

## ARTICLE 22 — CALLING TIME ON PREVENTIVE DETENTION

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### Abstract

*Part III of the Indian Constitution guarantees various fundamental rights to persons, and also details various regulations for the deployment of preventive detention laws by the Union and States. The alacrity with which preventive detention has thus been deployed as a law enforcement tool has alarmed some, and the politically motivated use of these powers is what has often attracted the most criticism. But amidst this clash of arms, surprisingly little problem has been found with the constitutional scheme that regulates preventive detention law. This essay takes aim at Article 22 of the Constitution and argues that the minimum threshold it sets for legislatures is painfully inadequate. Rather than safeguard individual liberty against legislative tyranny, I argue that Article 22 is suborning these ideals instead. Is it time, then, to rid the Constitution of Article 22? And, dare I say, time to finally question as Indians our glibness at the detention of thousands without trial every year?*

*Keywords: Preventive Detention, Article 22, minimum threshold, judicial abnegation, rule of law, detention without trial.*

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## 1. Introduction

As I write this essay, countless persons in the (erstwhile) State of Jammu & Kashmir have been arrested and detained without being produced before a magistrate, or being informed of the reasons for their arrest. We will probably never learn how many persons were deprived of their liberty in this fashion, and they will, in all likelihood, never be prosecuted in court.

In the past few years, I have had some opportunities to discuss how such deprivations of personal liberty are not only legal, but part of the chapter on fundamental rights in the Constitution. When my audience was legally trained, the reaction was a mixture of resignation, and even acceptance: *because* if the Constitution itself talks about preventive detention, then it must be necessary. When the same conversation happened with laypersons, who had not read the Constitution, the reaction was far more visceral: rather than revere the constitutional text, they pushed for changing *status quo*.

This short essay is an effort to nudge the legal community into questioning the perceived necessity of preventive detention; more importantly, questioning our lazy acceptance that regulation of preventive detention by the Constitution is sufficient. I will demonstrate that at present, this regulation is singularly *insufficient*, for it adopts a position that is least protective of personal liberty and permits the executive to enjoy untrammelled powers of arrest and detention without trial.

Before we proceed, a few caveats. This is not a legal article offering a fully formed argument, but an essay intending to spur debate and discussion, by sharing thoughts that are at best a work in progress. Thus, having identified the infirmities in the *status quo*, I do not have an answer for any clear course of action. What I am certain about, though, is that serious questioning of preventive detention will help provide better answers on how to restore personal liberty from its presently precarious position in the hands of the State.

## 2. Legal Basis

The Indian Constitution specifically empowers both the Central and the State Legislatures to pass laws for “Preventive Detention”. Entry 9 in List I of the Seventh Schedule to the Constitution empowers the Central Legislature to legislate for matters relating to “preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India” and persons subjected to such detention.<sup>1</sup> Similarly, Entry 3 in List III of the same Schedule confers powers on Central and State Legislatures *concurrently* to legislate for matters relating to “preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community” and persons subjected to such detention.<sup>2</sup>

This legislative power stands limited by the Chapter III of the Constitution which guarantees various fundamental rights to persons and / or citizens.<sup>3</sup> Unlike other kinds of legislative power, the power to pass preventive detention laws attracts the *specific* attention of

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<sup>1</sup> Entry 9, List I, Seventh Schedule, the Constitution of India.

<sup>2</sup> Entry 3, List III, Seventh Schedule, the Constitution of India.

<sup>3</sup> Article 13, the Constitution of India (Declaring that every law contrary to Chapter III shall be void).

Article 22 of the Constitution, which details the do's and don'ts for any legislature enacting a preventive detention statute. These are:<sup>4</sup>

- a) Don't provide a right to counsel to persons subjected to such arrest and detention, nor inform them about the reasons for arrest, nor produce them before a magistrate within 24 hours or arrest [Article 22(3)];
- b) Don't allow purely executive detention to continue for more than three months, and have an inquiry by an Advisory Board to sanction detentions longer than three months [Article 22(4)];
- c) The Central Legislature may prescribe the procedure to be followed by the Advisory Board in an inquiry [Article 22(7)];
- d) The Central Legislature can also pass a law which allows for persons to be detained for longer than three months without an Advisory Board hearing [Article 22(7)];
- e) The Central Legislature may prescribe the maximum period for which any person may be detained under preventive detention laws [Article 22(7)].
- f) Do communicate the grounds of detention "as soon as may be" to the person [Article 22(5)];
- g) Do afford the detained person the "earliest opportunity of making a representation" against the detention [Article 22(5)];
- h) Don't provide any facts to the person, the disclosure of which is against "public interest" [Article 22(6)].

This constitutional regime governing preventive detention forms the backdrop to what is today a vast network of Central and State legislation that provides for such detention without trial. Currently, there are four Central statutes that provide for preventive detention: The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974, the National Security Act 1980, the Prevention of Black-Marketing and Maintenance of Supplies of Essential Commodities Act 1980, and the Prevention of Illicit Traffic in Narcotics Drugs and Psychotropic Substances Act 1988. Four such laws have been passed and repealed over time.<sup>5</sup> At the same time, different preventive detention laws have been passed by almost all State Legislatures over time,<sup>6</sup> which means that in most states there are actually, *at least* five different statutes operating at any point of time that allow for preventive detention.

In terms of pure numbers, it is difficult to estimate just how many persons are arrested and detained under these laws, for there is no source except government data. But even these supposedly conservative estimates put the number of persons who suffered preventive detention through 2016 (the last available year) at around 8,000.<sup>7</sup>

<sup>4</sup> Note, though, that while this list of do's and don'ts for preventive detention laws contained in Article 22 was amended by the 44<sup>th</sup> Amendment to the Constitution of India passed in 1978, it has not been brought into force by any government yet.

<sup>5</sup> These statutes are: (i) Preventive Detention Act, 1950; (ii) Defence of India Act, 1962 [read with the Defence of India Rules]; (iii) Maintenance of Internal Security Act, 1971; (iv) Defence of India Act, 1971 [read with the Defence of India Rules].

<sup>6</sup> See *Lawless Laws*, Amnesty International (India), available at <http://lawlesslaws.amnesty.org.in/> (2016), last seen on 30/06/2020; (Offering an interactive, state-by-state map, of active preventive detention laws as of 2016).

<sup>7</sup> I arrive at this figure by adding the figures for persons in detention *at the end* of 2016, with the figures for persons detained and released *during* 2016. See, Table 3.4., *Prison Statistics India: 2016*, National Crime Records Bureau, available at <http://ncrb.gov.in/StatPublications/PSI/Prison2016/TABLE-3.4.pdf>, last seen on 30/06/2020. (Note: The data does not include foreigners who are detained.); Table 7.5, *Prison Statistics India: 2016*, National Crime Records Bureau, available at: <http://ncrb.gov.in/StatPublications/PSI/Prison2016/TABLE-7.5.pdf>, last seen on 30/06/2020.

### 3. Exposing the Rule of Law Myth

In his remarkable book, Nasser Hussain interrogated the colonial emphasis on installing the “rule of law” for the despotic South Asian society: The idea that government would no longer be the fiefdom of an oriental despot but be run under a system of laws, as legislated by Parliament and the breach of which was subject to judicial review.<sup>8</sup> As Hussain convincingly demonstrated, in practice, the colonial experiment relied heavily on the *myth* of a rule of law to create a system where executive discretion of a sovereign remained writ-large, only being coated by a veneer of legality and procedure.<sup>9</sup>

One example of this tendency is traced by Radhika Singha in the evolution of the Criminal Procedure Code provisions on taking bonds to prevent breaches of the peace.<sup>10</sup> This history shows an executive that was loathe to surrender its power to *any* judicial review, and only assented to a law where judicial review was curtailed to leave vast streams of executive discretion unfettered.<sup>11</sup> This logic of conferring the executive with wide powers to secure public order transposed itself onto the first *Goonda* laws in provinces of colonial India, permitting preventive detention and expulsion of local rowdies.<sup>12</sup>

In almost seventy years of India’s life as a constitutional republic, a moment designed to secure liberty and transform the individual-state relationship in independent India,<sup>13</sup> the Criminal Procedure scheme on preventing breaches of the peace remains almost entirely as it was under colonial rule. Similarly, *Goonda* laws have proliferated across states beyond Bengal, and have been expanded to also arrest, detain, castigate, and expel *Bootleggers*, *Slumlords*, *Video Pirates*, *Slumlords*, and *Dangerous Persons*.<sup>14</sup>

This gradual expansion of executive powers and erosion of personal liberty in India demands a level of historical scrutiny that is beyond my scope.<sup>15</sup> In this section, I focus on the perversions perpetrated by the rule of law myth in independent India in context of preventive detention. This critique looks at two aspects: Problems at the Constitution’s birth, and the judicial approach to fossilize the text.

The fact that Article 22, a clause that in effect offers a guide to legislatures on how to pass laws that can allow for preventive detention, finds a place in *the* Chapter on Fundamental Rights in the Indian Constitution is perplexing at first. Until, of course, we turn to the Founding-Era history and read the Constituent Assembly Debates.

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<sup>8</sup> Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law*, University of Michigan Press 3–6, 41–56 (2003).

<sup>9</sup> *Ibid.*, at 6, 22–29, 58, 65–66.

<sup>10</sup> Radhika Singha, *Punished by Surveillance: Policing “Dangerousness” in Colonial India*, 49(2) *Modern Asian Studies* 241 (2015).

<sup>11</sup> *Ibid.* at 246–48, 255–64.

<sup>12</sup> *Ibid.* at 266, 258: Singha perceptively suggests how one reason for preventive legislation during colonial times was the support from propertied classes, who thought wide executive powers are needed to deal with the problems posed by the lower classes.

<sup>13</sup> See Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (Harper Collins India, 2019).

<sup>14</sup> See, e.g., the Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Gamblers, Goondas, Immoral Traffic offenders, Slum-grabbers and Video or Audio Pirates Act, 1985.

<sup>15</sup> Hailie Ludsin, *Preventive Detention and the Democratic State*, Cambridge University Press 84-153 (2016).

### 3.1. *The Conventional Story of a Complex Founding History*

The standard story upon reading the Debates is, broadly, as follows. The set of clauses guaranteeing civil liberties had witnessed serious excision in the initial drafting exercises.<sup>16</sup> But the unkindest cut for many was the exclusion of the words “Due Process of Law” from the Draft Constitution of India, which instead provided that life and personal liberty could be taken away by “procedure established by law” instead.<sup>17</sup> This was ultimately accepted to form part of the Constitution.<sup>18</sup>

Now, the exclusion of Due Process was largely due to a fear of this clause enabling the future Supreme Court to act like a “third chamber” and stall critical reform legislation that Parliament hoped to push.<sup>19</sup> But this focus on the welfarist agenda was accompanied by striking

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<sup>16</sup> Initial drafts of the Fundamental Rights clauses prepared by the Fundamental Rights Sub-Committee and the Constitutional Adviser, Sir B.N. Rau contained provisions borrowed chiefly from the Irish and American systems that guaranteed individuals various civil and political rights. Procedural guarantees relevant to the criminal process adapted clauses modelled on the Fourth, Fifth and Eighth Amendments to the U.S. Constitution. Within the space of April 1947, though, the wide-ranging set of protections for privacy and individual liberty had been reduced to a handful of clauses. At the time, this included a Due Process clause, inspired from the Fifth Amendment to the U.S. Constitution, which protected persons against deprivations of life, liberty and property without due process of law. See Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, 61–63 (1966) (nature of committees in the Drafting Process); See, B. Shiva Rao (ed.), *The Framing of India’s Constitution*, Vol. II 147–50 (2010 reprint). (note on foreign sources for fundamental rights chapter).

In the Sub-Committee’s Report dated April 16, 1947, the Fourth Amendment was mirrored by Clause 11; the Fifth Amendment was split up across Clauses 5–7, 12 and 27; the Eighth Amendment was adopted in Clause 28. See, *The Framing of India’s Constitution*, Vol. II, 171–175. In the Adviser’s Draft there was no provision for the Fourth Amendment, the Due Process Clause was mirrored by Article 16, and the other criminal procedure clauses were placed together as Article 26. See, *The Framing of India’s Constitution*, Vol. III, 7–12. On the point of similarities between the American and Indian models, see Speech of Dr. B.R. Ambedkar, *Constituent Assembly Debates*, Vol. VII, 40 (04/11/1948) (“The difference between the position under the American Constitution and the Draft Constitution is one of form and not of substance. That the Fundamental Rights in America are not absolute rights is beyond dispute. In support of every exception to the Fundamental Rights set out in the Draft Constitution one can refer to at least one judgment of the U.S. Supreme Court. ...”).

<sup>17</sup> The Drafting Committee had been appointed by a Resolution dated August 29, 1947, to settle a Draft of the new Constitution. This was submitted to the Assembly on February 21, 1948 and the comments in the Draft suggest the words “procedure established by law” were adopted from the Japanese Constitution of 1946, and were preferable on account of being more specific. See, *The Framing of India’s Constitution*, Vol. III, 523.

The trigger behind this “revolutionary” change is considered to have been a meeting between Sir B.N. Rau, Constitutional Adviser to the Constituent Assembly, and Justice Felix Frankfurter, during the former’s tour of the United States in late 1948. Sir B.N. Rau had been dispatched for a tour of the United States, Canada, Eire, and Great Britain and met Justice Frankfurter during this trip. See *Framing*, Vol. III, 217–34. Gadbois and Austin both argue this was only one aspect of the reasons why Due Process was dropped, and point to further evidence gleaned from the positions adopted by members of the Drafting Committee. Gadbois, *Supreme Court of India: The Beginnings*, 151–152 (Vikram Raghavan & Vasujith Ram (eds.), Oxford University Press 2018); Austin, *Cornerstone*, at 103–105.

<sup>18</sup> See Constituent Assembly Debates, Vol. VII 797–98 (03/12/1948), 842–857 (06/12/1948), 859 (07/12/1948), 999–1001 (13/12/1948). Debate scheduled for December 3, was pushed to December 6, and came to an abrupt halt on December 7, 1948 when Dr. Ambedkar conveyed the wish of the Assembly for further deliberations to be kept pending. Perhaps to try and arrive at a compromise, as the debates had shown clear fault-lines ran through the Assembly on the issue. The trick seems to have worked, as when the clause was taken up on December 13, it was accepted after a speech by Dr. Ambedkar without any debate.

<sup>19</sup> See Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 Berkeley Journal of International Law 216, 221–22 (2010).

inattention to what the absence of a Due Process clause meant for state-based violations of the traditional civil-political rights to life and liberty — a prominent feature of the British regime.<sup>20</sup> Thus, citing public criticism and personal dissatisfaction over the excision of Due Process,<sup>21</sup> Ambedkar introduced Draft Article 15-A to “[save] a great deal which had been lost by the non-introduction of the words ‘due process of law’”.<sup>22</sup>

This Draft Article went through minor modifications and ultimately became Article 22.<sup>23</sup> Why include clauses regulating preventive detention here? Ambedkar’s speech introducing Draft Article 15-A provides answers. He explicitly recognized that this measure may be necessary “in the present circumstances of the country” and argued that the “exigency of liberty of the individual should [not] be placed above the interests of the State.”<sup>24</sup> Ambedkar then argued that the proposed clauses controlled use of preventive detention, by installing measures such as a three-month limit on any executive detention, conferring a right to know grounds of detention and to make a representation for release, and ensure mandatory referrals to Advisory Boards for detention beyond this period.<sup>25</sup>

That Ambedkar asked those “fighting for protection of individual freedom” in the Assembly to congratulate themselves on having secured this Article<sup>26</sup> might seem jarring at first. But, a closer inspection of the political context of late 1940s India lends substance to his comments. Preventive detention laws were in force in almost all provinces for the three years during which the Constituent Assembly went about its work in Delhi.<sup>27</sup> The need for a detailed procedure in Article 22 arose because Due Process was no longer there to check legislative powers to pass preventive detention laws, that had already been conferred.<sup>28</sup> This meant that nothing stopped legislatures from creating laws where persons could be detained for lengthy periods without having any right to know the grounds of arrest and detention or a *right* to challenge this process, or having wide discrepancies on these lines.<sup>29</sup> Thus, this constitutional regime was meant to be an *incremental* improvement on prevailing legislative practices on preventive detention.

To say that these proposals received flak from members of the Assembly would be an understatement. In a fiery speech, Thakur Das Bhargava called Draft Articles 15 and 15-A “a blot upon the Constitution.”<sup>30</sup> Bakshi Tek Chand called Draft Article 15-A “a cloak for denying

<sup>20</sup> See M.C. Setalvad, *War and Civil Liberties*, Oxford University Press, 45—69 (1945).

<sup>21</sup> Speech of Dr. B.R. Ambedkar, *Constituent Assembly Debates*, Vol. IX, 1497 (15/09/1949).

<sup>22</sup> Speech of Dr. B.R. Ambedkar, *Constituent Assembly Debates*, Vol. IX, 1497—98 (15/09/1949).

<sup>23</sup> *Constituent Assembly Debates*, Vol. XI, 575—77, 600 (15/11/1949), 531—36 (16/11/1949). These debates focused on further tweaks to Clause 7 of Article 22 to confer more leeway to the Executive by allowing cases where detention could proceed longer than three months *without* requiring Advisory Board approval.

<sup>24</sup> Speech of Dr. B.R. Ambedkar, *Constituent Assembly Debates*, Vol. IX, 1500 (15/09/1949).

<sup>25</sup> Speech of Dr. B.R. Ambedkar, *Constituent Assembly Debates*, Vol. IX, 1500 (15/09/1949).

<sup>26</sup> Speech of Dr. B.R. Ambedkar, *Constituent Assembly Debates*, Vol. IX, 1500 (15/09/1949).

<sup>27</sup> See *e.g.*, Bengal Criminal Law Amendment Act, 1930; CP and Berar Public Safety Act 1947; Punjab Public Safety Act, 1947; Madras Maintenance of Public Order Act, 1947; Bihar Maintenance of Public Order Act, 1947; U.P. Maintenance of Public Order (Temporary) Act, 1947; Marwar Public Security Act, 1947; Bombay Public Security Measures Act, 1947.

<sup>28</sup> *Power of Preventive Detention Given to Centre: Constituent Assembly Adopts Provision*, *The Times of India* 8 (23/08/1947). The relevant clause for List III was approved during Debates on August 22. See *Constituent Assembly Debates*, Vol. V, 112—18 (22/08/1947).

<sup>29</sup> See Speech of H.V. Pataskar, *Constituent Assembly Debates*, Vol. IX, 1523—24 (15/09/1949); Bakshi Tek Chand, *Constituent Assembly Debates*, Vol. IX, 1529—30 (15/09/1949).

<sup>30</sup> Speech of Pandit Thakur Das Bhargava, *Constituent Assembly Debates*, Vol. IX, 1506 (15/09/1949).

the liberty of the individual” and a “Charter to the Provincial Legislature to go on enacting legislation under which persons can be arrested without trial and detained for such period as they think fit”.<sup>31</sup> H.V. Kamath criticized the Drafting Committee, for working as if to frame “a short-term Constitution ... which will last perhaps just as long as some of us hope to be in power”, and he worried if the Members had imagined “how some other persons, possibly totally opposed to our ideals, to our conceptions of democracy, coming into power, might use this very Constitution against, and suppress our rights and liberties?”<sup>32</sup>

### 3.2. Reading against the Grain

The Constituent Assembly Debates, thus, paint a picture of its Members being struck with a crisis of conscience. It suggests their commitment to liberty was beyond question, but circumstances had forced the Members’ hand and propelled the constitutional regime legalizing preventive detention that is present in India today. This view lends Article 22 a Founding-Era intention of serving to protect personal liberty and expiates our collective shame at having the Constitution’s Fundamental Rights Chapter aggressively detail a legal regime to safeguard preventive detention laws.

Until recently, I was happy to subscribe to this viewpoint.<sup>33</sup> What propelled doubts in my mind was some prodding by a friend<sup>34</sup> to consider this question: If Article 22 sought to restrict use of preventive detention, then why has it failed so miserably in achieving this result? Rather than witness a gradual limitation or erosion of preventive detention, independent India has witnessed a remarkable expansion of this power, normalizing it to an extent unparalleled in other liberal democracies.<sup>35</sup>

With this perspective, consider a remark made by Ambedkar during the debates over Draft Article 15-A. Reacting to the harsh criticism from his compatriots over including clauses on preventive detention, he retorted that *they* had “done worse”.<sup>36</sup> What was this all about? Ambedkar was referring to how the Assembly had agreed, almost without debate, to invest future Legislatures with powers of preventive detention in 1947.<sup>37</sup>

Thus, if the Members were actually unhappy about preventive detention, why allow for such laws in the first place? It’s a reasonable criticism, and one that only becomes louder if we read the Constituent Assembly Debates together with the work done by the same Members while acting as the Provisional Parliament, which served as a Central Legislature for independent India between 1950 and 1951.<sup>38</sup>

<sup>31</sup> Speech of Bakshi Tek Chand, *Constituent Assembly Debates*, Vol. IX, 1506 (15/09/1949).

<sup>32</sup> Speech of H.V. Kamath, *Constituent Assembly Debates*, Vol. IX, 1521 (15/09/1949).

<sup>33</sup> See Abhinav Sekhri, *Preventive Justice Part 1: The History Behind Article 22*, The Proof of Guilt (02/12/2016), available at <https://theproofofguilt.blogspot.com/2016/12/preventive-justice-part-1-history>, last seen on 30/06/2020.

<sup>34</sup> My thanks to Arudra Burra for this conversation and prodding me to be less kind to the Constituent Assembly.

<sup>35</sup> Hallie Ludsin, *Preventive Detention and the Democratic State*, 196, 400–405 (2016).

<sup>36</sup> Speech of Dr. B.R. Ambedkar, *Constituent Assembly Debates*, Vol. IX, 1561 (16/09/1949) (“We have given power to the Legislatures of the State and Parliament to make laws regarding preventive detention. What I am trying to do is to curtail that power and put a limitation upon it. I am not doing worse. You have done worse.”).

<sup>37</sup> *Power of Preventive Detention Given to Centre: Constituent Assembly Adopts Provision*, The Times of India, 8 (23/08/1947). The relevant clause for List III was approved during the Debate on September 3, 1949. See *Constituent Assembly Debates*, Vol. IX, 929–931 (03/09/1949).

<sup>38</sup> See Nandini Upreti, *Provisional Parliament of India* (Lakshmi Narain Agarwal, 1971).

On the eve of Independence Day, 1950, the Provisional Parliament passed restrictive bail provisions to double-down on the crisis regarding provisions of essential supplies and commodities, reversing the presumption of innocence itself.<sup>39</sup> Such restrictions had only been seen once in the history of the *Raj*—during the Second World War—<sup>40</sup> but have since become standard-fare in repressive laws that have been passed by successive governments after independence.<sup>41</sup>

But perhaps the legislative activity that strikes the loudest dissonant chords is that which led to the Preventive Detention Act of 1950.<sup>42</sup> This statute, passed exactly a month after the Constitution came into force, was again accompanied by public statements of anguish on part of the Home Minister.<sup>43</sup> But it becomes difficult to accept these statements at face value considering the statute.

Four issues stand out. *First*, rather than even attempt at trying to demarcate specific kinds of conduct that could empower executive officials to use preventive detention powers, the PDA simply copied the entire Entry from the Legislative lists and retained the broadest

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<sup>39</sup> Government of India, *Parliamentary Debates*, Vol. VI, 1013—1112 (14/08/1950). The amendment required that rather than presume the person innocent, the court presume that a person seeking bail was *guilty* of the alleged crime. For a discussion, see Abhinav Sekhri, *Restrictive Bail Conditions in Indian Criminal Procedure: Lessons from History*, The Proof of Guilt, available at <https://theproofofguilt.blogspot.com/2019/06/restrictive-bail-conditions-in-indian.html>, last seen on 30/06/2020.

<sup>40</sup> Government of India, *Parliamentary Debates*, Vol. VI, 1103—04 (14/08/1950); Abhinav Sekhri, 'Restrictive Bail Conditions in Indian Criminal Procedure: Lessons from History'.

<sup>41</sup> See Rule 184, Defence of India Rules supplementing the Defence of India Act, 1971 (since repealed); Section 12AA (inserted in 1981), Essential Commodities Act, 1955 (since repealed); Section 20(8), Terrorist and Disruptive Activities (Prevention) Act, 1987 (since repealed); Section 37 (amended in 1989), Narcotic Drugs and Psychotropic Substances Act, 1985; Section 7A (inserted in 1994) of the Anti-Hijacking Act, 1982; Section 6A (inserted in 1994), Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982. Section 21(4), Maharashtra Control of Organised Crime Act, 1999; Section 8, Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002; Section 45, Prevention of Money Laundering Act, 2002; Section 51A (inserted in 2002), Wildlife Protection Act, 1972; Section 49(7), Prevention of Terrorism Act, 2002 (nearly identical; since repealed); Section 43D (inserted in 2008), Unlawful Activities Prevention Act, 1967 (nearly identical); Section 36AC (inserted in 2008) of the Drugs and Cosmetics Act, 1940; Section 212(6), Companies Act, 2013.

<sup>42</sup> The Preventive Detention Act, 1950, was preceded by the Preventive Detention (Extension of Duration) Order, 1950, passed on January 26, 1950, which declared that any detention order passed prior the commencement of the Constitution, even if void under the Constitution, will continue to remain in force for a period of three months.

<sup>43</sup> See Government of India, *Parliament Debates*, Vol. II, 909—10 (Feb. 25, 1950) (Patel reportedly said: "Now, perhaps Members are aware that I know more than anybody else what the mental attitude of a detenu would be when he is arrested in the middle of the night in his sick bed and again when he is in detention when many of his dear relations die in this country or outside this country and when their dead bodies are brought back and he is not released even for cremation by the imposition of such conditions that the detenu declines for the honour of his country to go out. So, when this legislation is brought in, it is not done with a light heart. It is done with a heavy heart. When responsibility is placed on one to keep law and order and safeguard the liberties of millions of people, for the protection of that liberty and for the fulfilment of that duty one has to take actions which are most detestable. But to call this measure as a black Bill is I consider a very light-hearted comment to make. There are occasions on which there may be room for humour, jokes and laughter. But I assure this House that I have passed two sleepless nights when I was asked to take up this measure. ...").



possible scope of power.<sup>44</sup> *Second*, the PDA did not restrict the use of this power to only senior officials, and continued with the colonial policy of allowing even commissioners of police to detain first and seek approval later.<sup>45</sup> *Third*, the PDA *reduced* the level of scrutiny to regulate executive officers using this power from the prevailing colonial standards, by excluding the word “reasonable” as a test for executive satisfaction, and further limited scope for independent judicial review.<sup>46</sup> *Fourth*, the PDA crafted a procedure for deciding representations against detention that gave *fewer* rights to detained persons than practices from wartime Britain or existing provincial laws in colonial India: There was no right to legal representation for Advisory Board proceedings, which were rendered confidential, and to an extent which not only foreclosed the right to a public hearing, but went so far as to *proscribe* any court from allowing any discussion of either the grounds of detention or the hearings before the Advisory Board.<sup>47</sup>

Surely, then, if the anguish was real, why craft a statute that treated persons in independent India *worse* than what the colonial regime had done? Such legislative strategies suggested that, in some regards, the Constitution was only furthering the rule of law *myth* that the colonial regime had so successfully engaged. On paper, there could be no stronger basis than the Constitution to regulate preventive detention. But, if the regulation itself only serves to *legitimize*, rather than curb, the use of such power, then the rule of law quickly descends back to the rule of man which it sought to improve upon.

### 3.3. Judicial Abnegation

In the powerful documentary *13<sup>th</sup>*,<sup>48</sup> an interviewee argued that the text of the 13<sup>th</sup> Amendment to the U.S. Constitution was not self-enforcing. It had to be read *by people* in a way that has helped to deny freedom to communities of colour through mass incarceration.<sup>49</sup>

The same can be said about the colonial rule of law myth: Without courts accepting their role of supplying limited judicial review over executive acts, it would not be possible to effectively perpetuate this myth.<sup>50</sup> And history confirms that the Indian Supreme Court has, repeatedly, accepted the logic of limited judicial review to foster the myth that preventive detention is regulated by a rule of law.

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<sup>44</sup> Section 3(1), Preventive Detention Act, 1950.

<sup>45</sup> Sections 3(2), 3(3), Preventive Detention Act, 1950.

<sup>46</sup> Section 3(1)(a), Preventive Detention Act, 1950. This permitted detentions if the officer was “satisfied” that a person was engaging in prohibited conduct.

The relevant standard for the colonial legislation was found in Rules 26 and 129 of the Defence of India Rules, passed under the Defence of India Act, 1939. Rule 129 authorised detentions of persons whom an officer “reasonably suspects” of engaging in prohibited conduct. The non-compliance of statutes with this standard was at the heart of the Federal Court decision in *Keshav Talpade v. King Emperor*, AIR 1943 FC 1.

The British law of most recent vintage, i.e. Defence Regulation 18-B passed at the start of the Second World War, allowed the Secretary of State to pass detention orders only if he considered there was “reasonable cause to suspect” a person of engaging in prohibited conduct. On the experience under Regulation 18-B, see, A.W. Brian Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Oxford University Press, 1994).

<sup>47</sup> Sections 10 & 14, Preventive Detention Act, 1950.

<sup>48</sup> Ava Duvernay *et. al.*, *13<sup>th</sup>* (Dir.: Ava Duvernay) (2016).

<sup>49</sup> *Ibid.* (Interview with Kevin Gannon).

<sup>50</sup> Hussain, *Jurisprudence of Emergency*, 69—97.

This history of judicial abnegation began within a month of the PDA 1950 being passed, when A.K. Gopalan brought a writ petition challenging the validity of the Act before the Supreme Court.<sup>51</sup> It is often forgotten that because the PDA prohibited Gopalan from sharing the grounds of his detention or other papers with the Supreme Court, the arguments remained in the realm of the hypothetical. This was critical, for it meant that arguments inviting the Court to strike down the law could only turn to the *hypothetical* abuse that it made possible, rather than try and argue that the abuse was manifest in Gopalan's detention itself.<sup>52</sup> The arguments still convinced two Justices on the Bench to declare the law unconstitutional, but four Justices upheld the law and affirmed the idea that wide powers for the executive were necessary for preventive detention.<sup>53</sup> Pertinently though, all Justices agreed that the provision which prevented a Court from looking at the detention papers, was unconstitutional.<sup>54</sup>

The abstract nature of hearings in *Gopalan* makes the decision particularly bad precedent. And yet, for at least twenty years, the Court's conclusions about the limited scope of judicial review in preventive detention controlled the field. Subsequent decisions used *Gopalan*'s conclusions to not only expand the scope of executive power, but also constrain judicial review further, for instance by approving the use of preventive detention in cases executive detention orders were passed *in spite of* a court having granted the same person bail on largely the same set of allegations.<sup>55</sup>

It did not help that subsequent decisions misapplied *Gopalan* in a way that constrained judicial review further, by reading *Gopalan* as authority for the proposition that laws on preventive detention were *only* subject to the tests of Article 22 and not the other fundamental rights. Thus, the Supreme Court refused to review arrest and detention without trial, even if the underlying conduct behind the arrest was an exercise of *constitutionally protected fundamental rights*.<sup>56</sup>

A year before the suspension of civil liberties took place by a declaration of Emergency, the Supreme Court reversed this view in *Haradhan Saha* and unequivocally held that preventive detention law would not be tested within the silo of Article 22, but also upon the

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<sup>51</sup> A.K. Gopalan v. State of Madras & Anr., 1950 SCR 88. The litigation attracted significant media attention at the time: see *Communist Prisoners' Case against Madras State: "Rules Nisi" Issued by India's Supreme Court*, Times of India 10 (23/03/1950); *"Preventive Detention Act Not Valid": Counsel's Plea in Supreme Court*, Times of India 3 (01/04/1950); *Arguments in Detenu's Case: Resumed Hearing in Supreme Court*, Times of India 5 (06/04/1950); *Detention Act Validity: Arguments Before Supreme Court*, Times of India 10 (07/04/1950) (The newspaper reports the Attorney General M.C. Setalvad as having argued that "There is no question of feeling here ... for I am myself arguing much against my feelings; but there can be no doubt as to what the intention of the framers of the Constitution was."); *Detenus' Safeguards under Constitution*, Times of India 3 (19/04/1950) (Noting an exchange between Fazl Ali, J. and M.C. Setalvad where the Justice raised concerns about the Indian law providing a truncated right to be heard, even when compared with wartime Britain); *Fundamental Rights & Constitution*, Times of India 3 (20/04/1950); *Preventive Detention Act Held Valid*, Times of India 1 (20/05/1950), *Divided Supreme Court Decision on Preventive Detention*, Times of India 3 (20/05/1950). This was because of Section 14, Preventive Detention Act, 1950.

<sup>52</sup> This was because of Section 14, Preventive Detention Act, 1950.

<sup>53</sup> The Bench was comprised of all six sitting Justices of the Court. Only Mahajan, J. and Fazl Ali, J. declared the statute unconstitutional.

<sup>54</sup> A.K. Gopalan v. State of Madras & Anr., 1950 SCR 88.

<sup>55</sup> See Kartic Chandra Guha v. State of W.B. & Ors., (1975) 3 SCC 490; Rekha v. State of Tamil Nadu, (2011) 5 SCC 244; Union of India v. Dimple Happy Dhakkad & Ors., CrI. Appeal 1064 of 2019 (Decided on 18.07.2019). See Ludsin, *Preventive Detention and the Democratic State*, 205 (Showing how the *fact* that preventive detention can be used to circumvent bail has become a consideration for legislators to support / pass preventive detention statutes).

<sup>56</sup> Bhatia, *Transformative Constitution*, Chap. 8.

anvil of other fundamental rights.<sup>57</sup> This meant that you could not be subjected to executive detention for, say, exercising your constitutional right to free speech. But, in the same breath, the Court somehow concluded that that “*even if Article 19 be examined in regard to preventive detention, it does not increase the content of reasonableness required to be observed in respect of orders of preventive detention*” beyond what was existing in Article 22.<sup>58</sup> When a year later the Court held judicial review itself could be taken away by the Executive during the Emergency in *A.D.M. Jabalpur*, we know that the rule of law myth has reached its apogee.<sup>59</sup>

The story of a judicial renaissance after the Emergency is the subject of much critical literature, but while this literature focuses on the many judicial innovations of the era surprisingly little attention is paid to what happened in the field of preventive detention itself, the focus of the decision in *A.D.M. Jabalpur* which was critiqued as the judiciary’s *nadir* during the Emergency.

In *Maneka Gandhi*,<sup>60</sup> the Supreme Court reiterated that the Chapter on Fundamental Rights offered a composite test for legislation, rather than examining it in silos. It also *notably expanded* on the meaning of the words “procedure established by law” in Article 21, holding that this phrase effectively carried the *same* scope as “Due Process” despite the extensive Debates in the Constituent Assembly pointing to the contrary.<sup>61</sup> But what would this expansive notion of judicial review mean for preventive detention law? Would this change the pre-Emergency position adopted in *Haradhan Saha*? Only one opinion from *Maneka Gandhi* touched upon this, and Chief Justice Beg squarely held that the notion of “Due Process” in the preventive detention context meant nothing more than what Article 22 guaranteed.<sup>62</sup> Thus, he actually turned the clock back from what had been held in *Haradhan Saha*!

That nothing much had changed in how the judiciary perceived its role in context of preventive detention was evident by 1980, when the Court unanimously upheld the National Security Act, 1980,<sup>63</sup> reiterating the same logic of necessity for (almost) unbridled executive power that the Constituent Assembly had pitched to justify the harshness of the PDA, 1950.<sup>64</sup> The only, and critical, difference was that while the PDA 1950 contained a sunset clause to reinforce claims of the *temporariness* of the need for such powers, the National Security Act of 1980 contained no such clauses, suggesting a *permanent need* for executive superpowers.<sup>65</sup>

<sup>57</sup> *Haradhan Saha v. State of West Bengal & Ors.*, (1975) 3 SCC 198.

<sup>58</sup> *Haradhan Saha*, ¶ 31.

<sup>59</sup> *A.D.M. Jabalpur v. Shiva Kant Shukla & Ors.*, (1976) 2 SCC 551.

<sup>60</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

<sup>61</sup> *Supra* 21-26. (CAD on excision of due process and insertion of Draft Article 15-A.)

<sup>62</sup> *Maneka Gandhi*, ¶ 200 (Beg, C.J.) (“I have already referred to the passages I cited in *A.D.M., Jabalpur* case to show that, even in *Gopalan* case the majority of Judges of this Court took the view that the ambit of personal liberty protected by Article 21 is wide and comprehensive. It embraces both substantive rights to personal liberty and the procedure provided for their deprivation. One can, however, say that no question of “due process of law” can really arise, apart from procedural requirements of preventive detention laid down by Article 22, in a case such as the one this Court considered in *Gopalan* case. The clear meaning of Article 22 is that the requirements of “due process of law”, in cases of preventive detention, are satisfied by what is provided by Article 22 of the Constitution itself. This article indicates the pattern of “the procedure established by law” for cases of preventive detention.”).

<sup>63</sup> *A.K. Roy & Ors. v. Union of India*, (1982) 1 SCC 271.

<sup>64</sup> *A.K. Roy*, ¶¶58—68; *See also*, Ludsin *Preventive Detention and the Democratic State*, 136—151 (also considers the legislative process and offers critique).

<sup>65</sup> Section 1(3), Preventive Detention Act, 1950.

### 3.4. *Post Script*

The combination of judicial abnegation and unabashed claims to power by the executive has created a system where courts are happy to adopt a hands-off policy on the *substance* of preventive detention, but at the same time maintain a critical eye on its *procedural* components. Thus, we find ourselves in the strange space where courts can exhort about the importance of personal liberty and chastise the executive for failing to dot the i's and cross the t's when passing detention orders, and even expand the scope of this procedural regulation, but keep turning a blind eye to the reasons *why* a person might be arrested and detained in the first place, on mere *allegations* and not proof of guilt.

And this perplexing reality exists in a constitutional scheme where, somehow, the legislative primer of Article 22 remains the mainstay of regulation over preventive detention *in spite of* the fact that the *raison d'être* of this clause has ceased to exist. And, where the constitutional text *itself* is living on a strange half-life, simply because the executive has refused to notify amendments that have been passed in the 44<sup>th</sup> Amendment to the Constitution. The minimum thresholds of Article 22 were adopted by the Constituent Assembly because the words "Due Process" had been taken out of Article 21. Today, the Supreme Court has, in no uncertain terms,<sup>66</sup> confirmed that due process is part of the Constitution.

If the constitutional landscape has travelled a long distance from where the journey began in 1950, to the extent that certain words no longer mean what they did back then, and new horizons for existing rights have been unequivocally affirmed, why must the standards for preventive detention remain frozen in time? This open-ended question is what I turn to in the final section of this Essay.

## 4. Conclusion — Where do we go from here?

In this essay, I sought to demonstrate that India's constitutional regulation of preventive detention is deficient on several counts, considering the premise that protecting and safeguarding personal liberty was a core interest of the Constitution. Moreover, I argued that the persistence to continue with the *same legal standards* as 1950 in 2019 is particularly problematic, for which all branches of State are to be held responsible.

Having identified the problem, the next step is to consider what can be done to redress this. It is a question to which I do not have any convincing answer at this point. A suggestion that I have floated in public forums, is to delete Article 22 altogether from the Constitution with a clear message of it being unsatisfactory. This would then leave Articles 14, 19, and 21 as bulwarks to protect personal liberty against abuse of preventive detention by the executive, together with a judiciary that is free to enforce stricter norms, for it will no longer be shackled by the text of Article 22.

The problem in this scenario is the need to pin hopes on the Judiciary. For all the lyrical waxing about personal liberty and individual freedom, the Supreme Court has time and again failed to stand up to the other branches of the state and protect these virtues from an onslaught. What, then, prevents the Supreme Court from reverting to type in this scenario? Is it not likely, as was pointed out to me,<sup>67</sup> that the Court ends up using the same old tests of Article 22 to regulate preventive detention, but now through Article 21? While I wholeheartedly embrace

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<sup>66</sup> Mohd. Arif v. Registrar, SCI, (2014) 9 SCC 737.

<sup>67</sup> Many thanks to Lawrence Liang for flagging this concern.

this concern, the marginal gains from a stronger judicial review are bound to weed out the egregious cases of using preventive detention, and also lead to more frequent and robust reviews, with counsel, than the cycles currently incorporated through the Constitution.

Arguably, the best legal solution would be to delete the relevant Entries from the Legislative Lists that permit the Central and State Legislatures to pass preventive detention statutes altogether. This would possibly allow such legislation to only be considered during an Emergency, constitutionally declared, rather than for ordinary law and order purposes. Whilst being the most desirable, this course of action is likely to meet the greatest resistance by a government that has so long been under the influence of this heady power.

The history of preventive detention law in India shows that all three branches of State have, at different times, made apparent their contentment with upholding a regime where personal liberty can be thrown into the dustbin. Since 1950, Legislatures have repeatedly failed to even try and lift themselves beyond the constitutional minimums; the Executive has actively frustrated the coming into force of a set of a higher constitutional baseline; and a Judiciary that has been famous for innovation and reinterpretation of text has remained docile as persons are arrested and detained without trial on *allegations* of video piracy, leaking exam papers, cricket-ground spats, and the like.<sup>68</sup>

Considering this inglorious institutional past, perhaps it is time to look elsewhere. At the end of the day, the only satisfactory answer for this is the People to which the Constitution is promised. After all, “laws and constitutions are but the paper safeguards of liberty. A people must have the will to be free.”<sup>69</sup> Safeguards for individual liberties have always been reduced to paper when the individuals themselves forget the value of this liberty, and are no longer resistant to its deprivation. The same can be said about the practice of preventive detention in India. The fact that this most odious deprivation of personal liberty is normalized today is because the People have not challenged this process. Even when persons have opposed preventive detention, either as opposition party members in Parliament, or as civil rights activists, they have surprisingly always had no qualms about using preventive detention against *some* category of persons. Why not question the necessity of preventive detention itself wholesale? Do we really need a legal tool that allows persons to be locked away for months on the basis of mere *suspicion*? Is there no such thing as a presumption of innocence? Until we start calling time on Article 22, I do not think we can fully begin to tackle these difficult questions. What are we waiting for?

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<sup>68</sup> See Aasavri Rai, *Guest Post: Arrests under the Infamous “No Vakil, No Appeal, No Daleel” Law, The Proof of Guilt* (25/12/2018), available at <https://theproofofguilt.blogspot.com/2018/12/guest-post-arrests-under-infamous-no.html>, last seen on 30/06/2020.

<sup>69</sup> Cecil T. Carr, *Concerning English Administrative Law*, 92 (Columbia University Press, 1941).