Jus Corpus Law Journal
Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

Preventive Detention Law: A Tool used for Absolutism

Saransh Sinha[a]

[a]Vivekananda Institute of Professional Studies, New Delhi, India

Received 18 July 2022; *Accepted* 16 August 2022; *Published* 18 August 2022

Criminal procedures are used to punish a person for an offence they have committed, whereas preventive detention is often enforced as a precautionary measure. The main goal of preventative detention is to stop the inmates from committing any crimes against the state rather than to punish them. Because it violates fundamental rights, preventive detention goes against the very foundation of a democratic state. The decision in the matter of Justice K.S. Puttaswamy (Retd.) v Union of India discusses privacy. It discusses how people's liberties, particularly their right to privacy, are expanding. The main issue with preventative detention is that detaining someone based on a single suspicion is a flagrant breach of their inalienable right to liberty. Human rights advocates who support an individual's right to liberty and those who support the needs of the state hold opposing views on preventative detention. The requirement to sustain momentum between personal freedom on the one hand and the state's duties toward national security on the other makes this balance of the highest significance. Personal liberty is not an absolute right, much like other fundamental liberties protected by the Constitution. It could consist of certain legitimate limitations that the state imposes by the law. But the state cannot violate someone's privacy without adhering to some fundamental guidelines. Preventive detention restricts freedom in an authoritarian manner in the guise of national security, and laws of this nature need to be altered to protect people's fundamental rights.

Keywords: *fundamental rights, preventive detention, personal liberty, privacy.*

INTRODUCTION

When someone is placed in preventive detention, it means that although they have not yet committed a crime, the authorities feel they threaten the maintenance of peace in society. Preventive detention is defined under Section 151[1]of the CrPC as a measure conducted based on a suspicion that the person in question may execute some crimes. If a police officer learns that a certain person may commit a crime, they may be arrested without the need for a warrant or instructions from a magistrate.[2] In some circumstances, Article 22[3] of the Constitution of India offers protection against arrest and imprisonment.[4] The Constitution of India gives the Parliament the authority to enact rules governing preventive detention where they are necessary for national security, foreign policy, or defence. Parliament has sole jurisdiction over the legislation. Although we presently have several regulations governing preventative detention, it is still unclear to what extent these practices can serve to safeguard the interests of detainees. The current legal system demands prompt court action and fosters the arbitrary use of power. The judiciary is extremely important in detention cases because, unlike preventative detention, which has its coercive authority in the hands of the administrative branch, punitive detention cases guarantee the presence of a judicial brain before the arrest.

PREVENTIVE DETENTION IN OTHER COUNTRIES

Germany:

In German criminal law, preventive detention is a measure governed by the German Criminal Code that allows the state to hold dangerous criminal offenders in governmental custody, perhaps for life, to protect the public from them. Similar provisions can be found in other states. However, the legislation as a whole has been the topic of heated debate, with some questioning

[1] Code of Criminal Procedure, 1973, s 151
[2] Kanha Shrivastava & MedhaShrivastava, 'Preventive Detention in India' (*Live Law*, 16 April 2022) <https://www.livelaw.in/columns/preventive-detention-act-police-officer-section-151-of-crpc-constitution-of-india-196775> accessed 08 July 2022
[3] Constitution of India, 1950, art 22
[4] *Ibid*

its constitutionality.[5] The German constitution bans a person from being penalized twice for the same offence. However, as compared to other European countries, Germany has comparatively low jail terms. Preventive detention was occasionally used to hold those deemed dangerous in jail for prolonged periods, although there was a ten-year limit. In 1998, the ten-year restriction was lifted. Six years later, another rule permitted courts to order preventative detention of convicts retrospectively until soon before their release, thereby permitting a person's sentence to be prolonged at the discretion of the court.[6] In late 2009, the European Court of Human Rights concluded that Germany had violated these two articles when a state court retrospectively prolonged the incarceration of a serial burglar convicted of attempted murder beyond the ten-year maximum after he was sentenced. Germany's Federal Constitutional Court concluded in 2011 that German laws, despite significant revisions, were unconstitutional and ordered tens of thousands of euros in compensation to four criminals convicted of child rape and attempted murder but imprisoned for more than a decade after serving their sentences. Germany has modified its laws once more.[7] Since 2013, new amendments have made it illegal to apply preventive detention retrospectively. It also included the claim that persons under preventive custody had a mental condition or were of "unsound mind".

***United States of America*:**

The preventive detention statute was enacted by the US Congress in 1984 and permits federal courts to imprison defendants awaiting trial if the administration can show that no releasing terms will safeguard the security of the community and its citizens.[8]The concept of preventative detention became theoretically possible for the first time with the Salerno judgment. However,

[5] Michael Pösl & Andreas Dürr, 'Germany's System of Preventive Detention Considered Through the European Court of Human Rights and the German Federal Constitutional Court'<https://www.nomos-elibrary.de/10.5235/219174412802604216.pdf?download_full_pdf=1> accessed 08 July2022
[6] Jacob Resneck, 'Pitfalls of Germany's 'preventive detention' (*DW*, 27 January 2016) <https://www.dw.com/en/pitfalls-of-germanys-preventive-detention/a-19008228> accessed 09 July 2022
[7] *Ibid*
[8] Jerry Norton, 'Preventive Detention' (*Britannica*, 10 November 2011) <https://www.britannica.com/topic/nolle-prosequi> accessed 09 July 2022

the 1984 ruling resulted in little change in practice.US courts understood that bail might be refused or limited in capital and some other matters where there was a high risk of escape.

***Australia*:**

Following the terrorist bombings in London in July 2005, the Anti-Terrorism Act[9] (No 2) 2005 incorporated preventative detention orders into the Criminal Code Act.[10] They allow the Australian Federal Police to hold a person for up to 48 hours without arrest or prosecution. Contact with the outside world, especially family members, is highly prohibited while in incarceration. Each state and territory have passed laws increasing the maximum period of imprisonment under the PDO system to 14 days. PDOs are unique among Australia's several anti-terrorism measures introduced following the September 11 attacks.[11] It is difficult to understand why the PDO regime was implemented, given that the law at the time already provided a wide variety of authorities and charges that allowed police to arrest, charge, and punish terrorists. Unsurprisingly, the PDO regime was not utilized for the first nine years after it was enacted, and it has only been used four times since then.

***New Zealand*:**

The two forms of preventative detention in New Zealand. An indefinite jail sentence is what is meant by "preventive detention." The other is civil detention known as a "public protection order." An indefinite sentence of incarceration known as "preventive detention" is comparable to and second only to life in prison in terms of harshness. It may be awarded to offenders aged 18 or older who have been found guilty of a qualifying sexual or violent offence and the court finds that if they were given a fixed-term prison sentence, they would be likely to commit another qualifying sexual or violent offence.[12] The non-parole period for preventive imprisonment is at least five years, although the sentencing judge may increase it if they think the prisoner's past justifies it. 34 of the 314 individuals serving preventative detention periods

[9] Anti-Terrorism Act, 2005
[10] Svetlana Tyulkina & George Williams, 'Preventive Detention Orders in Australia' (2015) 38 (2) UNSW Law J <http://classic.austlii.edu.au/au/journals/UNSWLawJl/2015/26.html> accessed 09 July 2022
[11] *Ibid*
[12] Sentencing Act, 2002, s 87

in 2013 were on parole. From 1968 until 2021, Alfred Thomas Vincent spent 52 years behind bars on a preventative detention order.

PREVENTIVE DETENTION IN INDIA

Certain rules and regulations in India's governance structure were either created to maintain internal security or have been in place since the time of the British administration. Caste and racial violence are widespread in today's society. Since the constitution of India places a high priority on equality, human freedom, and national security, Article 21[13] of the constitution guarantees that every individual has the inalienable right to live with dignity. In the general interest of the people, the state government has always taken a ruthless stance toward the detainees by restricting and denouncing illicit activity. Preventive detention was included in our constitution as a way to stop anti-national activities. India is among the very few countries in the world whose constitution allows a peaceful atmosphere without any restrictions that are generally considered to be important to preserve the rights of a human being. In its submission to the NCRWC in August 2000, the SAHRDC advocated for the deletion of those clauses in the Indian Constitution that expressly authorize preventative detention.

In particular, Article 22[14] permits preventative detention in all circumstances, including times of calm and non-emergencies. The Constitution explicitly permits the detention of a person for up to 3 months without charge or trial. Detainees are also refuted from the right to legal counsel, periodic review or time, cross-examination, entry to the courts, and compensation for wrongful detention. In short, Article 22's prohibition on preventative detention is a terrible threat to the freedom of a human being. Article 4 of the ICCPR, which India has accepted, admits that some personal rights may not always be guaranteed in times of emergency. However, the Government has not used this prerogative and is unable to do so because India's existing state does not meet the criteria outlined in Article 4.

[13] Constitution of India, 1950, art.21
[14] Constitution of India, 1950, art 22

CRITICISM OF PREVENTIVE DETENTION

The Maintenance of Internal Security Act[15] (MISA), which granted the State the authority to arrest and imprison a person for a year without a valid process, was enhanced during the Emergency between 1975 and 1977. These people were detained because they posed a risk to society rather than because they had committed a crime. With the conclusion of the Emergency, MISA was eliminated, and the use of this preventative detention was constrained. However, as our nation developed and public concern about individual liberties subsided, some of the old practices of the ruling class quietly reappeared, reviving support for PD. We are currently in a situation where, according to official data, approximately 1 lakh people were detained and arrested in 2018 under PD statutes. [16]The idea that the police should only intervene once a crime has occurred seems absurd to PD's supporters. However, the PD regime itself cannot be justified by this alleged requirement for preventative powers. There are a few things to keep in mind:

Firstly, whenever national security is in question detaining someone without a trial could appear just. The same cannot be stated when it is applied to address problems like video piracy. This challenge of scope applies to the defining of the risks as well as the kinds of hazards for which PD should be permitted. The inclusion of concepts like public order makes PD legislation vulnerable to misuse. For instance, journalists who criticize prominent officials are detained under the National Security Act. No defined boundaries of scope also mean that Preventive Detention laws are often combined with conventional criminal law to hold people behind the bars for extended periods while asking fewer questions, rather than being used to "prevent" damage.[17]

Second, the forced detention for up to three months under the PD regime's policy breaches the foundation stones of our constitution, which is intended to "zealously" preserve freedom. What worsens this issue is the fact that this arbitrary law is supported by Article 22 of the Indian

[15] Maintenance of Internal Security Act, 1971
[16] Abhinav Sekhri, 'Why it is critical to review preventive detention laws' (*Hindustan Times*, 24 February 2022) <https://www.hindustantimes.com/analysis/why-it-is-critical-to-review-preventive-detention-laws/story-OuN05iXpk3OZS9nrkSStUN.html> accessed 10 July 2022
[17] *Ibid*

Constitution.[18] Whatever reasons the Constituent Assembly might have had to make this decision for a young country still recovering from the wrath of the cruel Partition, the same arguments must now be contested even after 70 years in the greatest democracy of the world. Particularly considering how much Indian law has changed in this period on how much value is placed on the rights to freedom and life as well as how the Constitution is to be interpreted.

SAFEGUARD AGAINST MISUSE OF PREVENTIVE DETENTION

In the case of preventative detention, some rights are assured by the Indian Constitution:

- According to Clause 2 of Article 22, no one who has been detained and arrested could be forced into custody longer than the specified time without the consent of a magistrate. Each person who has been arrested and detained must appear before the nearest judge within one day of their arrest, omitting the time spent travelling from the point of arrest to the court.[19]
- According to Clause 4 of Article 22, no one can be held for a duration longer than three months unless and until an advisory panel finds a valid rationale for such custody. The members of the consultative panel must be as qualified as a judge in the High Court. The recommendations should be delivered at any cost before the specified three-month deadline.
- According to Clause 5 of Article 22, any official who places a person in preventative custody must inform them of the basis for their imprisonment as soon as feasible. The grounds for detention must be logically connected to the item that the person in detention is forbidden from obtaining. The letter must contain all important facts about the situation on the ground and not only state the facts.[20]
- Under clause 5 of Article 22, the detainee's right to representation requires prompt disclosure of the reasons for the detention. The subject must be given the earliest opportunity to object to the order from the authority issuing the detention order.[21]

[18] *Ibid*
[19] *Ibid*
[20] *Ibid*
[21] *Ibid*

JUDICIARY IN PREVENTIVE DETENTION CASES

A.K. Gopalan v State of Madras[22]

The Supreme Court tested the validity of the specific provisions of the Preventive Detention Act, 1950, given the Indian Constitution for the first time in the well-known case A. K. Gopalan v State of Madras, and it was also the first decision in which the Apex Court was asked to interpret law under which it had been established. The majority of the Court found that Article 21[23], which states that "no individual shall be deprived of his life or personal liberty except by the method established by law," According to this interpretation, "personal liberty" refers to the absence of any bodily constraint, including arrest and imprisonment. The majority's conclusion that Article 21[24]assured independence from getting imprisoned and rejected the petitioner's argument that Article 19 (I) (d)[25], which assured the freedom of "movement throughout the territory of India" giving the State the right to implement "reasonable restrictions" taking care of the interest of the "general public and the Scheduled Tribes," applied in cases of preventive detention.

Thus, the request for the Court to rule on the question of whether preventive detention in general and the specific sections of the Preventive Detention Act, 1950, might be considered "reasonable limits" on liberty was unsuccessful. The Court concluded that Article 21[26] simply ensured that any method set forth by law must be correctly respected, not that the courts should decide whether the procedure set down by the legislature is reasonable and just. As a result, in this instance, the Supreme Court banned judicial implication of procedural protections in cases of punitive or preventive detention. The process of the detention proceedings was only by requirements that were specifically stated in the Constitution of India, such as in Article 22[27]. According to the Court, Fundamental Rights are not mutually exclusive and Article 19 does not apply in situations where Article 21 does. A person under preventative custody was not covered

[22] *A.K Gopalan v State of Madaras* (1950), AIR 27
[23] Constitution of India, 1950, art.21
[24] *Ibid*
[25] Constitution of India, 1950, art.19
[26] Constitution of India, 1950, art.21
[27] Constitution of India, 1950, art.22

by Article 19 since they were free men. Therefore, even if the process was unreasonable or inconsistent with natural justice, it could not be contested.

Maneka Gandhi v Union of India[28]

The Gopalan case is superseded by this one. The phrase "personal liberty" was used in the broadest sense. By a majority vote, it was decided that Article 21 does not preclude Article 19 and that any law denying someone their liberty must pass muster not only about Article 21 but also about other sections of Part III of the constitution. "*Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow of unimpeded and impartial justice. Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial*." In this instance, the court used the Golden Triangle to illustrate the need to interpret Part III of the Constitution as a whole and the reality that no one article stands alone. No measure passed by the legislature may violate a right outlined in Part III of the Indian Constitution. The Apex Court's establishment of substantive due process was most notable for giving courts the authority to broaden the Constitution's restricted definition of the right to life to embrace a broad range of unenumerated rights.

Ahmed Noor Mohamad Bhatti v State of Gujarat[29]

In Ahmed Noor Mohamad Bhatti v State of Gujarat, the Apex Court ruled that Section 151 of the CrPC, which provides a law enforcement officer with the authority to arrest a person with no warrant to prevent a cognizable offence, is constitutionally valid and that the police's misuse of this authority does not deliver the clause arbitrarily and unfair. The preventative detention act is a crucial instrument in the executive's hands which allows them to detain anybody about whom there is a reasonable suspicion that he may commit a crime or whose actions may be detrimental to the state's law and order, and the police may detain them without a warrant.

[28] *Mankeka Gandhi v Union of India* (1978), AIR 597
[29] *Ahmed Noor Mohamad Bhatti v State of Gujarat* (2005) 3 SCC 647

PREVENTIVE DETENTION IN RECENT TIMES

Protest of the CAA

The Citizenship Amendment Act (CAA) was established in 2019 by the Prime Minister's administration to give a path to provide citizenship for religious minorities from Bangladesh, Pakistan, and Afghanistan who arrived in India before 31st December 2014. As a result of the law, Muslims were not placed on the list. The decision to grant religious rights to Indian citizens triggered large protests across India, including those led by women of the Muslim community, and resulted in a harsh police reaction. Following the protests against the CAA,1113 people were detained and 5,558 were held in preventive prison.[30]

The Citizenship Amendment Act (CAA) was opposed by activists who were detained, and the United Nations had asked India to release them, stating that "authorities should promptly release all human rights defenders who are currently held in pre-trial custody without adequate evidence, frequently solely based on comments they made criticizing the discriminatory nature of the CAA." Numerous of the individual instances mentioned above have noteworthy allegations of torture and other cruel treatment. According to experts, these protesters' bail was denied because of "counterterrorism or national security regulations, as well as procedural police powers."

Muntazir Ahmad Bhat v Union Territory of JK &Anr[31]

On the evening of 14th August 2022, the J&K police stopped a catastrophic incident—usually termed the Pulwama conspiracy—by dismantling a Pakistan-based Jaish-e-Mohammad (JeM) unit tasked with instigating unrest by detonating an improvised explosive device (IED) in a car. Four terrorists connected to the group were detained, including one from Uttar Pradesh. The first person that was detained in this regard under J&K Public Safety Act, for fictitious and dubious reasons with no reason given the contested detention order was Muntazir Manzoor, a

[30] 'Anti-CAA protests' (*The Times of India*, 26 December 2019) <https://timesofindia.indiatimes.com/india/anti-caa-protests-1113-arrests-5558-preventive-detentions-19-dead-in-up/articleshow/72980374.cms> accessed 11 July 2022

[31] *Muntazir Ahmad Bhat v Union Territory of JK & Anr.,* (2021) Writ Petition (Criminal) No. 105/2021

JeM member. He was discovered in possession of two Chinese hand grenades, a pistol, one magazine, and eight live rounds. Additionally seized was his vehicle, which was used to carry weaponry to the Valley of Kashmir. The District Magistrate had put Mr. Bhat in preventive detention to keep him from endangering the security of the state in any manner. When hearing the mentioned case, Justice Rabstan of the J&K and Ladakh High Court noted that acts like these that are extremely detrimental to state security have a significant degree of cross-border societal deformity.

The Hon'ble judge stated that those who have the responsibility of preserving public order or ensuring national security must be the sole arbiters of what the State's national security, security requires, or public order while rejecting the petition calling for the release of detainees involved in the Pulwama conspiracy from preventive detention. In addition, the Bench noted that while acts of violence are nothing new, modern extremism, radicalization, and terrorism in all of their forms pose serious threats to the civilized world. As a result, the Bench dismissed the petition, declaring it to be without substance, to monitor the inmates' illegal behaviour.

Abhayraj Gupta v Superintendent, Central Jail, Bareilly[32]

The Allahabad High Court ruled in the case of Abhayraj Gupta v Superintendent, Central Jail, Bareilly that the power of preventative detention should not be employed if a man is already in jail and that there is no immediate possibility of their release. A murder suspect had been served with a detention order. In principle, 3 FIRs were filed against the petitioner based on the single murder on December 2 and were filed under many sections of the IPC. The petitioner claims that Rakesh Yadav was killed as a result of his plot and that on December 2, 2019, when the police tried to apprehend him for the aforementioned crime, he opened fire on them to kill them. Using the authority granted by the NSA, 1980, a detention order was made against the petitioner due to the cruel murder carried out by his accomplices as part of a plot, where it was stated that people felt afraid and fearful and that public order was disturbed. When taking into account the detention order imposed against the petitioner, the Court observed that it made the clear claim

[32] *Abhayraj Gupta v Superintendent, Central Jail, Bareilly* (2021) Writ Petition (Criminal) No. 362/2021

that if the petitioner is freed on bail, he may commit crimes once more. The Court prevailed by noting that there is no felony justification for listing this apprehension within the detention order, and neither is there such a declaration that the apprehended motion may be detrimental to maintaining law and order in society. As per the Court, the petitioner's claimed act did not violate public order since it hadn't yet upended the community to the extent of generating a broad disruption of civil authority. Finally, the Court determined that the foundation for the order under Section 3(2) of the NSA, was missing in the current case and that the appellant needed to be held to prohibit him from behaving in a way that would jeopardize the maintenance of public order.

IS PREVENTIVE DETENTION A TOOL USED BY EXECUTIVES?

Although the courts have always acted to protect individuals' highly valued fundamental rights, it presently takes several months for writ petitions against preventative detention orders to be considered due to the huge volume of outstanding cases that are overwhelming the courts. As a result, persecution arises from the process. Laws governing preventive detention are made bulletproof to curb the extent of any intervention judicially. This occasionally gives the executive unrestricted and generally uncontrolled authority without any culpability, opening the door to the possibility of serious misuse of the powers given. The time it often takes to petition for, let alone receive, court redress favours the administration. Even in situations when it is discovered that these laws have been abused, the ultimate goal of keeping the offender in jail for an extended amount of time is finally achieved.

The right to legal advice and assistance should not simply be viewed through a legal or constitutional lens, but also as a right that follows from the fundamental human right to enjoy one's freedom. It is hard for a layperson unfamiliar with the law and lacking in experience in such a circumstance to comprehend the justifications for his arrest in the complex world of law. It is completely impossible to expect such a person to provide a convincing defence before a panel of advisors made up of attorneys or former judges. Additionally, the State has the option to turn the advisory board into a strictly executive committee; such a group cannot be viewed

as unbiased or free from political influence. The qualifying requirements for advisory board members are outlined by the Constitution in Article 22.[33]

In reality, these advisory committees frequently lengthen the term of custody while, in the same cases, High courts later annul the detention orders. This shows that the Constitution's protections against challenging illegal imprisonment are ineffective, and in practice, the detainee must go to court to obtain relief in certain situations. As was previously said, courts have ruled time and time again that legislative authority restricting an individual's liberty should only be utilized sparingly, very carefully, and not regularly. Unfortunately, this counsel appears to be nothing more than a decorative accent in the museum of legal doctrine. The NSA and other laws governing preventative detentions are frequently reported to be being abused in several different ways. They could be used to suppress dissent against the State, project the image of a powerful State, or perhaps even for benefits or gains both personal and political. Particularly dire conditions have emerged in UP. According to a statement made by Awanish Kumar, from August 19 of last year until now, the U.P. Police have used the NSA against 139 people, 76 of whom were charged with cow slaughter and 13 of whom were charged with allegedly taking part in protests against the CAA.[34]

In Muzaffarnagar, a city in west UP, the use of NSA against Dalits and Muslims had reportedly become so common that even small altercations between the children from these communities resulted in the minority community members being charged under NSA, according to a famous report. The detention of Dr. Kafeel Khan under NSA the previous year for taking part in the anti-CAA protests, following his arrest by the UP Police from Mumbai and kept in custody even after receiving a bail order, only to be ordered detention after three days, is one of the common examples of the routine misuse of such powers. The Allahabad High Court finally overturned the detention order, but it took several months for the court's proceeding to be finished and

[33] Jasir Aftab, 'Preventive Detention Laws in India: A tool for executive tyranny?' (*The Leaflet*, 12 April 2021) <https://theleaflet.in/preventive-detention-laws-in-india-a-tool-for-executive-tyranny/> accessed 10 July 2022
[34] *Ibid*

during this, his family had to file a petition with the Apex Court to accelerate the proceedings of the High Court.

CONCLUSION

For a growing nation, maintaining peace and order as well as protecting scarce resources is crucial. Since its independence, India has had several rebellions based on factors such as gender, class, colour, and religion. These preventative detention techniques and national security laws have helped India preserve its independence, dignity, and autonomy to a large extent. The rules governing preventative detention require certain modifications or amendments to be fully consistent with the Right to Life and Liberty. Some detractors have drawn parallels between the value of security and human rights. India is a big nation with a variety of regions and cultures, which makes relations with its neighbours tough. The independence, dignity, and sovereignty of India are to be protected by these security-related laws, acts, and ordinances. Under the false pretext that they are being used to limit people's liberties, preventive detention rules cannot be overturned as long as they are created inside the bounds of parliamentary entry and therefore do not violate any requirements or limits imposed by that body.