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Deadly dilemmas in preventive detention: A constitutional paradox of public security and individual liberty

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Abstract
Preventive detention is the power of the state to hold someone without trial on the suspicion that they might cause future harm. It has long sparked debate in India. Unlike punishment after proven guilt, it acts before the fact and is based on fears of threats to public order or national security. India is among the few democracies that have written such powers directly into its Constitution under Article 22. This article traces the history, laws, and court rulings on preventive detention and examines how courts have shifted between upholding government discretion and gradually building checks through due process. The paper also asks whether preventive detention, often used against journalists, students, activists, and dissenters, aligns with Ambedkar's idea of constitutional morality and India's commitments to liberty, dignity, and equality. A comparison with international standards under the ICCPR shows India falling short. The study concludes that preventive detention has shifted from an emergency safeguard to a routine tool of governance. To restore balance, reforms are needed, including stronger judicial review, stricter limits on executive power, mandatory transparency, compensation for wrongful detention, and regular legislative oversight.

Keywords: Constitutional morality, Human rights, Preventive detention, Rule of law

Introduction
Preventive detention is the power to detain individuals not for acts committed but for potential acts they might commit—raises profound questions about liberty, security, and the limits of state authority. It stands in tension with the foundational principle of criminal law: *nullum crimen sine lege* no crime without law, no punishment without conviction.

Globally, preventive detention is typically reserved for exceptional circumstances such as wartime or grave national emergencies. Liberal democracies like the United States and the United Kingdom impose stringent judicial and parliamentary checks whenever such powers are invoked. By contrast, India presents a unique case. Its Constitution, adopted in 1950, explicitly embeds preventive detention as a permanent feature of governance under Article 22.

The framers of the Indian Constitution faced a newly partitioned nation grappling with communal violence, political instability, and perceived security threats. In this climate, preventive detention was justified as a necessary evil to safeguard national unity. However, what was intended as a temporary safeguard has over time evolved into an enduring and frequently used instrument of state control.

Today, preventive detention is not confined to terrorists or hardened criminals. Instead, it is regularly applied against journalists, students, human rights defenders, trade unionists, and political opponents. Laws such as the NSA, UAPA, PSA, PASA, and KAAPA have expanded the scope of detention from high national security risks to ordinary law-and-order disturbances. This routine misuse has prompted criticism from scholars, civil society, and international human rights bodies.

The paradox of preventive detention in India lies in its simultaneous constitutional legitimacy and its moral inconsistency. On the one hand, Article 22(3)–22(7) sanctions detention without trial. On the other, Articles 14, 19, and 21 enshrine equality, freedoms, and the right to life and liberty. Reconciling these contradictory mandates has proven difficult, and judicial interpretations have fluctuated dramatically across decades.

This article seeks to interrogate preventive detention in India across four axes:

1. **Constitutional and Doctrinal Foundations:** How preventive detention coexists with liberty in the constitutional scheme.

2. **Statutory Frameworks:** Examination of national and state-level preventive detention laws.
3. **Judicial Trends:** Case law analysis of the courts' shifting approach to detention.
4. **Ethical, Social, and International Dimensions:** The impact on constitutional morality, human dignity, and compliance with global standards.

In doing so, it incorporates doctrinal theory, statutory analysis, empirical findings (such as the Tamil Nadu study on average detention periods), and comparative insights. A bilingual perspective is also added through a translated Malayalam essay highlighting preventive detention's social consequences at the grassroots.

Review of Literature

Preventive detention presents a complex dilemma in democratic societies, balancing public safety against individual rights. This practice, which involves detaining individuals based on the suspicion of potential future harm rather than past actions, challenges traditional legal doctrines and raises significant ethical and legal questions. Democracies have increasingly adopted preventive detention as a tool for managing perceived threats, but this shift has sparked debate over its implications for due process and human rights. The following sections explore the doctrinal foundations, comparative practices, and ethical considerations of preventive detention.

Doctrinal Foundations of Preventive Detention

- Preventive detention is often criticized for bypassing the traditional legal requirement of probable cause, which mandates that individuals can only be detained if they have committed or are about to commit a crime. Critics argue that this practice undermines the presumption of innocence and due process rights, as it allows for detention based on suspicion rather than evidence of wrongdoing (Allen & Laudan, 2011) [11] (Landesman, 2011) [12].
- The legal frameworks governing preventive detention vary across jurisdictions, with some countries embedding it within their statutory laws, while others rely on executive powers during emergencies. In the United States, for example, preventive detention has been justified under the guise of national security, particularly in the context of the war on terror (Blum, 2008) [13].

Comparative Analysis of Preventive Detention Practices

- Different democracies have adopted varying approaches to preventive detention. In the United States, preventive detention is used extensively in the context of terrorism, with the government detaining individuals as "enemy combatants" without formal charges (Blum, 2008) [13]. In contrast, countries like the United Kingdom and Israel have developed legal frameworks that allow for preventive detention under specific circumstances, often related to national security threats (Blum, 2008) [13].
- In Malaysia, preventive detention laws have been applied controversially to children, raising concerns about the protection of minors' rights and the need for legal reform to align with international standards (Mustaffa et al., 2020) [17].
- The use of preventive detention in India, England, and the United States highlights the potential erosion of due process rights and the establishment of a separate legal system for certain individuals, which can undermine democratic principles (Ludsin, n.d.).

Ethical Considerations and Human Rights Implications

- The ethical justification for preventive detention is often debated, with proponents arguing that it is necessary to protect the public from dangerous individuals, while opponents contend that it infringes on individual liberties and human rights (Bhim, 2017) [14].
- The European Court of Human Rights has grappled with the tension between public security and individual rights, particularly concerning offenders labeled as "dangerous." The court's jurisprudence reflects the challenges of balancing rehabilitation and security, often placing the burden on detainees to prove their eligibility for release (O'Loughlin, 2024) [15].
- Preventive detention regimes can blur the lines between civil and criminal law, leading to potential human rights abuses. Critics argue that these regimes should be scrutinized to ensure they do not violate fundamental rights and that they incorporate mechanisms for rehabilitation and legal recourse (Keyzer, 2013) [16].

While preventive detention is often justified as a necessary measure for public safety, it poses significant challenges to democratic values and individual rights. The expansion of preventive detention practices in various democracies highlights the need for careful consideration of their legal and ethical implications. Balancing security and liberty require robust legal safeguards and adherence to international human rights standards to prevent the erosion of due process and the rule of law.

Objectives of the Study

1. To critically examine the constitutional and statutory framework of preventive detention in India, with particular focus on the tension between public security and individual liberty under Articles 14, 19, 21, and 22 of the Constitution.
2. To evaluate preventive detention in practice through judicial interpretations, comparative perspectives, and human rights standards, and to propose reforms that align India's preventive detention regime with constitutional morality and international obligations.

Research Methodology

This article adopts a doctrinal legal research methodology, which is normative, analytical, and critical. It relies on primary sources such as constitutional provisions, statutes, and judicial decisions, as well as secondary sources including scholarly commentary, reports, and international legal instruments.

Primary Sources

- Constitution of India (Articles 14, 19, 21, 22).
- **Central statutes:** NSA (1980), UAPA (1967), COFEPOSA (1974).
- **State statutes:** PSA (1978, Jammu & Kashmir), PASA (1985, Gujarat), KAAPA (2007, Kerala).

- **Landmark judgments:** A.K. Gopalan v. State of Madras (1950) [1], ADM Jabalpur v. Shivkant Shukla (1976) [2], Maneka Gandhi v. Union of India (1978) [3], Rekha v. State of Tamil Nadu (2011) [5], Justice K.S. Puttaswamy v. Union of India (2017) [4].

Secondary Sources
- Scholarly works by Austin, Baxi, and Khosla.
- Reports by Amnesty International and UN Human Rights Committee.
- Comparative jurisprudence from UK, US, Canada, South Africa.

Analytical Framework: The research is grounded in the doctrinal conflict between public security and individual liberty, and in Ambedkar's idea of constitutional morality. It applies comparative constitutionalism to evaluate India's divergence from international human rights norms.

Analysis and Discussion

Constitutional and Doctrinal Framework

The Constitution guarantees fundamental rights under Part III. Article 21 ensures that no person shall be deprived of life or personal liberty except according to procedure established by law. Article 19 protects freedoms of speech, assembly, association, and movement. Article 14 guarantees equality before law. Preventive detention directly undermines these protections.

Yet, Article 22 explicitly legitimizes preventive detention. It permits:
- Detention up to three months without trial.
- Extension beyond three months with an Advisory Board of High Court judges.
- Maximum detention up to twelve months (longer by parliamentary approval).
- Denial of immediate legal counsel and full disclosure of grounds for detention if deemed against public interest.

This constitutional duality institutionalizes the conflict between liberty and security. Dr. B.R. Ambedkar described preventive detention as a "necessary evil." Members like K.M. Munshi criticized its inclusion, warning of authoritarian misuse. Ultimately, security concerns prevailed, embedding preventive detention as an extraordinary but permanent power.

Doctrinal Conflict

Preventive detention embodies the tension between public security and individual liberty. Courts have variously prioritized one over the other:
- **A.K. Gopalan v. State of Madras (1950) [1]:** Upheld preventive detention, narrowly interpreting Article 21.
- **ADM Jabalpur v. Shivkant Shukla (1976) [2]:** During the Emergency, suspended habeas corpus rights, allowing unchecked detention.
- **Maneka Gandhi v. Union of India (1978) [3]:** Expanded Article 21, introducing substantive due process.
- **Justice K.S. Puttaswamy v. Union of India (2017) [4]:** Recognized privacy and dignity as core to constitutional identity.

The doctrinal shift toward liberty has been significant, but the persistence of Article 22 ensures that preventive detention remains an entrenched exception.

Statutory Framework: India's preventive detention regime consists of a complex web of central and state statutes.

National Laws

1. **Preventive Detention Act (1950):** First national law, lapsed in 1969.
2. **MISA (1971):** Widely abused during the Emergency (1975–77). Repealed in 1978.
3. **NSA (1980):** Allows detention up to 12 months for threats to public order, national security, or essential services.
4. **COFEPOSA (1974):** Focuses on smuggling and economic crimes.
5. **UAPA (1967):** Anti-terror law, permits prolonged detention without charge, frequently used against students, journalists, and dissenters.

State Laws

- **Public Safety Act (J&K, 1978):** Detention up to two years for security threats. Widely used post-2019 abrogation of Article 370.
- **Tamil Nadu Act (1982):** Targets bootleggers, drug offenders, and goondas.
- **Karnataka Act (1985):** Similar provisions for habitual offenders.
- **PASA (Gujarat, 1985):** Allows detention of "anti-social elements."
- **KAAPA (Kerala, 2007):** Permits detention of "known goondas" and "rowdies" up to one year.

Comparative Table

Law	Scope / Targets	Max Detention Period	Key Issues
NSA (1980)	Public order, national security	12 months	Used against protestors, journalists, minorities
UAPA (1967)	Terrorism, unlawful activities	180 days pre-trial	Vague definitions, long custody
COFEPOSA (1974)	Smuggling, economic crimes	1 year	Executive discretion, weak safeguards
PSA (J&K, 1978)	Public order & security	1–2 years	Arbitrary, widely misused post-2019
PASA (Gujarat, 1985)	"Anti-social elements"	1 year	Overbroad categories
KAAPA (Kerala, 2007)	Known "goondas"	6–12 months	Stigmatizing, vague standards

Judicial Trends and Case Law Analysis

Indian courts have oscillated between validating state power and safeguarding liberty.

- **A.K. Gopalan (1950) [1]:** Liberty subordinated to procedure established by law.
- **ADM Jabalpur (1976) [2]:** Infamous ruling suspending habeas corpus during Emergency.

- **Maneka Gandhi (1978) [3]:** Landmark decision requiring fairness and reasonableness in any law depriving liberty.
- **Rekha v. State of Tamil Nadu (2011) [5]:** Detention order quashed for lack of proximate justification.
- **Justice K.S. Puttaswamy (2017) [4]:** Elevated liberty, privacy, and dignity as part of India's constitutional identity.

Despite progressive jurisprudence, most detentions survive judicial scrutiny because courts defer to the **"**subjective satisfaction" of detaining authorities.

Preventive Detention and Constitutional Morality: Dr. Ambedkar's concept of constitutional morality emphasized liberty, dignity, and equality as guiding principles. Preventive detention, though legal, often violates this spirit.
A Tamil Nadu study revealed that 7,448 individuals over 22 years were preventively detained for an average of 181 days. Many were eventually released without trial, underscoring the human cost of arbitrary detention. Families face stigma, financial hardship, and psychological trauma. Preventive detention thus creates not only legal contradictions but also social injustices.

International Human Rights and Comparative Perspectives

ICCPR Standards

India ratified the International Covenant on Civil and Political Rights (1966), which mandates:

- **Article 9:** Freedom from arbitrary detention.
- **Article 14:** Right to fair trial.
- **Article 4:** Limited derogation only in emergencies.

Comparative Jurisdictions

- **UK:** TPIM Act (2011) – strict judicial oversight.
- **US:** Bail Reform Act (1984) – limited preventive detention with clear evidence.
- **Canada:** Charter requires detention to be demonstrably justifiable.
- **South Africa:** Abolished preventive detention post-apartheid.

India's preventive detention regime offers weaker safeguards, limited transparency, and broader executive discretion than these democracies.
Contrary to the spirit of the Constitution, preventive detention laws empower the government to detain individuals without charges or trial. Intended only for emergencies, these laws are frequently misused against journalists, students, activists, and opposition members. Courts often prioritize national security over liberty, allowing detention based solely on the subjective satisfaction of authorities. A Tamil Nadu study revealed that thousands detained under preventive detention spent on average 181 days in custody, often without judicial verdicts. Preventive detention, though textually constitutional, violates the moral spirit of the Constitution. Reforms are essential to ensure that liberty and dignity are not sacrificed at the altar of security. This grassroots perspective underscores the human cost of preventive detention, complementing doctrinal critiques with lived realities.

Reform Proposals

1. **Restrict Scope:** Limit preventive detention to genuine national security emergencies.
2. **Proportionality Review:** Courts must assess necessity, proportionality, and alternatives.
3. **Transparency:** Publish annual data on preventive detentions.
4. **Legal Aid:** Guarantee immediate access to counsel and disclosure of grounds.
5. **Time-Bound Trials:** Mandatory short timelines to file charges.
6. **Compensation:** Provide damages for wrongful detention.
7. **Parliamentary Oversight:** Periodic review of all preventive detention laws.

Conclusion

Preventive detention in India reveals the uneasy coexistence of liberty and security within constitutional design. While Article 22 grants legitimacy, its frequent use under statutes like the NSA, UAPA, PSA, PASA, and KAAPA undermines Articles 14 and 21. Judicial deference, vague statutory grounds, and executive overreach have normalized extraordinary powers.
Reforming preventive detention is not only a legal necessity but also a moral imperative. A democracy cannot justify arbitrary detention of its citizens in the name of hypothetical security threats. Only by restricting scope, enforcing accountability, and aligning with international human rights standards can India reconcile its constitutional promise of liberty with the need for public security.

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