# LIBERTY WITHOUT A TRIAL: CAN PREVENTIVE DETENTION SURVIVE THE TEST OF CONSTITUTIONAL JUSTICE IN INDIA?

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## ABSTRACT

The power in the constitution of India which enables the state to remove the freedom of a person based on what they might do is called "Preventive detention". It is allowed under Article 21 and 22 of Constitution and it has been held to be valid by Supreme Court in A.K. Gopalan v State of Madras. This paper addresses the question of whether it can possibly be different from constitutional justice, i.e. deprivation of liberty should be based on strict necessity, be subject to speedy review by an independent entity, and that the authority should be liable for bribes if it infringes upon the constitution. It concludes that the answer is 'yes' and 'no' in the real world, on the facts, at least 'no'. The Supreme Court has created genuine restrictions, namely that public order is restricted to the law and that in Rekha vState of Tamil Nadu, the Court declared preventive detention as illegal if the ordinary criminal law can do the job, and the enforcement of time limits. But the constitutional protections are weak, the earlier amendment to give the Advisory Board greater authority has, to the best of the author's knowledge, never been implemented, and even with provisions that introduce confidentiality and that require lawyers to appear before the Advisory Board, the remedy typically comes after half of the detention has taken place. There is no escape from the fact that power over people is being abused as one of the instruments of common policing in Uttar Pradesh and Telangana, and the news on detenus from the NCRB, indicates the same. The paper suggests four steps of a necessity test and a series of statutory and institutional changes.

**Keywords:** preventive detention, Article 22, Article 21, National Security Act, public order, proportionality, and habeas corpus.

## I. Introduction

The Ladakhi educator, activist and a pro-Statehood and Sixth Schedule nationalistic activist was detained under the National Security Act (NSA), 1980 two days after the protests in Leh in favour of the sixth schedule and Statehood resulted in the death of four people on 26 September 2025. His wife contested this detention in the Supreme Court on a habeas corpus petition, on one of its grounds that the acts on which it was founded had not been communicated to him. The Union finally revoked the order on 14 March 2026, after some five and a half months of the maximum allowable twelve month period. On March 23, 2026, a bench of Justices Aravind Kumar and P. B. Varale reserved all the pending arguments for a hearing on the merits, but dismissed the petition.

This episode illustrates this pattern on a small scale – and is the pattern this paper studies. An Executive gets someone arrested because he/she believes the person will eventually act criminally! It takes many months for the legal process to catch up. The detention ceases once the aircraft comes within close quarters of a control tower aircraft, and if it does, then there's no more time for a ruling on what constitutes a legal detention. This kind of detention is authorised for by the Constitution in the terms. The question here is whether it's the same thing as it's got to be the same authorization question; is it the same thing as it’s got to be the same justification question?

What has stood the test of time, the paper argues, is not only certain constitutional text but also its constitutional interpretation.Therefore, the paper claims, the real litmus test is that preventive detention has continued and has continued on certain conditions that Indian law has enacted more frequently but that it has enacted less on. Three conditions matter. The power would have to be more limited than the regular criminal process could handle and relate only to threats that it could not resolve on its own. The decision of the executive must be brought for early and independent examination by the detainee. It is unlawful detention and should have repercussions for the perpetrators. The Supreme Court has given a shape to the first condition in the doctrine, such as in the public order cases and in Rekha v. State of Tamilnadu. Not all three were achieved by these statutorial/institutional mechanisms; and the experience of the High Court's judgment shows that there is a wide gap in the states where data are available.

The constitutional design and preventive and punitive detention are prescribed in Part II. Part III is a discussion of the doctrine as it evolved from A.K. Gopalan to the more recent cases.

Statutes and their use are described in Part IV. Part V discusses the effectiveness of the procedural safeguards. Part VI examines the power against proportionality, rule of law and international standards. Part VII goes into the argument for, and against, preventive detention. In Part VIII, proposals for reforms are presented and Part IX concludes.

### A. Research Questions

This paper discusses four questions. Whether firstly, a power of detention without a trial can be com-forth with Article 21, as interpreted after Maneka Gandhi v Union of India? Second, on what issues has the Supreme Court evolved its reasoning on preventive detention? Third, on the evidence available, what protection do the provisions of Article 22 and detention legislation afford a detainee? Fourth, what would secure liberty better that would take away the State's power to deal effectively with real threats.

### B. Objectives

The study is intended to trace the development of the doctrine, from a formalistic interpretation of Article 21 to a due process interpretation, and to identify where preventive detention can be found outside the confines of the doctrine; to draw distinctions between the constitutional protections and their implementation in statute; examine the empirical record, noting its shortcomings, yet without excusing the execution of preventively detained individuals; give the strongest possible defence for enabling the power; reassess the power in light of the empirical record; and suggest remedial changes, based upon specific defects.

### C. Methodology and Limits

The approach is based on ideas and critical analysis. The fundamental materials are the Constitution, the National Security Act, 1980, the COFEPOSA Act, 1974, state detention laws and decisions from the Supreme Court and High Court cases. The paper is a practice with data from the 'National Crime Records Bureau' ('NCRB') and published studies on the outcome of the Habeas applications at the High Courts. There should be two limits. Firstly, there is only a partial record of empirical events. There is published data on prison numbers, but this is at a certain point in time and does not break down the numbers by statutory ground. Numbers in Part V are recorded in one state as reported in the press; and these do not always reconcile for the same state. These figures are cited as a means to gauge and should not be understood as

evidence of a national trend. Second, where the paper does look at the use of the Unlawful Activities (Prevention) Act, 1967 allowing prosecution and custody, it overlooks this as an Act of preventive detention in the meaning of Article 22(3)(b).

## II. The Constitutional Design

### A. Articles 21 and 22

Article 21 of the Constitution says that no person shall be deprived of his/her life or personal liberty except in compliance with an ample procedure laid down by law. Article 22 has then divided the arrested persons into two groups. Clauses (1) and (2) allow an individual arrested under ordinary law to be told the reasons for his arrest, have him read his rights, to have a lawyer of his choosing read him his rights, and to be brought before a magistrate within 24 hours of his arrest. This is denied the arrested or detained person under a preventive detention law, in the case of a person, under clause (3)(b).

Smaller amount is provided for in clauses (4) to (7). A detention shall not be imposed for a period exceeding 3 months unless a report is filed before the three months' end before the end of the term by an advisory Board of persons who are, or have been or are qualified to be High Court judges that adequate cause exists. It is incumbent on the detaining authority to notify the grounds as early as may be and give the person the earliest possibility of making a representation but shall not be required to reveal facts which it deems to be contrary to public interest. Parliament may in law prescribe the cases in which detention beyond three months may be continuous without a Board opinion, the period for the continuance of the detention and the procedure of the Board. There is a separation of powers in the legislature. The Union List includes preventive detention for matters connected with defence, foreign affairs and security of the India while the concurrent list includes provisions regarding security of the State, maintenance of public order and maintenance of supplies and services essential to the community.

This text has two features, which are discussed later. The first, is that the Constitution allows preventive detention, does not call it into question and lays only bare minimum safeguards, which gives courts limited leeway to rule that the preventive detention is unconstitutional. Second the ground stated in Concurrent List is broad. Nor is "public order" one of the things threatened to the State on the Union List to receive the power it grants, and the occasion before

was far wider than the State's need for power over ordinary offenders to keep the supplies and services essential to the community in order.

**B. Preventive and Punitive Detention.**

If the detention is punitive, it is conducted after a trial. A court needs to establish a completed act for the state, the accused will have the opportunity to challenge evidence, and an independent judge will give considerations or reasons. Preventive detention works before he or she has been found guilty of an offence, and is implemented because the detaining authority derisively decides that some individual is likely to commit an offence in the future which will cause detriment to others. It is always described as a precaution and never as a punishment; it is based upon a satisfaction which has always been deemed as belonging to the executive. The same case law also held that the satisfaction is not beyond review, which is addressed in part III.

The reason for the power isn't frivolous. If a person is planning an attack, or is a conduit for hostile intelligence, an officer can not wait for an act to be completed and then prosecute. A trial is not a good way to prevent something that hasn't yet occurred. What makes the power useful, in a way, are its speed, its surreptitiousness, and the anticipated nature of the power, and those virtually eliminate the buffer provided by the law. The determination to detain is made by an Executive Officer. The first review is by a Board appointed by the same government. A detainee does not have a right to counsel prior to it. Now there's no finding of guilt to test and only an opinion on risk. If this is the case, the quality of protection relies virtually solely upon the attitude of the later stages and especially of judicial review.

**III. What is the nature of this doctrine that has evolved?What sort of doctrine has evolved?**

**B. From Prasad to Arjun Ayaluramadai**

In 1950, in A.K. Gopalan vs State of Madras, the Supreme Court, by a majority, upheld the Preventive Detention Act, 1950, with one section of the act overturned. It used the term “procedure established by law” to describe the meaning of Article 21, specifying that procedure must be set out in enacted legislation, and treated Article 22 as a standalone code in itself on preventive detention. But Fazl Ali J. dissented saying that "At most, it included the elementary

ingredients of natural justice". On the majority's view a detention law that complied with Article 22 needed no further test of fairness.

Three of these decisions had this perspective. In R.C. Cooper v. Union of India, the theory that each Fundamental Right exists in its own separate world was rejected, and it was determined that the impact (on the right of the person) of State action is what is relevant. In the case of Khudiram Das v. State of West Bengal, 1975, it was held that satisfaction, although subjective, of the detaining authority is not beyond scrutiny. The Court is not obliged to reweigh the sufficiency of the material nor requires to ask whether the use of the material was sufficient to inform the Authority that it was required to take a lawful decision. In that case of Maneka Gandhi v. Union of India, it was decided that a 'procedure' which takes away a person's freedom must be 'right, just and fair' and not arbitrary, and that Articles 14, 19, and 21 are all related.

The interval between Khudiram Das and Maneka Gandhi also has the worst moment in the subject in the Court. In case of a Presidential order suspending Article 21 during the Emergency, in any hologras circumstance after the suspension of Article 21, a person imminently detained under any preventive detention law could not approach the court to examine any detention, whether mala fide or otherwise. Khanna J. dissented. Later, the nine-judge bench in K.S.P vs UOP decided the above as wrong. Finally, the episode should be taken as a warning of how weak the protections are for preventive detention when a court takes an attitude of refusal to look the reasons in the face.

### *B. A.K. Roy and the Compromise on Validity*

The point at which Maneka Gandhi's reasoning was tested against preventive detention was A.K. Roy v. Union of India, where a Constitution Bench considered the validity of the National Security Act together with section 3 of the Constitution (Forty-fourth) Amendment Act, 1978. That section would have amended Article 22(4) to shorten the period without a Board's opinion from three months to two and to require a Board of serving High Court judges with a serving judge as chairman. The amendment was to come into force on a date the Union would notify. The Court upheld the Act, accepted that preventive detention laws are not outside Article 21, and declined to compel the Union to bring the amendment into force. To the author's knowledge, the amendment has not yet been notified; this should be checked against the current text of the Constitution before submission.

Roy is a compromise, and its terms explain much of what follows. It confirmed that Maneka Gandhi's fairness requirement applies in principle, but it would not hold the NSA invalid for failing it. It also left the decision whether a safeguard that Parliament had itself enacted by constitutional amendment would ever operate in the hands of the executive. A constitutional protection that the executive can leave dormant for more than four decades is not a protection that a detainee can invoke. The result was a division of labor in later case law. The Court polices compliance with the procedural steps in Article 22(5) and the statutes with considerable strictness, and it polices the label of "public order," but it has not required the State to show that detention was necessary in the sense that a proportionality inquiry would demand.

### *C. Rekha and the Ordinary-Law Principle*

The strongest statement of a necessity requirement comes from Rekha v. State of Tamil Nadu, decided on April 5, 2011, by a bench of three judges. The detenu had been detained under the Tamil Nadu Prevention of Dangerous Activities Act, 1982, while in custody in a criminal case, on the ground that there was a real possibility of his obtaining bail. The detention order did not provide details of any bail orders in similar cases. The Court quashed the order. Katju J. wrote that preventive detention is by nature repugnant to democratic ideas and an anathema to the rule of law, that no such law exists in the United States or England except in wartime, and that if the ordinary law of the land can deal with a situation, recourse to preventive detention is illegal.

Rekha states the principle in absolute terms, and this is also a source of tension. The Court has elsewhere accepted that a person facing prosecution may also be preventively detained, and Rekha itself turned partly on the authority's failure to give any details of bail orders in similar cases. The better reading is not a bar on any detention where a prosecution exists, but a requirement that the authority show why the ordinary law, including bail conditions, is inadequate in the particular case. The Court applied this in Ameena Begum v. State of Telangana (2023), where it quashed a detention under the Telangana Prevention of Dangerous Activities Act, 1986, held that the activities attributed to the detenu could not be branded as prejudicial to public order, and observed that the ordinary framework for maintaining law and order was sufficient to deal with them. The principle has been stated, but it has to be restated in case after case, which is itself evidence of how it is received by detaining authorities.

## IV. Statutory and practical aspects of preventive Detention

### A. The National Security Act, 1980

Central and State Governments can detain a person if it is necessary to prevent acts prejudicial to the defence of India, relation with foreign powers and security of India. A State Government can also take into custody a person they believe to be likely to carry out acts harmful to the security of the State, or to the maintenance of public order, or to supplies and services necessary to the public of the State. This may be done by a District Magistrate or Commissioner of Police if authorized to do so by the State Government; during the periods specified by the State Government to not more than three months' duration at any one time and the order shall cease upon expiration of a period of 12 days unless so extended by the State. The principal safeguards against constitutional texts are indicated in Table 1.

**Table 1: Constitutional safeguards and the National Security Act, 1980**

| **Safeguard** | **Constitution** | **National Security Act, 1980** | **Comment** |
|---|---|---|---|
| Decision-maker | Not specified; law may vest power in the executive | Section 3: Central or State Government; District Magistrate or Commissioner of Police if the State so directs, for up to three months at a time; lapses after twelve days without State approval | Decision taken by executive officers at district level |
| Grounds | Art. 22(5): as soon as may be | Section 8(1): ordinarily within five days; within ten days in exceptional circumstances, with reasons in writing | Outer limits enforced strictly by courts |
| Representation | Art. 22(5): earliest opportunity | Section 8(1): to the appropriate Government | Must be considered with expedition |
| Advisory Board | Art. 22(4): High Court judges or persons qualified to be; report within three months | Section9–11: three-member Board constituted by the Government; reference within three weeks; report within seven weeks | Serving-judge Board in the 1978 amendment not notified |
| Counsel and disclosure | Art. 22(1) excluded by Art. 22(3)(b); | Section 11(4): no entitlement to a legal practitioner; proceedings | Detainee cannot test what the Board sees |

| | | | |
|---|---|---|---|
| | Art. 22(6) permits non-disclosure | and report (except the opinion) confidential | |
| Maximum period | Art. 22(7)(b): left to Parliament | Section 13: twelve months from detention; may be revoked earlier | Four times the three-month baseline in Art. 22(4) |

*Source: Compiled from India Const. art. 22 and the National Security Act, 1980, 3, 8–13.*

The table shows how much the statute leaves to the executive branch. The Advisory Board is the only independent check before the High Court; however, the statute makes its proceedings and report, apart from its opinion, confidential and denies the detainee any entitlement to appear through a legal practitioner. Commentators have also criticized the fact that the Board is constituted by the same government whose order it reviews.

### *B. COFEPOSA and State Laws.*

The Economic Offences Act 1974 (known as the 'COFEPOSA') operates in a similar fashion with respect to economic offences. It must be communicated reasons (grounds) that would normally have to be communicated within five days, or 15 days in exceptional cases as to what the reason is entered in writing during periods of emergency. In Attorney General for India v. Amratlal Prajivandas the Supreme Court resolved the issue regarding the constitutionality of COFEPOSA and other related Bills.

The character and scope of the state statutes is quite different and is of greater significance for the purposes of this paper. Its 1982 Act was designed to cover bootleggers, drug offenders, forest offenders, goondas, immoral traffic offenders, sand offenders, slum grabbers, video pirates and photo-publishing offenders and now on revision, it includes cyber law offenders and sexual offenders. The Telangana Act of 1986, as amended, has a list similar to this in its title and scope which extends to financial offenders, among others. These are, of course, ordinary criminal classes  not an indictment of any group's merits, but only of this fact of their nature. The category creep that Part V explores is the shift from Union List to catalogue of types of ordinary offender that denies security of India.

### *C. Scale*

NCRB's Prison Statistics India counts "detenues" held in prisons under preventive laws on 31

December of each year. The count is a stock, and so it understates the number of persons ever detained in a year, since many detentions end before year-end. The reported figures are 3,590 for 2020 (0.73 per cent of all prisoners), 3,470 for 2021, and 4,324 for 2022, an increase of 24.6 per cent over 2021. For 2024, press reports of the NCRB report put the figure at 3,048, of which Tamil Nadu accounted for 36.6 per cent, against 660 in Jammu and Kashmir, 414 in Maharashtra, 249 in Gujarat, 215 in Kerala, 92 in Madhya Pradesh, and 82 in Uttar Pradesh; Bihar reported none. In 2022, Tamil Nadu had 2,129 of the 4,324.

The distribution is a notable feature. In 2024, a single state whose statute is built around offender categories holds about one in three of all detenus, and nearly half in 2022, while a state with the country's largest prison population reports a small number. These figures do not show that any given detention was unlawful, and they are partly a product of what states choose to report. However, they are difficult to explain by reference to national security, and they indicate that the practice of preventive detention in India is driven mainly by state legislation and state policing priorities.

## V. The Safeguards in Practice

**This episode is made up of two sections:**

The most consistent role of Supreme Court has been emphasising the procedural requirement of the Article 22 (5). That, the right of the detainee to make a representation is a real right and that it must be taken in to consideration by the appropriate Government with expeditiousness and that if the Government were to do otherwise the continued detention of the detainee would be vitiated. The time required for supplying grounds in either of the situations - five days or ten in NSA, five or fifteen in COFEPOSA - is to be viewed as maximum time periods and not targets.

This is a critical safety, but it's a form of security. Where a detaining authority provides written grounds of length and in time, and takes into account a representation, then it has fulfilled this requirement, even if the detention was not necessary, or whether the grounds provided were inadequate. The cases in which the procedure fails are the ones, those without authority considering the order in the least. The Allahabad High Court in Dr. Kafeel Khan's habeas petition against arrest by the superintending intelligence agency and consequent extension of his detention by the Aligarh District Magistrate, found that the petitioner had been lying under

the custody of the District Magistrate when the same had issued extension orders without the petitioner being served on him and had relied upon selective reading of the speech alleged to pose threat to public order. It invalidated the detention on 1 September 2020, six and a half months after the detention.

**B. Advisory Boards**

The aim of the Advisory Board is that it acts as an independent review, prior to the High Court. An amendment in 1978 would have made it stronger, with the requirement that serving judges would be responsible for it but this amendment wasn't made effect. The Board, as set up by the NSA determines whether materials the government submits it in confidence and without authority and responsibility for the detainee will be used. According to figures provided by the Uttar Pradesh Government and published after the end of 2020, there was no consensus on the approval of 534 persons who were subjected to the NSA in the State in 2018, 2019 and 2020 by the Advisory Board (53, 21, 47 respectively) and 50 out of the 534 were quashed by the Allahabad High Court.

The Board does not rubberstamp the orders and rejects about a quarter of those that come its way. But these counts also should be considered in conjunction with the High Court record set below. By the same token, if High Courts invalidate such orders in significant numbers as per the record, a stage at the Board where it has ejected a significant number of such orders, could hardly be described as a screening function as envisioned by Article 22(4). Without case-level data, the overlap between the sets of cases cannot be determined and the overlap is a finding: the State has no public information on which to determine whether its safeguards succeed.

**D. Self-Evidencing Support For The Power of Texas Courts**

The detainee's true protection will be through judicial review and the evidence is that it is all too often effective. In an investigation, released in 2021, The Indian Express studied the 120 cases it had before the Allahabad High court for the period from January 2018 to December 2020, all of which are habeas corpus applications brought against arrest by the NSA. Out of this, the Court quashed the order of the District Magistrate in 32 districts (94 cases). The cases arising communal violence cases that were prosecuted were all quashed and so were 30 of the 41 cow slaughter cases. The investigation revealed that the District Magistrate did not exercise his mind in 11 cow slaughter detentions and detention orders and that orders were issued in all

districts in exactly the same terms and that there had been an “atmosphere of fear and terror” in seven cow slaughter detentions. In 12 arrests, they remained in prison for over 6 months after they were granted bail from criminal court.

It would be absurd to try to reconcile the state-reported 50 quashed orders and the 94 quashed orders reported by the press for the same time period, and this doesn't happen here. Both those numbers are huge. From the numbers, the percentage of executive orders available in the courts that are deemed unconstitutional is quite high. This is a good sign of the quality of decisions selected in the sample, but not for orders that aren't challenged.

Telangana is no exception. Responding to the STATE v APPL,, the Supreme Court in Ameena Begum said that the Commissioner had issued a detention order without knowing of the earlier High Court order dated 16 August 2021 detailing the difference between public order and law and order and noted that “a pernicious trend prevalent in the state of Telangana has not escaped our notice”. A court recently had set aside another Telangana detention in 2024, which said that the creation of the impression of effect on public order was a prerequisite for preventive detention. Repeated orders which, as amended by the court, are repeated again in the same form by the same authority are indicative of a system of remedies not of judicial review but judicial corrections of practice.

This suggests three structure boundaries. The first one is the timing. The review of the order is ex post. Ameena Begum was detained for about five months after the order and a High Court quashed the order at the end of five months, and Kafeel Khan was detained for weeks/month. If an order is cancelled by the authority, as the union did when they cancelled Sonam Wangchuk's order, then the merits may never be determined and no one has a finding against the detaining authority. The second is related to standard of review. Courts are at their best when the difficulty arises as a result of some procedural defect or where the "public order" description is simply inaccurate, but less effective where the executive has formed an opinion about potential future harm based on material which the court cannot readily evaluate. The third has to do with consequences. It has been recognised in the Supreme Court that compensation can be claimed under articles 21 & 32 on unlawful detention. There is no evidence but that the quashed preventive detainees are routinely paid anything back – or that an officer receives any consequence if a repressive action, officially undertaken under a directive to which he did not apply his mind, results in his order being quashed – this is a gap

in research that should be plugged before.

### *D. Public Order and Category Creep*

The constitutional design limits preventive detention by its grounds, and the line that has done most work is between public order and law and order. In Ram Manohar Lohia v. State of Bihar, the Court described three concentric circles: law and order is the widest, public order is within it, and the security of the State is the narrowest. An act may affect law and order without affecting public order, and a breach of the law in all cases does not lead to public disorder. Ameena Begum and Nenavath Bujji applied the test to quash detentions based on individual disputes and habitual offending.

The distinction is sound, but it is a test about labels, and labels are easy to supply. A detention order that recites that there is an "atmosphere of fear and terror" satisfies the form of the public-order ground, whatever the facts. For this reason, the label test cannot by itself separate genuine preventive necessity from ordinary policing. The Rekha principle comes closer, but it is applied only when a court looks at the order. A workable distinction requires four questions to be answered on the face of the record: whether the order identifies a specific, serious threat linked to the detainee's anticipated conduct; whether that threat is imminent; whether the ordinary law, including bail conditions, is shown to be inadequate for reasons recorded, with the bail position stated; and whether a less restrictive measure would not do. The first two keep the power of real prevention. The third is Rekha. The fourth is the necessity limb of proportionality, discussed next. Together, they would give the detaining authorities, Advisory Boards, and courts a common standard.

## VI. Proportionality, the Rule of Law and International Standards

### *A. Proportionality*

The Supreme Court has adopted proportionality as a test for restricting fundamental rights. It requires a legitimate aim, a rational connection between the measure and the aim, that no less restrictive measure be equally effective, and a balance between the benefit of the measure and the harm to the right itself. A.K. Roy was decided long before this development, and the Court has not re-examined the structure of the NSA.

Applied to preventive detention, the test does not condemn the power but disciplines it. The aim of preventing grave harm is legitimate. Detention is suitable in the narrow sense that an incapacitated person cannot act. The difficulty lies in necessity. A court applying proportionality would ask why bail conditions, reporting requirements, externment, or surveillance would not meet the risk. Comparative practice is instructive here. Rekha observed that the United States and England have no preventive detention law except in wartime, which is a broad claim; the United Kingdom, for example, has used restrictive measures short of detention against terrorism suspects under the Terrorism Prevention and Investigation Measures Act 2011. The point for present purposes is not that India should copy any foreign model, but that lesser measures exist and that the necessity limb requires the State to explain why they would not do. At present, the Indian statutes do not require this, and the case law requires it only in the Rekha situation.

### *B. Rule of Law and the Separation of Power*

The rule of law requires that a person deprived of liberty be able to contest the deprivation before a body that is not the one that ordered it. In preventive detention, the order is made by an executive officer, the first review is by a board the same government constitutes, and the first fully independent review is the High Court under Article 226 or the Supreme Court under Article 32. Articles 22(5) and 22(6) and the confidentiality provisions of the NSA further limit what the detainee can know and contest. The design places the strongest check last and makes it available only to those who can reach a court, which the evidence in Part V suggests is a substantial but incomplete class. ADM Jabalpur showed what happens when that last check is withdrawn.

### *C. International Standards*

Article 9 of the International Covenant on Civil and Political Rights prohibits arbitrary arrest and detention and requires that anyone deprived of liberty be able to challenge its lawfulness before a court. The Human Rights Committee's General Comment No. 35 treats security detention without charge as exceptional. It states that the State bears the burden of showing a present, direct, and imperative threat that cannot be addressed by other means, and that the burden grows with the length of detention. This formulation is close to the four-part test proposed in Part V.

India's accession to the Covenant carried a declaration that Article 9 shall be applied consistently with clauses (3) to (7) of Article 22 of the Constitution. The declaration means that India has not accepted the Covenant's standard as a separate limit on its preventive detention laws. However, the Constitution directs the State to foster respect for international law and treaty obligations, and the Covenant's standard is a fair benchmark for the content of "just, fair, and reasonable" procedure under Article 21.

## VII. The Case for Preventive Detention and Its Evaluation

Four arguments are commonly made in defence of the power. The first is necessity. India faces terrorism, insurgency, and organized violence, and some threats cannot be met by prosecution after the event. The argument has force, and the paper accepts it as a justification for a narrow power. However, it justifies a power confined to grave and imminent threats, not the power that Article 22(3)(b) and the state statutes create, which reaches sand offenders, video pirates, and financial offenders. The argument proves less than it needs to. Nor can it be tested on the published record. Prison statistics do not distinguish detentions for the security of the State from those for public order or essential supplies, and the absence of that breakdown means that the public cannot see how much of the practice the necessity argument actually covers.

The second argument is textual. The framers chose to include Article 22(3)–(7), and Parliament has legislated under it; therefore, the institution is part of the constitutional settlement. This is true, but it establishes only that the power may exist. The text itself sets limits, including the three-month rule, the Board, and the right to a representation, and the 1978 amendment shows that Parliament itself later judged the original safeguards insufficient. An argument from text cannot justify the continued dormancy of a textual improvement.

The third argument is that judicial review is an adequate safeguard. The High Court record described in Part V is the best evidence for and against this. It shows that courts act and find a high proportion of challenged orders unlawful. It also shows the extent of unlawful detention that needs to be corrected, the remedy comes after liberty is lost, the same errors recur, and only those who succeed in reaching a court benefit. An adequate safeguard would prevent wrongful detention and not merely end it.

The fourth argument is that the power is time-limited and thus mild. Under the NSA, the maximum is twelve months, which may be shortened at any time. That is a real limit. However,

it is four times the three months that Article 22(4) permits without a Board's opinion, and the detainee has no equivalent of bail. A year without trial, imposed on an executive's prediction, is not a mild measure, and the Wangchuk case, in which five and a half months passed with no judicial ruling, illustrates the point.

On balance, the defence succeeds only as a defence of a narrower power than the one that exists. It supports a regime for grave, specific, and imminent threats with strong and early independent review. It does not support the present regime, in which the power is available for broad categories of ordinary offences and checked mainly after the fact.

## VIII. Reform

The reforms proposed here follow from the defects identified above. They are set out in Table 2 and discussed briefly afterwards.

**Table 2: Defects and proposed reforms**

| **Defect identified** | **Proposed reform** | **Where discussed** |
|---|---|---|
| Constitutional safeguard left dormant | Bring Section3 of the Forty-fourth Amendment into force or replace it with an equivalent serving-judge Board | Part III.B |
| Board lacks independence and openness | Allow counsel before the Board; give the High Court the Board's reasoned opinion and the materials before it | Part V.B |
| No showing of necessity | Require every order to record why ordinary law is inadequate, the detainee's bail position, and less restrictive measures considered | Part V.D |
| Remedy comes late | Automatic referral of every order to the High Court for a preliminary legality review within a short fixed period | Part V.C |
| No public data | Annual publication by statute and ground of orders made, Board outcomes, High Court outcomes and duration | Parts IV.C, VII |

| | | |
|---|---|---|
| No consequence for unlawful orders | Statutory compensation where an order is quashed for non-application of mind; departmental accountability | Part V.C |
| Category creep | Periodic legislative review of Union and State Acts, with removal of ordinary-offender categories | Part IV.B |

The most direct step is to bring Section 3 of the Forty-fourth Amendment into force, or, if Parliament considers it unsuitable, to replace it with an equivalent. A Board of serving High Court judges would not be a complete answer to the dependence of the Board on the government, but it would be an improvement on the present arrangement, and it is a reform that Parliament has already approved.

At the statutory level, section 11(4) of the NSA should be amended to allow detainees to be assisted by counsel before the Board, and the Board's reasoned opinion and the materials placed before it should be made available to the High Court in any habeas proceeding. A new provision should require every detention order to record, in addition to the grounds, why the ordinary law is inadequate, the detainee's bail status, and the less restrictive measures considered. This would turn the principle in Rekha from a ground of quashing into a condition of validity.

The most significant structural change would address timing. A rule that every preventive detention order is referred automatically to the High Court within a short fixed period for a preliminary examination of legality on the record would not depend on a family's ability to file a petition. It would shift the burden of obtaining an early hearing from the detainee to the State. This proposal is the author's own and would require careful drafting to avoid overloading the High Courts, perhaps by limiting the first review to specified questions: grounds, material supplied, and the four-part necessity showing.

Finally, transparency and accountability should be built into the system. State and Union Governments should publish annual figures on detentions by statute and ground, board outcomes, and high court outcomes, as well as the duration of detention. Departmental accountability for orders quashed for non-application of mind should be a matter of course, and a statutory entitlement to compensation for detention quashed on that basis would give the right to liberty a remedy beyond release. A periodic legislative review of preventive detention

statutes, including state acts, should consider whether categories of ordinary offenders should remain within them.

## IX. Conclusion

Can preventive detention survive the test of constitutional justice in India? As a constitutional text, it has survived every challenge since A.K. Gopalan, and the text of Article 22 makes it very difficult to hold otherwise. As constitutional justice, the answer depends on the conditions under which the power is exercised. The Supreme Court has set out the right conditions in principle: the power must be confined to public order and beyond, as Lohia and Ameena Begum require; it is illegal where ordinary law suffices, as Rekha holds; and its procedural requirements are to be strictly enforced. However, the constitutional and statutory machinery around the power does not secure these conditions in practice. The Advisory Board is not independent in the way the 1978 amendment intended, the statutes restrict the detainee's participation, and the available evidence from Uttar Pradesh and Telangana indicates that executive orders are often found unlawful when they reach a court, and that the remedy is slow and offers no consequences for the authority.

Therefore, power can survive only if it is narrowed and supervised in ways that Indian law has not yet adopted. A necessary standard that asks whether the threat is specific, imminent, beyond the ordinary law, and not met by lesser measures; early and automatic independent review; an Advisory Board that is genuinely independent and open to the detainee; and public data and accountability together would make the power compatible with constitutional justice. Without them, the more accurate description of the present position is that preventive detention is constitutionally permitted, and often not constitutionally justified.

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