

# NOT FAIR, JUST OR REASONABLE

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## **Preventive Detention Laws practically sacrifice due process interests at the altar of crime control**

The revocation of statehood for Jammu and Kashmir was accompanied by widespread arrests and detentions under the erstwhile State's Public Safety Act of 1978, which allows for detention without trial for up to two years. The arrest and detention of persons without requiring them to face a public trial, which is driven towards proving innocence or guilt of an accused person alleged to have committed an offence, is referred to as 'preventive detention' in Indian law. Preventive detention statutes exist at both the national and State levels and are intended to serve as effective measures to prevent the occurrence of crime.

Under these laws, executive officers such as District Magistrates and Commissioners of Police are empowered to pass orders for arrest and to take persons into custody. These powers can be exercised if the officers are "satisfied" that the person's conduct is posing a risk to certain kinds of interests that the law deems important. For instance, the National Security Act of 1980 permits arrest and detention of persons when it is in the interest of maintaining "public order", which can occur even without any allegations of the person breaking any existing laws.

### **Absence of Procedural Fairness**

- Since the purpose of the preventive detention is to prevent crime, it is argued that compliance with painstaking procedures such as

those of a criminal trial would defeat the law's purpose. Therefore we find that preventive detention processes come without many of the hallmark procedural fairness that we take for granted in the regular criminal law.

- Thus, unlike regular law, there is no need for a person arrested under the exceptional preventive detention process to be informed of the grounds immediately. Nor is there a requirement to produce the arrested person before a court.
- While all arrests and detentions under preventive detention laws do undergo some subsequent checks, this scrutiny remains almost exclusively executive-based. There is no judicial oversight where detention beyond three months is not sought. And even in those cases which go to a Tribunal comprising judges, there is no public hearing involved and no guaranteed oral hearing for the detenu.
- No publicly available orders or judgments are published about the ultimate decision. Finally, throughout this process, there is no right to legal assistance for detainees.
- The only opportunity for many lies in pursuing a writ of habeas corpus before the High Court, which again can only test preventive detention orders on limited grounds. It is barred from undertaking a full-scale review of this executive process.

The idea that laws should permit pre-emptive intervention to prevent the commission of crimes is an appealing one. That the legal framework governing this preventive project comes along with reduced procedural compliances and quick outcomes only makes preventive detention laws more tantalizing for security-minded officers, who are thus incentivized to use these exceptional statutes to deal with even ordinary law and order situations, ultimately normalizing preventive detention and bringing them down from their exceptional status. This suggestion is supported by the Crime in India Report for 2018 released by the NCRB which disclosed that close to one lakh people were arrested and detained in custody under preventive detention laws, as per government estimates.

## Threat to personal liberty

Exceptional situations certainly justify exceptional measures. But there is a fair case to argue that even under this logic, the procedures of preventive detention laws in India practically sacrifice due process interests at the altar of crime control, and this bargain is ill-suited to justice, no matter how grave the risks. In their present form, it is difficult to accept such laws provide us the "fair, just and reasonable" procedure that Article 21 of India's Constitution demands of any law that takes away personal liberty.

**SOURCE:** *The Hindu*