

Indian Preventive Detention Laws: Balancing Individual Rights and National Security

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ABSTRACT

Preventive detention laws in India are designed to guard public order and national security by discouraging individuals from taking actions that may pose a threat to society or the state. The laws that safeguard fundamental rights in Articles 21 and 22 of the Indian Constitution are often in conflict with these rights, which may be required. In this paper, we analyse the evolution of preventive detention laws in India, with a particular emphasis on their constitutional foundation, court interpretations, and rigorous international comparisons. The study suggests changes to preventive detention to enhance democracy and transparency through the study of key case laws and socio-political contexts

1. INTRODUCTION

Preventive detention entails detaining individuals who may be a threat to public order or national security based on suspicion. Preventive detention is different from punitive detention, which occurs after a legal conviction, as it operates outside standard legal procedures. Preventive detention laws are present worldwide, but their implementation varies significantly. Democratic countries tend to impose more stringent rules to prevent misuse.

Preventive detention laws in India were primarily intended to silence political opposition during the colonial period. Independence has resulted in the implementation of various laws, including the Preventive Detention Act of 1950, the National Security Act of 1980, and the Unlawful Activities (Prevention) Act of 1967. These laws have been criticised for their misuse, random application, and impact on individual rights, despite their purpose of serving national security interests.

The objective of this paper is to analyse the evolution and enactment of preventive detention laws in India, evaluate them against best practices from around the world, and propose reforms that balance national security and constitutional rights

2. HISTORICAL EVOLUTION OF PREVENTIVE DETENTION IN INDIA:

2.1 Pre-Independence Era: The Foundations of Preventive Detention: The British colonial government introduced preventive detention in India as a means of keeping an eye on the Indian population, particularly following the emergence of nationalist movements. Several laws were passed that granted authorities the power to detain people without a trial, frequently to suppress political dissidents.

2.1.1: The Rowlatt Act, 1919: The Rowlatt Act (also called the Anarchy and Revolutionary Offences Act, 1919) was a law in Colonial India that was initially viewed as unpopular. The Act allows for those suspected of revolutionary activities to be held captive for an unlimited period and tried without recourse to a jury. The Act led to widespread protests, most notably the Jallianwala Bagh Massacre (1919).

2.1.2 The Defence of India Act, 1939: During World War II, the British introduced the Defence of India Act, 1939, which gave sweeping powers to detain individuals suspected of anti-British activities. Under the Act, it is possible to make arrests without warrants, indefinitely detain prisoners, and restrict publications. This law resulted in the imprisonment of several freedom fighters, such as Mahatma Gandhi and Jawaharlal Nehru.

2.2 Post-Independence Period:

Retention and Expansion of Preventive Detention Laws:

2.2.1 The Preventive Detention Act, 1950: The Prevention Detention Act (PDA) was created in response to national security concerns shortly after independence. The detention period was extended to a maximum of a year and advisory boards were created to evaluate cases. In 1969, the Act came to an end after being criticized for allowing detentions without trial.

2.2.2 The Maintenance of Internal Security Act (MISA), 1971: The Maintenance of Internal Security Act (MISA) was

created in 1971 to ensure the prevention of internal threats. This allowed for the use of indefinite detention without trial and was commonly used during the Emergency (1975-77) to suppress political opponents. In 1978, it was abolished.

2.2.3 The National Security Act (NSA), 1980: Today, the National Security Act (NSA) of 1980 remains in effect. The policy permits detention without charge for as long as 12 months, but has received criticism for the lack of judicial oversight.

2.2.4 The Unlawful Activities (Prevention) Act (UAPA), 1967: The UAPA was originally created to prevent secessionist movements, but it has been adapted several times, most notably in 2019, when the government was allowed to categorize individuals as terrorists. According to critics, this violates due process and has been used to portray activists and dissenters in a negative light.

2.4 Summary: Continuity and Concerns: Even though India transitioned from colonial rule to democracy, it still maintains and expands preventive detention laws. These laws are still being scrutinized due to their potential misuse, lack of transparency, and impact on civil liberties, despite their validity as tools to safeguard national security.

3. CONSTITUTIONAL AND LEGAL FRAMEWORK FOR PREVENTIVE DETENTION IN INDIA

The legal and constitutional framework for preventing detention in India aims to balance national security and individual liberties. Preventive detention laws are crucial in protecting national security and public order, but they also pose significant threats to fundamental rights, which are enshrined in Articles 21 and 22 of the Indian Constitution¹. This section deals with the constitutional provisions, important laws, and judicial oversight mechanisms related to preventive detention in India.

1. The Constitution of India.

Preventive Detention under Article 22: Article 22 of the Indian Constitution outlines specific provisions designed to protect against arbitrary arrest and detention. It safeguards for individuals from unlawful detention, but also permits preventive detention under certain conditions. Article 22 has specific provisions for preventive detention:

3.1. Grounds for Detention: The preventive detention laws allow for an individual to be detained without any formal charges or trials. It is the responsibility of authorities to inform the detainee of the reason for detention, but only if it is in the best interest of the public.

3.2. Judicial Oversight: An Advisory Board that is headed by a High Court judge is responsible for evaluating detention that lasts more than three months. If the board determines that the detention is unjustified, the detainee should be released without delay.

3.3. Parliamentary Control: Parliament has the authority to set the maximum period for which a person can be detained under preventive detention laws. - Preventive detention laws can be challenged in courts if they violate constitutional rights.

Key Preventive Detention Laws in India

Several laws in India grant authorities the power to detain individuals under preventive detention provisions. The most significant of these include:

1. National Security Act (NSA), 1980: Legislation aims to prevent activities that threaten national security and public order. - Allows for maximum detention of 12 months without formal charges being filed. - The detainee has a lower chance of challenging detention in the courts, resulting in a higher chance of misuse.

2. Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA), 1974:

- The objective is to prevent economic offences, particularly smuggling and violation of foreign exchange laws.
- Prevents individuals suspected of being involved in smuggling activities from being detained.
- Focuses on safeguarding the country's financial security rather than defending against traditional national security threats.

3. Unlawful Activities (Prevention) Act (UAPA), 1967:

- The objective is to fight against terrorism and illegal activities that pose a threat to India's sovereignty and integrity. - Provides authorities with a wide range of powers to hold individuals or organizations suspected of terrorist activities in custody. - Providing detention for extended periods without charges raises concerns about the possibility of misuse.

Concerns and issues about preventive detention laws

Preventive detention laws are designed to protect national security, but they could also endanger fundamental rights. These laws pose some significant concerns that include,

Violation of Article 21: The law that prohibits detention restricts personal liberty without any legal process.

Transparency is lacking: Authorities have access to extensive discretionary powers, but limited accountability mechanisms.

Political Abuse: This law is commonly used to target political opponents, activists, and dissenters.

Limited Judicial Review: Detention decisions cannot be questioned by courts because of the broad wording of these laws.

Preventive detention in India is structured in a complicated way to balance the rights of individuals with the security of the country. Preventive detention laws have often resulted in human rights violations, even with the protections of Article 22. A more effective judicial oversight, transparency, and accountability mechanism is necessary to prevent the misuse of these laws.

The Supreme Court cases that were significant in the evolution of Indian constitutional jurisprudence on personal liberty and fundamental rights were a significant factor.

Four important decisions:

—A. K. Gopalan v. State of Madras (1950)², ADM Jabalpur v. Shivkant Shukla (1976)³, Maneka Gandhi v. Union of India (1978)⁴, and Justice K.S. Puttaswamy v. Union of India (2017)⁵

Supreme Court Judgments:

2. *AK Gopalan v. State of Madras (1950)*

3. *ADM Jabalpur v. Shivkant Shukla (1976)*

4. *Maneka Gandhi v. Union of India (1978)*

5. *Justice KS Puttaswamy v. Union of India (2017)*

These rights have been crucially defined and redefined by them.

1. A.K. Gopalan v. State of Madras (1950): A narrow interpretation of Fundamental Rights

A .K . Gopalan v. State of Madras was the first case to address the conflict between individual freedom and state security during India's independence.

Background:

A.K.Gopalan, a renowned Communist leader, was detained without any legal proceedings as per the Preventive Detention Act of 1950.

He challenged his arrest, arguing that it was a violation of his fundamental rights under Articles 14 (Right to Equality), 19 (Certain Rights Related to Liberty) and 21 (Protecting Life and Personal Liberty) of the Constitution of India.

Supreme Court's Decision:

The Supreme Court upheld the Preventive Detention Act of 1950, with Section 14 preventing the release of detainees on detention grounds. The Court's interpretation of Article 21 was straightforward; stating that any legal procedure set up by law must be legal, regardless of its impartiality. The decision's emphasis was on a divided view of fundamental rights, stating that each article is distinct and not connected.

Impact: The ruling was criticized for its narrow interpretation, allowing unjust laws to be passed on personal freedom only if it was done by the legislature.

2. ADM Jabalpur v. Shivkant Shukla (1976): Suspension of Habeas Corpus: During India's political crisis, the ADM Jabalpur v. Shivkant Shukla case tested the ability of fundamental rights to be respected under emergency provisions.

Background: Prime Minister Indira Gandhi declared an emergency during the Emergency of 1975, which resulted in the detention of many political opponents without trial under the Maintenance of Internal Security Act (MISA). The detainees made legal arguments in their habeas corpus petitions to challenge their illegal detentions.

Supreme Court's Decision:

Article 359(1) during the Emergency prohibits individuals from using the courts to enforce the rights granted by Articles 14, 21, and 22, by a majority vote of 4:1. The majority held that the Emergency does not permit the filing of a writ petition if one's right to life and personal liberty is violated. Justice H.R. Khanna's famous dissent stated that the Constitution does not allow for any suppression of the rights to life and personal liberty, even in emergencies.

Impact: This judgment was widely criticized for causing instability in the rule of law and fundamental rights. The dangers of possessing complete executive power and the fragility of civil liberties during unusual times were brought to light.

3. Maneka Gandhi v. Union of India (1978): Expanding the scope of Article 21

Since the post-Emergency era, the judiciary's perspective on fundamental rights has significantly changed, as evidenced by Maneka Gandhi v. Case. Union of India case.

Background: Maneka Gandhi's passport was taken by the government 'in the name of the public' without any opportunity to speak. A lawsuit was filed by her against the act, claiming it violated her rights in Articles 14, 19, and 21.

Supreme Court's Decision: The Court overruled its earlier stance from the A.K. Gopalan case, holding that Articles 14, 19, and 21 are not mutually exclusive but are interconnected. It asserted that any law depriving a person of personal liberty must not only follow a procedure established by law but also be "just, fair, and reasonable." This interpretation expanded the scope of Article 21, ensuring that laws infringing on personal liberty would be subject to rigorous judicial scrutiny.

Impact: This landmark judgment laid the foundation for interpreting fundamental rights, which led to subsequent decisions regarding personal liberty and due process.

4. JUSTICE K.S. PUTTASWAMY V. UNION OF INDIA (2017)

Recognizing the Right to Privacy

The digital age saw a rise in awareness of privacy protection and freedom, which led to the case of Justice K.S. Puttaswamy vs. Union of India, which addressed the constitutional status of the right to privacy.

Background: The Aadhaar scheme by the government, which involved the gathering of biometric data from citizens, was questioned for infringing on the right to privacy.

The Supreme Court's verdict: The nine-judge bench unanimously stated that the protection of privacy is crucial to the right to life and personal freedom under Article 21.

The Court emphasized the significance of privacy, which includes the security of the home, sexual orientation, and personal information. Fundamental rights were once again supreme, even during emergencies, as they overrode previous decisions, like *ADM Jabalpur v. Shivkant Shukla*.

Impact: The decision has an important effect on laws and policies related to personal privacy, resulting in debates about data protection, surveillance, and personal autonomy.

These landmark cases highlight the dynamic and evolving nature of constitutional interpretation in India, emphasizing the judiciary's responsibility of safeguarding personal liberty and fundamental rights from arbitrary state actions.

5. ANALYSING GLOBAL PRACTICES WITH COMPARATIVE ANALYSIS:

5.1 United States: The USA PATRIOT Act (2001)¹

The USA PATRIOT Act (2001) took effect in order to prevent terrorism after the 9/11 terrorist attacks. The law allows individuals suspected of participating in terrorist activities to be held, but there are safeguards in place to prevent indefinite or arbitrary detention.

1. U.S. Patriot Act (2001).

2. UK Anti-Terrorism, Crime, and Security Act (2001).

3. European Court of Human Rights (ECHR) case law.

Key Features of Preventive Detention in the U.S.:

1. Judicial supervision: A judge must approve the detention and conduct periodic reviews.

2. Time-Bound Detention: Terror suspects may be held for up to 7 days without any formal charges.

3. Habeas Corpus Rights: In court, detainees are entitled to challenge their detention.

5.2 United Kingdom: The Anti-Terrorism, Crime, and Security Act (2001)²

As a result of the 9/11 attacks, the British government passed the Anti-Terrorism, Crime, and Security Act (2001) (ATCSA) to improve its capabilities in anti-terrorism. Detaining foreign nationals suspected of terrorism in a preventive manner is permitted.

Key Features of Preventive Detention in the U.K.:

1. Detention of Foreign Suspects:

ATCSA initially permitted non-citizens to be detained indefinitely.

2. Judicial and Parliamentary Oversight: The Control Orders System (2005) needed to have judicial oversight.

3. Human Rights Protections:

The reason for detention must be disclosed to detainees, and they must also have access to legal counsel.

5.3 European Human Rights Framework on Preventive Detention:

The European Convention on Human Rights (ECHR)³ has specific guidelines for preventing detention under Article 5 (Right to Liberty and Security) and Article 6 (Right to Fair Trial).

2. UK Anti-Terrorism, Crime, and Security Act (2001).

3. European Court of Human Rights (ECHR) case law.

Key European Court of Human Rights (ECHR) Rulings:

1. Lawless v. Ireland (1961): Preventive detention is only allowed in cases of extreme emergency.

2. Brogan v. United Kingdom (1988): Without judicial review, the ECHR bans detention beyond four days.

3. Al-Jedda v. United Kingdom (2011):

The UK was convicted of breaking human rights by detaining individuals in Iraq without proper trial.

5.4 Comparing India's Prevention Detention Laws:

Even though India is unique, every democratic country has judicial oversight and periodic reviews. The lack of procedural safeguards in India makes it prone to misuse.

Key Differences Between India and Other Democracies:

-The judicial oversight of India is inferior to that of the U.S., U.K., and Europe.

- In India, it is permitted for up to 12 months of detention without any formal charges.

- The transparency of advisory boards in India is not as transparent as in other democracies.

5.5 Suggestions for implementing preventive detention reforms in India:

1. Establish Mandatory Judicial Oversight: It is important to finish the court review within 48-72 hours of detention.

2. Minimize the maximum period of detention: Limit preventive detention to three months until there is strong evidence that justifies an extension.

3. Respecting legal representation is crucial: Detainees require a lawyer to be available immediately.

4. Improve the transparency and accountability levels: Ensure that regular parliamentary and judicial reviews are conducted.

Preventive detention laws are designed to safeguard national

6. DISCUSSING LAWS THAT PREVENT DETENTION

Security and public order, but they have been criticized by legal scholars, human rights organizations, and the judiciary. Articles 21 and 22 of the Indian Constitution, particularly Articles 21 and 22, are frequently weakened by these laws. The problems with preventive detention laws are related to concerns about due process, transparency, political misuse, and the disproportionate impact on specific communities.

6.1 Violation of Article 21 (Right to Life and Liberty): Article 21 of the Constitution of India guarantees the fundamental right to life and personal liberty, stating that 'no person shall be deprived of his life or personal liberty except in accordance with procedure established by law.' However, preventive detention laws allow individuals to be detained without formal charges or trial, which often violates the principles of natural justice and due process.

The Supreme Court has established that laws that limit personal freedom must be just, fair, and reasonable, and *Maneka Gandhi v The Union of India* (1978) is a good example of this.

These principles are frequently violated by preventive detention laws, which deny detainees a fair hearing or legal counsel.

6.2 Lack of Transparency and Oversight: Preventive detention laws in India lack transparency and independent oversight. In many democratic nations, there is judicial review or parliamentary scrutiny required before executive authorities can make detention decisions under Indian preventive detention laws without sufficient checks and balances.

A system where detainees are held arbitrarily and have limited avenues for appeal is a result of the absence of judicial review mechanisms.

The NSA allows detention for a maximum of 12 months without formal charges, and advisory boards that review detention cases frequently operate with inadequate procedural safeguards.

6.3 Potential for Political Abuse: Preventive detention laws are being criticized for their potential misuse for political purposes, which is a significant concern. These laws have been used in the past to suppress political protest, curtail opposition groups, and silence critics of the government.

The Maintenance of Internal Security Act (MISA) was used to hold political opponents without trial during the Emergency (1975-1977) and in today's society, journalists, activists, and human rights defenders have been taken into custody using the NSA and UAPA on broad and vague charges.

The use of preventive detention laws could have the effect of suppressing voices that criticize the government and decreasing the number of legitimate protests, which raises worries about selective application and the loss of democratic freedoms.

6.4 Disproportionate impact on minorities and activists: There is ample evidence that preventive detention laws have a disproportionately negative effect on communities that are not well-off, such as religious and ethnic minorities, human rights activists, and journalists. Various reports from international human rights organizations have documented cases where these laws are applied selectively against specific groups, reinforcing systemic discrimination.

For example, in Jammu & Kashmir, the Public Safety Act (PSA) has been frequently used to detain individuals without trial, particularly in politically sensitive cases. The UAPA's targeting of activists and scholars with terrorism-related charges has been criticized as lacking sufficient evidence.

Article 14 in the Indian Constitution requires selective enforcement, causing a decline in equality before the law.

7. POLICY REFORMS AND RECOMMENDATIONS

The implementation of comprehensive reforms is crucial to guarantee that preventive detention laws are used for their intended purpose and not violate fundamental rights. These sections present the key recommendations for balancing national security concerns with individual freedoms.

1. Setting up procedures for judicial review: Preventive detention laws in India have a significant problem with the lack of judicial oversight. It is important for an independent judicial authority to oversee all detention orders in order to prevent potential abuses. The key recommendations are:

- A specific timeframe requires the judicial review of detention orders to be completed.
- Establishing special tribunals with impartial judges to manage preventive detention cases.
- Giving access to legal remedies like habeas corpus petitions.

2. Periodic Parliamentary Scrutiny: Parliament needs to review preventive detention laws on a regular basis to prevent their abuse for political purposes.

Proposed measures include:

- Annual reports of detention cases with a breakdown of the reasons for detention are required by Parliament.
- A committee has been established by a parliamentary body to assess the effectiveness of laws that prevent preventive detention.
- Preventive detention laws must be renewed periodically by mandatory sunset clauses based on necessity.

3. Ensuring Legal Representation: Detainees without legal aid are incarcerated for longer periods of time when preventive detention laws are used. Adopting the following measures can ensure the right to fair representation is protected.

- Legal representation is a basic right for detainees.
- The establishment of a legal aid system for detainees financed by the government is taking place.
- Providing legal counsel during detention, rather than after prolonged incarceration.

4. Enhancing Public Awareness: The legal rights of those detained under preventive detention laws are not fully understood by many. To address this issue, the following initiatives must be implemented:

- Campaigns to educate the public on their rights under preventive detention laws are being carried out nationally.
- Legal rights education should be a part of school curriculum.
- Strengthening civil society

Organizations need to provide support to individuals who are affected.

8. CONCLUSION

In a country with a diverse and geopolitical sensitiveness, such as India, preventive detention is an essential tool to safeguard national security. The implementation must consider the fundamental rights of the Constitution. In order to safeguard democracy and prevent abuse, it is imperative to connect the legal framework for preventive detention with the guiding principles of justice, fairness, and due process. During the comparison with global practice, it was discovered that countries like the United States and the United Kingdom have put in place enhanced judicial oversight and periodic review mechanisms to mitigate the risks associated with preventive detention. The absence of strong procedural safeguards means that India is still at risk of misuse for political and administrative purposes. Enhancing judicial accountability, increasing parliamentary oversight, and ensuring detainees have legal representation are necessary for the reform of preventive detention laws.

Preventing preventive detention from being used to suppress dissent, target marginalized groups excessively, or undermine natural justice principles is crucial. Improving transparency in detention processes, adopting international best practices, and teaching citizens about their rights can greatly enhance the fairness and accountability of these laws.

Preventive detention is a crucial component of national security policy, but it should not jeopardize individual liberty and human rights. India can ensure the security of its citizens while also protecting fundamental rights and upholding its democratic principles by implementing legal reforms, improving oversight mechanisms, and maintaining transparency.
