
BALANCING SECURITY AND LIBERTY: A CRITICAL EXAMINATION OF PREVENTIVE DETENTION LAWS IN INDIA

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INTRODUCTION

The preamble is not just words on paper; it's a promise etched in the pursuit of the dignity of every individual. But the conditions under which this was done, left an unfortunate legacy behind. The framers of the Indian constitution gave constitutional sanctity to Preventive detention laws under Article 22. The Preventive Detention Act was introduced in 1984 whose objective was to allow the federal courts to confine or imprison the accused individuals, as they awaited trial if the government showed that their release could cause harm to a society or an individual. A society that embraces preventive detention without necessary safeguards sacrifices individual liberties on the altar of perceived security. It is striking a devastating blow to the freedom of an individual thereby ensuring a false sense of safety. Largely, preventive detention became an outrageous inroad into the domain of personal liberty and such an invasion will be accepted by people only when there is a clear statutory provision authorizing it. However, at present, it is covered by the regulations set forth by the executive.

When the government tries to restrict fundamental rights, it is guaranteed by liberal democracy that it will do so by upholding the rule of law rather than the executive rule. The rule of law requires “The law to be superior to and binding on the government and its officials” and the law to be universally applicable, “known, just and enforceable” and the law protect individual liberties.¹ Due process law plays an integral role here as it was designed to reduce the likelihood that the government may unintentionally deny freedom to innocent people. Such laws reflect a balance between the state’s security and individual’s rights to liberty, a balance that lies at the heart of the preventive detention debate. Thus the principles of the rule of law and due process

¹ E. Thomas Sullivan and Toni M. Massaro, *The Art of Due Process in American Constitutional Law* (2013) 1-2, 4.

stand in stark contrast to authoritarian practices that emphasize the “the legitimacy and supremacy of state power over the claims of the accused”.²

The long-running discussion on whether and how much to use custody to stop the most violent crimes and render the most dangerous offenders incapable of committing new ones came to a head after the events of 9/11. This event marked the change in emphasis from managing mentally ill offenders through preventative custody to employing detention as a national security strategy. The current debates on preventive detention typically compartmentalize the usages of preventive detention, which lessens its harm. Recently, the Apex court of India has ruled that laws about preventative detention are extraordinary measures best suited for dealing with emergencies and should not be employed as a means of upholding "law and order."

BALANCING SECURITY AND INDIVIDUAL RIGHTS

“The recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world”³ The presumption of innocence, which is the cornerstone of contemporary legal systems, is the subject of one main criticism. This idea is compromised when people are detained without official accusations or convictions as they are being held based on suspicions or potential future behavior rather than verifiable proof of misconduct. The validity of preventive detention is called into doubt by this departure from the fundamental principle of "innocent until proven guilty" on both an ethical and legal level. India’s constitution lists broad categories of threatened harm that may be the basis for preventive detention. These categories just describe circumstances and the constituent assembly gave the government broad detention powers intentionally so that the government would not be found handcuffed during dire circumstances. A lack of due process is a serious human rights concern related to preventive detention. People have the right to a fair trial on time, access to legal counsel, and knowledge of the charges against them in traditional legal systems. By forgoing these protections, preventive detention results in protracted incarceration without the benefit of a proper court procedure. In addition to violating the rights of those in custody, this lack of due process compromises the integrity

² Hung-En Sung, *Democracy and Criminal Justice in Cross-National Perspective: From Crime Control to Due Process*, 605 *Annals Amer. Acad. Pol. & Soc. Sci.* 314, (2006)

³ P. Sarojini Reddi, *Judicial Review of Fundamental Rights*. (Preamble to the Universal Declaration of Human Rights)

of the legal system as a whole.

The authors have stressed that any system of preventative detention must have strong legal safeguards to meet these human rights issues. Regular, unbiased court evaluations, notification of charges, access to legal counsel, and compliance with a fair incarceration period are a few examples of these protections. A thorough analysis of the moral and legal ramifications of preventative detention is necessary to strike a balance between the imperatives of national security and the defense of individual rights, with an emphasis on respecting the values embodied in international human rights instruments.

Whether preventive detention is a safeguard or a violation of human rights is a question that is still being addressed by the courts. One major aspect that appears while answering this question is the conflicting consideration between individual liberty and the safety of the state. The balancing between these two aspects raises multi-dimensional problems. Can the freedom of the individual be subordinated to the demands of the state and if so, to what extent? At the time of introducing Article 22 (Then - Article 15-A), Dr. B R Ambedkar said that “in the present circumstances of the country, it may be necessary for the executive to detain a person who is tampering either with public order as mentioned in concurrent list or with the defense services of the country. In such a case I do not think that the exigency of the liberty of the individual should be placed above the interests of the state”. His perspective, expressed during the framing of the Constitution, reflected the challenging socio-political conditions of post-independence India. Ambedkar believed that in specific cases, the state's interest in maintaining public order or safeguarding national defense could override individual liberties. However, the current usage of preventive detention under Article 22 of the Indian Constitution often deviates from its original intent. Originally conceived as a measure for extraordinary situations, the reasons for which Article 22 was crafted were focused on addressing immediate threats to public order and national security. Today, there is a growing concern that preventive detention powers are being employed in ways that extend beyond the intended scope, potentially compromising individual rights and liberties. The evolving landscape underscores the importance of striking a delicate balance between the state's interests and the protection of fundamental rights in the contemporary context.

THE IMPACT OF THE MISUSE OF PREVENTIVE DETENTION LAWS

The preventive detention laws are not just black letter laws that do not affect real human beings. One of the most jarring findings in the past years is that under the UAPA (Unlawful Activities (Prevention) Act, 1967) between 2018-20, 149 were convicted out of 4690 persons. This is just one aspect of the ongoing rise in preventive detention and many times unlawful arrests and abuse of civilians also take place. In recent years in the name of national security, the National Security Act has been abused by authorities to target marginalized communities. For instance, in Muzaffarnagar, it has been reported that the NSA (National Security Act, 1980) Act has been used against Dalits and Muslims even for the most trivial altercations.

Laws such as UAPA and NSA have often been used to silence activism as seen in the case of doctor Khafil Khan⁴ who was arrested under the NSA for taking part in the anti-citizenship protest and was kept in custody even after his bail order. Even then his family had to approach the apex court to accelerate the proceedings in the Allahabad High Court to overturn his detention order that he had received 3 days after his bail order. And in the case of the protests against the Kudankulam Nuclear Plant where it is reported that nearly 2.27 lakh people living in Idinthakarai have been detained under various sections in which 8,450 of them were detained under the Goondas Act and the NSA Act since 2011 and many of these cases were later thrown out by the courts⁵. Another transgression by the UP police using NSA was reported by Avani Kumar where 139 people were arrested and among them, 13 were charged with allegedly taking part in protests against the Citizenship Amendment Act.⁶ Despite the trauma, as recognized in *Joginder Kumar v. State of Uttar Pradesh*, the SC pointed out that because "arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person"⁷

The case of the arrest and detention itself causes these instances of illegal detentions under the guise of these laws give opportunities to the authorities to indulge in violence against the detainees. One such case is the case of Srimathi Aparna Marandi⁸ who along with her 4yr old son and 16 yr old relative and two friends was picked up by the police from Hatia railway

⁴ Saxena, A. (2020) Breaking: NSA charges against Dr. Kafeel Khan dropped; Allahabad HC directs immediate release [read judgment], Live Law. Available at: <https://www.livelaw.in/top-stories/breaking-nsa-charges-against-dr-kafeel-khan-dropped-allahabad-hc-directs-immediate-release-read-judgment-162223> (Accessed: 02 January 2024).

⁵ B. Suresh Lal, Victims and Prevention Detention Laws, 4 INT'L J.L. MGMT. & HUMAN. 5199 (2021).

⁶ Jasir Aftab, 'Preventive Detention Laws in India: A tool for executive tyranny?' (*The Leaflet*, 12 April 2021) <<https://www.leaflet.in/preventive-detention-laws-in-india-a-tool-for-executive-tyranny/>> accessed 28 December, 2023

⁷ *Joginder Kumar v. State of Uttar Pradesh*, 1994 SCC (4) 260

⁸ National human rights commission report, Pg.no.58-59 (2020)

station near Ranchi, Jharkhand, where even though her friends were released from the same day she and her son were detained over 24 hrs without being produced to the magistrate. The crux of the case was that only Smt Aparna was connected to the FIR bearing FIR no. 52/12 of police station Kathikund district, Dumka. In contrast, the others who were arrested with her including her son were in no way connected to this particular FIR which is a blatant violation of one's human rights for which they got barely any compensation. Now, why was the kid still held back in detention even though he had neither any criminal background nor the potential to commit the crimes as mentioned in the FIR?

This power given to the authorities sometimes leads to an extreme outcome of custodial death as in the case of the death of Baskar and Sachin⁹ who were taken into police custody and were later found dead at a railway track. In this case, there were no comprehensive records of their arrests as well as their death which further proves that the authorities have the power to manipulate facts with little to no consequences. Another instance that caused outrage was the arrest of a father and son in Tamil Nadu¹⁰ during the lockdown for keeping their shop open an hour after the curfew imposed by the state government, in the coming days they were declared dead in custody while the authorities had no right to keep them in custody after 24 hours but the special powers given to them had allowed them to not only arrest but as well as torture and ultimately cause the death of both the father and the son.

The persons arrested under any of the preventive detention laws or special powers are most likely to spend their time behind bars without any redressal or availability of bail. Many have been kept in custody and not even transferred to Prison facilities. In 2021, 483 persons were put behind bars under the NSA, from weeks to months in custody, of which 242 persons were released because they couldn't find the grounds for arrest. This statistic itself begs the question of whether the judgment of a law enforcement officer is enough to detain a person sometimes for months with no available redressal.

As seen in the above cases many times the detainees are not produced to the magistrate within the time required, the reports of the police officers are unreliable and the police officers misuse their powers to the extent of causing irreparable damage to the detainees and their families

⁹ National human rights commission report, Pg.no.53-54 (2020)

¹⁰ Press trust of India, Jayaraj-Fenix custodial deaths: CBI takes over probe into torture and killing of father-son duo, FIRSTPOST, ,(Sept.02,2021, 1:02pm) <https://www.firstpost.com/india/jayaraj-fenix-custodial-deaths-cbi-takes-over-probe-into-torture-and-killing-of-father-son-duo-857476.html>

which at certain occasions lead to their death. Even with the presence of review to courts and appeal to higher courts due and advisory boards due to the backlog of cases and the bias of these committee due to the isolation of the legal community the detainees are held in custody for extended periods of time sometimes even for years. These cases are not isolated incidents, they have been time and again proven by comparison between the convicted and detained person rates. Therefore more comprehensive restrictions are required.

THE MISSED OPPORTUNITY OF BHARTIYA NAGRIK SURAKSHA SANHITA

The Bhartiya Nagarik Suraksha Sanhita has provisions such as Sec 35, and Chapter 12 which deal with the power of the law enforcement authorities to detain civilians. Sec 35 which is similar to its predecessor in CrPC has retained the most controversial aspects of Sec 41 including the amendments of 2010 which were highly contentious. But the most concerning part of this bill is chapter 12 which despite retaining Sec 151 of its predecessor, has also granted additional powers in Sec 170 clauses 1 and 2 where it provided for complete discretion to the police official to decide when to arrest a civilian without magistrate orders or a warrant but just based on their judgment of the prevention of certain cognizable offense. Clause 2 of sec 170 further threatens the liberty of the civilians where the detention can be extended to over 24 hours just based on any other law in force then. This bill could have been used to reform the preventive detention laws which were threatening civilian rights but it has completely gone in the opposite direction by giving wider discretion to the police as well as reducing the redressal mechanisms for the detainees by partially abrogating the 24-hour rule and putting it under the influence of the already controversial preventive detention laws.

Sec 172 clause 2 provides for the detention of any person resisting the orders of the police officer in the course of his duty under preventing crime and the only restriction to this provision is that he is required to produce the person to the magistrate, but this restriction does fall short because the police are given the discretion to release the detainees in 24 hours in petty cases. This provision can be misused as there are no proper guidelines for the abstract notion of preventing crimes or what is considered as petty cases in which the offices are given a wide range of discretion to decide the release of the detainee.

The specially concerning language of this bill is exhibited in 172 clause 2. “A police officer may detain or remove any person resisting, refusing, ignoring or disregarding to conform to

any direction under sub-section 1". This power opens up avenues or gives opportunities for the police officers to be violent or detain protesters or other activists hence curtailing the most basic fundamental right of freedom of expression.

This bill has the potential to incorporate guidelines and comprehensive restrictions to curtail the power of the law enforcement officers and guarantee the rights of the civilians but instead it has not defined many liabilities and terms which are of ambiguous interpretation as well as losing already existing restrictions with its dangerous language and subsequent possible implementation, hence providing a gateway to an authoritarian state

THE JUXTAPOSITION OF INTERNATIONAL CONVENTIONS WITH THE PREVENTIVE DETENTION LAWS IN INDIA

The ICCPR (International Covenant on Civil and Political Rights) in Article 9 has provided for the protection of civilians of all the member nations to have a right against arbitrary detention. It has also provided for detention under due process of law but time and again the term arbitrary has been disputed for its application. As in the narrow application, the term arbitrary would come to mean arrest without due process of law but time and again the wider interpretation of the term arbitrary has been upheld by the international community as confirmed in Campora's *Schweizer v. Uruguay*¹¹ by the human rights committee where the committee held the wide definition of arbitrary means unjust detention or interference with the personal liberty of a person which has elements of inappropriateness, injustice and unpredictability.

Even though after due deliberation the covenant did not explicitly provide for the prohibition of preventive detention in unequivocal terms. The committee has also recognized the use of preventive detention laws on grounds of public security but explicitly condemned arbitrariness in the use of these laws. And has asked every member state to provide for adequate safeguards and stringent restrictions to preserve the right to personal liberty and security of life.

In the ICCPR article 4 provides for provisions for counter-terrorism and national security. But India as a member state does not justify the preventive detention laws through article 4 of the covenant but rather hangs on to the argument that the preventive detention laws in the nation do not have an arbitrary character which is not the reality. In many accounts which are the lack

¹¹ David Alberto Campora Schweizer Vs. Uruguay, "Communication No. 66/1980 (15 March 1980), UN Doc.Supp.No.40 A/38/40), 117 (1983), [18.1]"

of restrictions on the discretion of the police officer and the provision of preventive detention in the constitution itself in Article 22 Clause 3 sub-clause b is as follows: “Nothing in clauses (1) and (2) shall apply— (b) to any person who is arrested or detained under any law providing for preventive detention”.¹² As per clause 3 subclause b, a person detained by any preventive detention law is not required to be informed of the reason for detention and is also not required to be produced before the magistrate within 24 hours. The constitution further in clause 4 of article 22 provides for the detention of a person under these conditions for 3 months or more in certain cases through an advisory board.

India being a member state that accepted the ICCPR cannot defend its preventive detention laws and constitutional provisions by providing the argument that they are not arbitrary while they are as discussed in this paper where safeguards are inadequate.

THE CONSTITUTIONALITY OF THE CURRENT PREVENTIVE DETENTION LAWS.

As Justice H R Khanna in *ADM Jabalpur v. Shivkant Shukla*¹³ had opined “Article 21 cannot be considered to be the sole repository of the right to life and personal liberty. The right to life and personal liberty is the most important right of human beings in civilized societies governed by the rule of law. The sanctity of life and liberty was not something new when the Constitution was drafted. It represented a facet of higher values that mankind began to cherish in its evolution from a state of tooth and claw to a civilized existence. The principle that no one shall be deprived of his life and liberty without the authority of law was not the gift of the Constitution. It was a necessary corollary of the concept relating to the sanctity of life and liberty, it existed and was in force before the coming into force of the Constitution. Even in the absence of Art. 21 in the Constitution, the State has no power to deprive a person of his life or liberty without the authority of law. That is the essential postulate and basic assumption of the Rule of Law and not of men in all civilized nations... countries under Rule of Law where there is no provision corresponding to Art. 21, a claim was ever sustained by the court, that the State can deprive a person of his life or liberty without the authority of law.”

¹² The Constitution of India, 1950

¹³ *ADM Jabalpur v. Shivkant Shukla* 1976 SCC (2) 521

This opinion which later introduced the principles of natural justice in further judicial decisions such as in the case of Maneka Gandhi highlights the supremacy of Article 21 or the right to life and personal liberty as an inalienable human right essential for the existence of the rule of law. Establishing the supremacy of article 21, article 22 of the constitution provides for detention for 3 months without revealing the reason for arrest as well as providing for no redressal through the magistrate. Further, the detention can be extended over 3 months by an advisory board consisting of high court judges and legal personnel which is biased towards the detainees as the detainees are more often than not, lay persons who do not speak the legal language of the court and there is no guarantee that the advisory board is not a tool of the executives. Considering these real-life situations as well as the language of Article 22, Article 22 goes against the principles of natural justice, personal liberty, and Article 21 itself.

In the case of *Maneka Gandhi v. Union of India*¹⁴ personal liberty was interpreted in the broadest sense as including the right to move around the country as guaranteed by article 19 where the court also established the golden triangle which is the relationship between articles 14, 19, and 21. In this case, the court opined that no one shall be detained without being heard following the principles of *Audi Alteram Partem*. Preventive detention laws that exist currently in India fall inadequate of this basic principle and the underlying principle of the golden triangle because of the lack of established guidelines and protection that is the need of the hour to ensure civilian liberty as guaranteed by article 19, rule of law and anti arbitrariness as guaranteed by article 14 and the right to a dignified life as guaranteed by article 21.

In the case of *Ahmed Noor Mohammed Bati v. State of Gujarat*¹⁵, the SC dealt with the repercussions of the arbitrary use of section 151 of the CrPC which gave the right to a police officer to arrest a person with no warrant as per his discretion to prevent a cognizable offense(the new bill passed it is chapter 12, sec 170 to 172). The bench held that Preventive detention, even though a crucial tool for the executive to preserve law and order cannot be misused as per the whims of a law enforcement officer. The authors agree with the court's inference that the practice of preventive detention is not inherently arbitrary but its misuse and avenues provided by the law itself to misuse these laws goes against the principles of our constitution. The laws and provisions that provide for preventive detention in India are not

¹⁴ *Maneka Gandhi v. Union of India*, 1978 AIR 597

¹⁵ *Ahmed Noor Mohamad Bhatti v State of Gujarat*(2005) 3 SCC 647

inherently against the principles of natural justice or the principles of the constitution but their specificity of the duration of detention and the inadequacy of redressal or judicial intervention and the overall lack of safeguards is what makes them unconstitutional and subject to amendment.

CONCLUSION

This paper has attempted to highlight the ongoing epidemic of the misuse of preventive detention laws which have infringed on the most basic human rights that India as a constitutional nation holds in high stature. This paper highlights the constitutional discrepancies, the journey of preventive detention laws, and the real-life impact of these laws and proposes that the law is inadequate in its safeguard mechanism as well as in executive implementation and has failed to take into account the reality of our judicial and the law enforcement systems. The paper proposes the following solutions:

- To establish a separate tribunal to have cognizance of preventive detention cases
- To place the detainees in house arrest rather than in police custody
- To amend article 22 of the constitution
- To include restrictions such as:
 - Provide for tortious liability of the state
 - Individual liability of the law enforcement officers
 - The abrogation of sovereign immunity to the police officers in these cases