# WHETHER PREVENTIVE DETENTION IS AGAINST THE DUE PROCESS MODEL OF CRIMINAL JUSTICE SYSTEM WITH CRITICAL ANALYSIS – HERBERT PARKER

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**Abstract**

*Fundamental conflicts about individual liberty, state authority, and the rule of law have been brought up by the contradiction between preventive detention and the criminal justice system's due process notion. The presumption of innocence, procedural fairness, and safeguarding people against capricious governmental action are given top priority in Herbert Packer's due process concept. However, because preventive detention is based on the possibility of future misbehaviour rather than proved guilt, it permits the deprivation of liberty without trial. By examining constitutional underpinnings, judicial interpretations, and comparable legal frameworks, this study critically analyses the degree to which preventive detention deviates from the due process model. According to the essay, preventive detention essentially violates the concepts of justice, accountability, and due process, even though it is frequently justified in the name of national security and public safety.*

***Keywords:*** *Preventive detention, due process, Herbert Packer, criminal justice, presumption of innocence, human rights, national security, judicial review.*

## INTRODUCTION

The term preventive detention literally refers to the physical confinement of a person as a precautionary measure. In legal terms, it means restricting an individual's liberty by placing

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them in jail or another designated location to prevent them from engaging in actions that could threaten national security, foreign relations, public order, or the essential supply of goods and services.

Unlike arrest, which occurs after a crime has been committed and is part of an investigative process leading to punitive action, preventive detention is pre-emptive. It is designed to stop a person from committing offenses rather than punishing them for past actions. This form of detention is often called "Detention Without Trial," as it does not involve the usual legal proceedings to determine guilt, which take place only after an offense has been committed. It is important to distinguish between preventive detention and preventive custody in the context of a trial. When a person is denied bail and remains in jail while awaiting trial, it is to ensure that they do not interfere with the legal process. While preventing further crimes may be one factor in bail denial, this form of detention differs from preventive detention since it lacks the broader attributes of pre-emptive confinement for national security or public order concerns.[2]

The Preamble of the Indian Constitution is more than just a collection of words—it embodies a solemn commitment to upholding the dignity of every individual. However, the circumstances under which this commitment was framed left behind a complex and difficult legacy. The framers of the Constitution granted constitutional legitimacy to preventive detention laws under Article 22, allowing the state to curtail individual freedoms in certain situations.

The Preventive Detention Act, introduced in 1984, aimed to empower federal courts to detain or imprison individuals before trial if the government could demonstrate that their release might pose a threat to society or specific individuals. However, when a society embraces preventive detention without essential legal safeguards, it risks compromising individual liberties under the guise of security. This approach undermines the very essence of freedom and fosters a false sense of safety rather than genuine protection. Over time, preventive detention has evolved into a significant infringement on personal liberty, and such an intrusion can only be justified when explicitly sanctioned by clear legal provisions. At present, however, preventive detention is largely governed by executive regulations rather than robust statutory mechanisms.

[2] https://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/05._criminal_justice_administration/21._preventive_detention/et/8185_et_et.pdf

In a liberal democracy, any attempt by the government to restrict fundamental rights must be grounded in the rule of law rather than unchecked executive authority. The rule of law dictates that the law should be supreme and binding on both the government and its officials. It must be universal, just, and enforceable, ensuring the protection of individual freedoms. The due process of law plays a crucial role in preventing the state from unjustly depriving innocent individuals of their liberty. These laws aim to strike a delicate balance between national security and personal freedom, which lies at the core of the preventive detention debate.

Ultimately, the principles of the rule of law and due process stand in direct opposition to authoritarian practices that prioritize state supremacy over the rights of the accused.

**International Perspectives on Preventive Detention**

Comparative analysis reveals significant variation in preventive detention practices across different legal systems, with some jurisdictions establishing relatively robust safeguards while others permit extensive executive discretion with minimal oversight. These differences reflect varying conceptions of the proper balance between security imperatives and individual rights protections.

Several international human rights instruments address preventive detention practices, establishing minimum standards for their implementation. The International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary detention and requires that all detainees receive prompt notification regarding reasons for their detention. Similarly, the European Convention on Human Rights permits preventive detention only in specific circumstances with appropriate judicial oversight. These international standards emphasize that preventive detention must remain a limited exception rather than becoming a routine alternative to criminal prosecution.

Various regional and international courts have evaluated preventive detention practices against human rights standards. The European Court of Human Rights has consistently required that preventive detention include robust procedural safeguards, particularly when authorities cite national security concerns to justify secrecy. Similarly, the Inter-American Court of Human Rights has emphasized that preventive detention must remain proportionate to legitimate state interests and include meaningful review mechanisms. These judicial interpretations establish important constraints on state authority while acknowledging legitimate security concerns.

**EVOLUTION:**

The evolution of preventive detention in India has been shaped by historical, legislative, and judicial developments. The concept dates back to colonial rule, when the British Raj enacted laws such as the Defence of India Act, 1915, to detain individuals without trial in the interest of maintaining public order. After independence, India's Constitution recognized both the necessity and potential misuse of preventive detention, leading to its inclusion under Article 22, which provides certain safeguards while permitting detention under specific circumstances.

In the post-independence period, several laws such as the Preventive Detention Act (1950), Maintenance of Internal Security Act (MISA) (1971), and the National Security Act (NSA) (1980) were enacted to address internal security concerns. However, these laws often clashed with fundamental rights, leading to intense judicial scrutiny. The Supreme Court, in cases like A.K. Gopalan v. State of Madras (1950), initially upheld the validity of preventive detention laws, interpreting personal liberty narrowly. Over time, judicial perspectives evolved, and courts began emphasizing procedural safeguards, as seen in Maneka Gandhi v. Union of India (1978), where the scope of Article 21 (right to life and personal liberty) was expanded to include due process of law.

Despite judicial interventions, challenges persist, including prolonged detention without trial, vague grounds for detention, and lack of oversight. Courts have repeatedly stressed the need for stringent review mechanisms to prevent executive overreach. The evolution of preventive detention in India thus reflects an ongoing struggle to balance national security and individual freedoms, with the judiciary playing a crucial role in upholding constitutional safeguards while allowing the state to maintain order.[3]

## DUE PROCESS MODEL – HERBERT PARKER[4]

Herbert Packer's due process model is grounded in the philosophy that criminal justice should function as a means of safeguarding individual liberties rather than solely as a tool for crime control. Packer's model views the state as a powerful entity capable of wrongful conviction and abuse of power. Therefore, it insists on strict procedural safeguards to protect individuals from arbitrary detention, coercion, and wrongful imprisonment.

[3] https://ijrrssonline.in/HTMLPaper.aspx?Journal=International%20Journal%20of%20Reviews%20and%20Research%20in%20Social%20Sciences;PID=2019-7-2-29

[4] https://openoregon.pressbooks.pub/ccj230/chapter/1-8-due-process-and-crime-control-model/

The key tenets of the due process model include the presumption of innocence, the requirement of proof beyond a reasonable doubt, fair and public trials, access to legal representation, and the right to appeal. The model fundamentally opposes the idea of punishment or restriction of liberty without judicial proceedings. It argues that even in cases involving serious threats to public safety, the legal system must adhere to principles of fairness and accountability.

In contrast, preventive detention operates on the principle that pre-emptive action is necessary to prevent crimes that could endanger society. While it is often justified as a counterterrorism or public order measure, it effectively shifts the burden of proof from the state to the accused, requiring individuals to prove their innocence rather than the prosecution establishing their guilt. This shift challenges the very basis of the due process model and raises concerns about potential misuse of state power.[5]

## CRIMINAL JUSTICE REFORMS

Criminal justice reform is a crucial aspect of maintaining a legal system that is fair, efficient, and reflective of the principles of justice, rehabilitation, and public safety. It seeks to address systemic issues such as wrongful convictions, mass incarceration, judicial inefficiencies, and the disproportionate impact of punitive measures on marginalized communities. Reform efforts focus on multiple areas, including sentencing policies, prison conditions, access to legal representation, law enforcement accountability, and the reintegration of formerly incarcerated individuals into society. A well-functioning criminal justice system not only ensures that justice is served but also works to prevent future crimes through effective rehabilitation and reintegration strategies.

At the same time, criminal justice reform must also address the protection of due process rights to prevent wrongful convictions and ensure fairness in the legal process. One major criticism of certain legal systems is the restriction of discovery laws, which limits the ability of the defence to access evidence held by the prosecution. Ensuring transparency in legal proceedings is fundamental to upholding justice, as wrongful convictions can have devastating consequences for individuals and their families. Strong legal safeguards, such as access to legal

[5] https://www.researchgate.net/profile/Kent-Roach/publication/274113119_Four_Models_of_the_Criminal_Process/links/5898c22b92851c8bb6802aa8/Four-Models-of-the-Criminal-Process.pdf

representation, the right to appeal, and thorough evidence examination, are essential for preventing miscarriages of justice.[6]

### The Constitutional and Legal Framework of Preventive Detention

The legality of preventive detention varies across jurisdictions, but in many democratic nations, it exists as an exception to constitutional protections. In India, Article 22 of the Constitution provides for preventive detention while also laying down procedural safeguards. Detainees must be informed of the reasons for their detention, and an advisory board must review their case within a specified period. However, these safeguards do not equate to a fair trial, as detainees are not entitled to challenge the evidence against them in a conventional judicial setting.

In the United States, preventive detention is primarily used in cases involving national security threats, immigration laws, and pretrial detention of individuals deemed a flight risk or danger to society. The U.S. Supreme Court, in cases like *Zadvydas v. Davis* (2001), has ruled that indefinite preventive detention violates constitutional protections unless it serves a legitimate government purpose with adequate legal safeguards. Similarly, in the United Kingdom, preventive detention has been challenged under the Human Rights Act, with courts emphasizing the necessity of judicial oversight and proportionality in such cases.

Despite these legal frameworks, the discretionary nature of preventive detention laws often results in prolonged and arbitrary detentions. The absence of transparent judicial review mechanisms in many cases leads to indefinite confinement, contradicting the principles of procedural fairness and individual autonomy.

## Conflict Between Preventive Detention and the Due Process Model

The fundamental contradiction between preventive detention and the due process model lies in the shift from reactive punishment based on proven guilty to proactive restrictions based on suspicion. The due process model requires that individuals be treated as innocent until proven guilty, whereas preventive detention assumes potential guilt without requiring legal proof. This creates significant legal and ethical concerns.

[6] https://prsindia.org/billtrack/overview-of-criminal-law-reforms

One of the most concerning aspects of preventive detention is the erosion of legal safeguards, such as the right to a fair trial, legal representation, and the ability to challenge detention orders. In many cases, detainees are held based on classified information, with no opportunity to cross-examine witnesses or contest evidence. This secrecy undermines the adversarial nature of the legal system, where both sides should have an equal opportunity to present their case.

Another point of conflict is the burden of proof. In the due process model, the prosecution must establish guilt beyond a reasonable doubt. Preventive detention, however, often relies on lower standards, such as reasonable suspicion or intelligence assessments. This reduces the threshold for depriving individuals of their liberty, increasing the risk of wrongful detention.

Additionally, temporal limitations on detention are often weak or inconsistently applied in preventive detention cases. While some jurisdictions impose strict review periods, others allow indefinite detention under executive orders. The lack of clear time constraints further violates the due process principle that any deprivation of liberty must be necessary, proportionate, and subject to regular judicial scrutiny.

## Critical Perspectives on Preventive Detention

Proponents of preventive detention argue that in exceptional circumstances, such as threats to national security or large-scale public disorder, preventive measures are necessary to protect society. They contend that the legal system must adapt to evolving threats, and in some cases, conventional criminal proceedings may not be sufficient to prevent catastrophic events.

However, critics argue that preventive detention is susceptible to misuse, particularly in politically charged environments. Historical examples show that governments have frequently used preventive detention laws to suppress dissent, target opposition groups, and curtail civil liberties. The lack of robust oversight mechanisms often results in individuals being detained for extended periods without due process, violating fundamental rights.

## Empirical Evidence on Preventive Detention's Effectiveness

Evaluating preventive detention's actual effectiveness presents significant methodological challenges, as it requires assessing events that did not occur because of preventive action. Nevertheless, limited empirical evidence provides some insight into preventive detention's practical impacts on security outcomes and individual rights.Research examining counterterrorism applications suggests that preventive detention's security benefits may be more limited than proponents claim. While detention prevents specific individuals from

engaging in harmful activities during their confinement period, it frequently generates community resentment that can facilitate recruitment by extremist organizations. Additionally, detention without trial often creates perception of injustice that undermines government legitimacy and complicates security cooperation with affected communities.

Studies of pretrial preventive detention reveal significant disparities in application across demographic groups, with marginalized communities facing disproportionate detention rates even when controlling for offense type and criminal history. These disparities raise serious concerns about preventive detention's compatibility with equal protection principles and suggest that predictive assessments frequently incorporate implicit biases affecting detention decisions.

Research also indicates that prolonged preventive detention frequently produces significant psychological harm similar to effects observed in conventional incarceration. Uncertainty regarding detention duration appears particularly damaging to detainee mental health, especially when combined with limited communication with family members and restricted legal counsel access. These negative impacts raise additional concerns regarding preventive detention's proportionality and humanitarian implications.

## Alternative Approaches to Security and Public Safety

Given preventive detention's significant tensions with due process principles, exploring alternative approaches to addressing legitimate security concerns becomes essential. Several promising alternatives exist that might better balance security imperatives with rights protections.

Enhanced surveillance with appropriate judicial oversight offers one potential alternative to preventive detention in many contexts. Rather than detaining individuals based on anticipated wrongdoing, authorities could monitor individuals of concern while allowing them to maintain their liberty until they engage in actual criminal conduct. While surveillance raises separate privacy concerns, these might prove less severe than liberty deprivation through detention without trial.

Community-based intervention programs represent another promising alternative in many contexts. Rather than detaining individuals perceived as potential threats, authorities could engage them through structured programs addressing underlying factors contributing to

concerning behavior. Such approaches have shown promise in counterterrorism contexts where ideological factors motivate potential violence.

Strengthened international cooperation could also reduce perceived need for preventive detention in many security contexts. By sharing intelligence and coordinating law enforcement activities across jurisdictions, authorities might better address transnational threats without resorting to detention without trial. Such cooperation would require appropriate safeguards against information misuse but could potentially provide security benefits without corresponding rights violations.

## WHETHER PREVENTIVE DETENTION IS AGAINST THE DUE PROCESS MODEL

Preventive detention fundamentally challenges the principles of the due process model of the criminal justice system, which is designed to protect individual rights and ensure fair treatment under the law. The due process model upholds the belief that a person's liberty cannot be taken away without adequate legal justification, a fair trial, and an opportunity to defend themselves. It ensures that the state follows established legal procedures before depriving an individual of their freedom, requiring proof of guilt beyond a reasonable doubt, legal representation, and impartial judicial oversight. Preventive detention, however, circumvents these protections by allowing authorities to detain individuals without formal charges or a trial, merely on the suspicion that they may pose a future threat. This directly contradicts the fundamental safeguards provided by due process, particularly the presumption of innocence and the right to a fair hearing.

The primary issue with preventive detention is that it prioritizes state security and public order over individual liberty, often relying on subjective assessments rather than concrete evidence. Unlike traditional criminal justice procedures, where a person is held accountable for past offenses through a transparent and adversarial legal process, preventive detention imposes restrictions on an individual's freedom based on anticipated wrongdoing. This shift from punishment for proven offenses to precautionary confinement raises serious ethical and legal concerns, as it effectively grants the state unchecked authority to deprive individuals of their liberty without affording them due legal recourse. The absence of clear legal accountability mechanisms creates room for misuse, where detention orders may be influenced by political motives, discrimination, or a desire to silence dissenting voices.

Despite these concerns, some argue that preventive detention is a necessary tool in exceptional circumstances, such as national security threats, terrorism, or organized crime, where waiting

for a crime to be committed could have devastating consequences. Governments often justify preventive detention as a proactive measure to safeguard society from potential harm, arguing that in situations where evidence may be insufficient for immediate prosecution, detention is required to avert greater risks. However, this rationale must be weighed against the risk of arbitrary detentions, wrongful incarceration, and abuse of power. The lack of a robust judicial review mechanism in many preventive detention laws exacerbates the problem, as detainees may have limited means to challenge their detention or demand accountability from the state.

The due process model inherently opposes this approach because it emphasizes legal fairness over executive convenience. Due process requires that every person, regardless of the severity of the suspicion against them, is given a fair opportunity to challenge the accusations before an independent judicial body. It also ensures that legal procedures remain transparent, predictable, and not subject to the whims of executive authorities. In contrast, preventive detention, as implemented in various legal systems, often lacks sufficient procedural safeguards, making it a direct violation of due process principles. The absence of a trial, the indeterminate nature of detention, and the inability to access legal remedies in many cases place it at odds with the very foundation of a just and accountable legal system.

To bridge this gap, legal frameworks must impose clear restrictions on the use of preventive detention while ensuring that it aligns with constitutional safeguards and international human rights standards. Measures such as mandatory judicial review, limited detention periods, access to legal representation, and a well-defined scope for preventive detention orders can help minimize its conflict with the due process model. Without these safeguards, preventive detention will continue to stand as a serious challenge to individual freedoms, undermining the core values of justice, fairness, and accountability that form the essence of the due process model in the criminal justice system. The ongoing debate surrounding preventive detention ultimately reflects deeper questions about proper relationships between individuals and state authority in democratic societies. While perfect resolution of tensions between security and liberty remains elusive, meaningful constraints on preventive detention represent essential components of any justice system truly committed to individual rights protection. Through continuous critical examination of detention practices, legal systems can better ensure that security imperatives do not overwhelm fundamental commitments to procedural fairness, individual dignity, and the rule of law.

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