Detention of individuals suspected of terrorism: Law enforcement agencies may detain individuals suspected of being involved in terrorist activities to prevent them from carrying out attacks.
  - Detention of individuals suspected of rioting: Police may detain individuals suspected of participating in riots or violent protests to prevent further violence.
2. **PUNITIVE DETENTION:** Preventive detention refers to the practice of detaining an individual before they have committed a crime, based on the suspicion that they might commit a crime or engage in wrongful acts in the future. This type of detention is often used to prevent harm to society, maintain public order, or protect national security

### **The key characteristics of Punitive Detention are**

- Post- Conviction detention: The individual is a detained after being tried and convicted of a crime.
- Punishment for a crime: The detention is a form of punishment for the crime committed.
- Judicial oversight: The detention is authorized by a court of law, and the individual has the right Post-conviction detention : The individual is detained after being tried and to a fair trial and appeal.

## **EXAMPLES**

- Imprisonment for a crime: An individual is sentenced to imprisonment for a crime they have committed.
- Detention in a Juvenile correctional facility: A minor is detained in a juvenile correctional facility as a form of punishment for a crime they have committed.

## **SAFEGUARDS AGAINST PREVENTIVE DETENTION**

According to Clause 5 of Article 22, when a person is detained under Preventive Detention, the authority responsible must inform them of the reason for their detention as soon as possible.

- The reason for detention should have a rationale connection to the object that the (detenu) is prevented from acquiring.
- The detaining authority is not required to disclose the reason for detention prior to the arrest but is advised to do so at the earliest opportunity, thereby allowing the detained individual a fair chance to seek representation.
- A person who is already in detention may be detained if reasonable and satisfactory reasons exist to do so. The main problem is that there is no way to verify if the reason for detention is just and reasonable in the context of preventive detention until it is provided to the Advisory committee that is applicable only after a 3 months span.
- It also says that the reasons for the detention should be conveyed as quickly as possible in order to enable the person to have the right to representation.
- The authority that provides the command for detention shall give the soonest chance to make a representation against the order.

Preventive detention is a contentious practice that allows the state to detain individuals without trial or conviction, citing reasons such as national security, public order, and future threats. The state's justification for preventive detention is based on the need to prevent harm to society, maintain public order, and protect national security .

## STATE'S JUSTIFICATION

- National Security: The state argues that preventive detention is necessary to prevent activities that threaten national security, such as terrorism, espionage, or other forms of subversion.
- Public Order: Preventive detention is also justified as a means to maintain public order, preventing individuals from engaging in activities that could disrupt social harmony or cause public unrest.
- Future Threats: The state may detain individuals who are deemed to be a potential threat to society, even if they have not yet committed a crime<sup>3</sup>.

However, preventive detention has been criticized for its potential to undermine democratic values, individual liberties, and human rights.

## CRITICISMS

- Democratic Values: Preventive detention is seen as a violation of democratic principles, as it allows the state to detain individuals without due process or trial.
- Potential for Abuse: The subjective nature of preventive detention laws makes them prone to abuse, allowing authorities to detain individuals arbitrarily or for political reasons.
- Comparison with Global Practices: India's preventive detention laws have been criticized for being more restrictive than those in other democratic countries. The International Covenant on Civil and Political Rights (ICCPR) highlights the significance of prompt judicial review and safeguards against arbitrary detention.

## INDIAN CONTEXT

In India, preventive detention laws have been used to detain individuals under various acts, such as the National Security Act (NSA) and the Unlawful Activities (Prevention) Act (UAPA). The Supreme Court has emphasized the need for caution while exercising preventive detention powers, stating that they should not be used routinely.

## WAY FORWARD

To strike a balance between national security and individual liberties, it is essential to implement safeguards against abuse and ensure that preventive detention laws are aligned with constitutional principles and international norms<sup>4</sup>. This can be achieved by:

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<sup>3</sup> Kanubhai Shanabhai vs. State Of Gujarat, 2008

<sup>4</sup> Lawful Legal, Preventive Detention and Its Potential Unconstitutionality, <https://lawfullegal.in/preventive-detention-and-its-potential-unconstitutionality/>, last visited 16 June, 2025.

- Strengthening Judicial Review: Ensuring that detention orders are subject to speedy and effective judicial review.
- Increasing Transparency: Providing clear and transparent grounds for detention, and allowing detainees access to legal representation and medical care.

Constitutional safeguards and judicial oversight play a crucial role in preventing the misuse of preventive detention laws in India.

- **Role and Composition of Advisory Boards**

Advisory boards, comprising persons qualified to be appointed as High Court judges, review detention orders to ensure they are in accordance with the law. These boards provide a safeguard against arbitrary detentions, but their effectiveness depends on their independence and impartiality.

- **Judicial Review (Scope and Limitations)**

Judicial review of preventive detention orders is limited to examining whether the detaining authority has followed the prescribed procedure and if the detention is lawful. The courts cannot question the necessity of detention, but they can review the detention order to ensure it is not arbitrary or unjust.

- **Analysis of Key Supreme Court Judgments Interpreting Article 22 of the Indian Constitution.**

- Khudiram Das vs. State of West Bengal (1975): The court clarified that preventive detention is a preventive measure, not a form of punishment.
- Jaseela Shaji vs. Union of India (2024): The Supreme Court reaffirmed the importance of procedural safeguards in preventive detention cases and ruled that the detaining authority must provide copies of all documents relied upon for detention.
- Shaikh Nazneen vs. State of Telangana (2022): The court ruled that preventive detention cannot be used for ordinary law and order issues and is an exceptional power that affects personal liberty<sup>5</sup>.

## **THE LANDMARK CASES ON PREVENTIVE DETENTION IN INDIA**

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<sup>5</sup> Shreya Malhotra & Oishika Banerji, Preventive detention laws in india, Ipleaders, <https://blog.ipleaders.in/preventive-detention-laws-india/>, (November 12, 2020),



## **1. A.K. GOPALAN V. STATE OF MADRAS (1950)<sup>6</sup>**

Facts:

A.K. Gopalan, a communist leader, was detained under the Preventive Detention Act, 1950. He challenged his detention as a violation of his fundamental rights under Articles 19 and 21.

Issue:

Whether preventive detention violates fundamental rights such as personal liberty.

Ruling:

The Court upheld the detention and ruled that "procedure established by law" under Article 21 simply meant any procedure legally enacted, even if it was not fair or reasonable.

Impact:

It gave Parliament wide powers to restrict personal liberty through detention laws. Later criticized as too restrictive.

## **2.MANEKA GANDHI V. UNION OF INDIA (1978)<sup>7</sup>**

Facts:

Maneka Gandhi's passport was impounded by the government without giving her a reason. She challenged this as violating Articles 14, 19, and 21.

Issue:

Whether the 'procedure established by law' in Article 21 must be fair, just, and reasonable.

Ruling:

The Court overruled A.K. Gopalan, holding that the procedure cannot be arbitrary; it must be reasonable and meet the requirements of Articles 14, 19, and 21 together.

Impact:

Strengthened safeguards against misuse of preventive detention laws. A landmark case expanding personal liberty.

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<sup>6</sup> AIR 1950 SC 27.

<sup>7</sup> AIR 1978 SC 597.

### **3. ADM JABALPUR V. SHIVKANT SHUKLA (1976)<sup>8</sup> (HABEAS CORPUS CASE)**

Facts:

During the Emergency (1975-77), several persons were detained without trial. They filed habeas corpus petitions claiming illegal detention.

Issue:

Whether the right to approach the court for unlawful detention survives during an Emergency suspending Article 21.

Ruling:

The Court ruled no remedy was available during the Emergency, even if detention was illegal.

Impact:

Heavily criticized as a blow to personal liberty. Later declared wrongly decided by a constitution bench in 2017 (Puttaswamy case).

### **4. P. ALAGARSAMY V. STATE OF TAMIL NADU (1977)**

Facts:

Detention order challenged on the ground that the reasons for detention were vague.

Issue:

Can vague grounds invalidate preventive detention?

Ruling:

Yes, the Court held that vagueness defeats the detenu's right under Article 22(5) to make an effective representation against detention.

Impact:

Ensured that authorities provide clear, specific, and intelligible reasons for detention.

### **5. KHUDIRAM DAS V. STATE OF WEST BENGAL (1975)**

Facts:

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<sup>8</sup>AIR 1976 SC 1207.

Khudiram Das was preventively detained. He argued that irrelevant and extraneous materials influenced the detaining authority.

Issue:

Is subjective satisfaction of the detaining authority beyond judicial review?

Ruling:

No, the Court said that if the authority acted mala fide, based on irrelevant considerations, or without proper application of mind, courts can interfere.

Impact:

Opened the door for judicial review of preventive detention orders.

## **6. REKHA V. STATE OF TAMIL NADU (2011)**

Facts:

The petitioner challenged her detention under preventive detention laws used against those allegedly involved in selling expired drugs.

Issue:

Can preventive detention be used when normal criminal law is sufficient?

Ruling:

Preventive detention is not justified if the regular law (IPC/CrPC) is sufficient to deal with the situation. It is only for exceptional cases when urgent and extraordinary action is needed.

Impact:

Restricted the indiscriminate use of preventive detention laws.

Summary of Judicial Trends:

1. Initially Lenient (A.K. Gopalan) — State power was supreme.
2. Liberal Expansion (Maneka Gandhi) — Personal liberty strongly protected.
3. Emergency Setback (ADM Jabalpur) — Rights denied during Emergency.
4. Post-Emergency Safeguards (Khudiram Das, Rekha, Alagarsamy) — Higher scrutiny and fairness emphasized.

## **DUE TO THE PRESENT PREVENTIVE DETENTION LAWS WHAT ARE THE PROBLEMS WE ARE FACING?**

Preventive detention laws in India have been a subject of controversy, with several problems arising due to these laws:

### **KEY ISSUES**

- **Dent to Democracy**

Preventive detention laws allow for the detention of individuals without trial or conviction, which is undemocratic. This undermines the fundamental right to a fair trial and the principle of innocence until proven guilty.

- **Extra-Judicial Authority**

Governments have misused preventive detention laws to exert extrajudicial authority, leading to arbitrary detentions. This results in the concentration of power in the hands of the executive, undermining the separation of powers and the rule of law.

- **Misuse of Other Acts**

Laws like the Unlawful Activities (Prevention) Act, 1967, have been misused for preventive detentions, further complicating the issue. This highlights the need for stricter guidelines and oversight mechanisms to prevent the misuse of these laws.

- **Manipulation by Government Officials**

District magistrates and police have been known to make preventive detentions to control law and order, even when it may not always lead to public disorder. This abuse of power undermines the trust in law enforcement agencies and the administration of justice.

- **Human Rights Violations**

Preventive detention laws have been criticized for violating human rights, particularly the right to liberty and freedom from arbitrary detention. This is a clear violation of international human rights standards and India's constitutional guarantees.

## **AND WHO IS FACING THE MOST?**

- **Groups Most Affected**

## Political Activists and Dissenters

Those who express dissenting opinions or engage in political activism are often targeted under preventive detention laws. This stifles free speech, dissent, and political participation, undermining the foundations of democracy.

- **Minority Communities**

Minority communities, particularly Muslims, have been disproportionately affected by preventive detention laws, with many being detained under suspicion of terrorism or other crimes. This perpetuates discrimination, xenophobia, and Islamophobia.

- **Human Rights Defenders**

Human rights defenders, including lawyers, journalists, and activists, have also been targeted under preventive detention laws for their work in advocating for human rights. This undermines the rule of law, freedom of expression, and the protection of human rights.<sup>9</sup>

## HOW THESE PROBLEMS CAN BE SOLVED?

- **Legislative Reforms Amend the Acts**

Amending the preventive detention laws, such as the National Security Act, 1980, and the Unlawful Activities (Prevention) Act, 1967, is essential to ensure that they are necessary, proportionate, and non-discriminatory. This can be achieved by:

- **Narrowing the scope of detention:** Limiting the grounds for detention to only those that are strictly necessary to prevent harm to national security or public order.
- **Introducing stricter safeguards:** Requiring that detention orders be based on credible evidence and be subject to regular review.
- **Providing for compensation:** Allowing for compensation to be paid to individuals who are wrongly detained.

- **Introduce Safeguards**

Introducing robust safeguards is crucial to prevent abuse and ensure that preventive detention laws are applied in a fair, reasonable, and non-arbitrary manner. This can be achieved by:

- **Establishing an independent review committee:** Creating an independent committee to review detention orders and ensure that they are in accordance with the law.

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<sup>9</sup> AMNESTY INTERNATIONAL, <https://www.amnesty.org/en/location/asia-and-the-pacific/south-asia/india/report-india/>, (last visited June 18, 2025).

- Providing for judicial review: Allowing for judicial review of detention orders to ensure that they are based on credible evidence and are necessary to prevent harm to national security or public order.
- Requiring regular reporting: Requiring that the government regularly report on the use of preventive detention laws, including the number of detentions, the grounds for detention, and the outcomes of detention orders.
- Judicial Oversight
- Strengthen Judicial Review

Strengthening judicial review of preventive detention orders is essential to ensure that they are based on credible evidence and are necessary to prevent harm to national security or public order. This can be achieved by:

- Providing for automatic judicial review: Requiring that all detention orders be subject to automatic judicial review.
- Establishing clear guidelines: Establishing clear guidelines for judicial review, including the criteria for evaluating the necessity and proportionality of detention orders.
- Providing for compensation: Allowing for compensation to be paid to individuals who are wrongly detained.
- Ensure Timely Hearings

Ensuring that detention orders are reviewed in a timely manner is crucial to prevent abuse and ensure that preventive detention laws are applied in a fair, reasonable, and non-arbitrary manner. This can be achieved by:

- Establishing clear timelines: Establishing clear timelines for the review of detention orders.
- Providing for expedited hearings: Allowing for expedited hearings in cases where the detainee alleges that their detention is unlawful or unjustified.
- Requiring regular updates: Requiring that the government regularly update the detainee and their legal representatives on the status of their detention.
- Transparency and Accountability
- Publish Detention Data

Publishing data on preventive detentions is essential to ensure transparency and accountability. This can be achieved by:

The use of preventive detention laws, including the number of detentions, the grounds for detention, and the outcome-**Requiring regular reporting:** Requiring that the government regularly report on cases of detention orders.

- **Establishing an online database:** Establishing an online database that provides information on preventive detentions, including the name of the detainee, the grounds for detention, and the outcome of the detention order.

- **Providing for public access:** Providing for public access to information on preventive detentions, subject to necessary safeguards to protect national security and public order.

- **Establish Independent Review Mechanisms**

Establishing independent review mechanisms is crucial to ensure that preventive detention laws are used in a manner that balances national security and public order concerns with the need to protect human rights and prevent abuse. This can be achieved by:

- **Establishing a National Preventive Detention Review Board:** Establishing a National Preventive Detention Review Board to review detention orders and ensure that they are in accordance with the law.
- **Providing for independent oversight:** Providing for independent oversight of preventive detention laws, including regular audits and inspections.
- **Establishing clear guidelines:** Establishing clear guidelines for the use of preventive detention laws, including the criteria for evaluating the necessity and proportionality of detention orders.

- **Human Rights Protection**

- **Strengthen Human Rights Institutions**

Strengthening human rights institutions is essential to ensure that preventive detention laws are used in a manner that respects and protects human rights. This can be achieved by:

- **Establishing an independent human rights commission:** Establishing an independent human rights commission to investigate complaints of human rights abuses and provide recommendations for reform.

- Providing for human rights training: Providing for human rights training for law enforcement officials and other stakeholders involved in the use of preventive detention laws.
  - Establishing clear guidelines: Establishing clear guidelines for the use of preventive detention laws, including the criteria for evaluating the necessity and proportionality of detention orders.
- Provide Access to Legal Representation

Providing access to legal representation is crucial to ensure that detainees are able to challenge their detention and receive a fair hearing.

## CONCLUSION

Preventive detention laws in India represent a complex intersection between the state's duty to maintain public order and the individual's fundamental rights guaranteed under the Constitution. While Article 22 provides constitutional legitimacy to preventive detention, it also imposes safeguards intended to prevent misuse and protect individual liberty. However, in practice, these safeguards are often perceived as inadequate or loosely enforced, leading to concerns about arbitrary detention and violation of personal freedom.

The justification for preventive detention stems from the need to prevent threats to national security, public order, and essential services. Yet, such powers, if not exercised with restraint, can undermine democratic values, the rule of law, and human rights. Judicial pronouncements have repeatedly emphasized the necessity of balancing state interests with individual liberties, but challenges in practical implementation persist.

Therefore, there is an urgent need for comprehensive legislative reforms to ensure stricter procedural safeguards, judicial oversight, and accountability in the use of preventive detention. Measures such as transparent detention procedures, regular review boards, time-bound detention periods, and meaningful access to legal remedies can help strike the necessary balance between state security interests and the protection of civil liberties.

In conclusion, while preventive detention remains an essential tool in the hands of the state to counter imminent threats, its exercise must be cautious, proportionate, and consistent with the constitutional promise of individual liberty and human dignity.