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Improving Preventive Detention Laws

By: John Sebastian,Faiza Rahman

The 44th Amendment to the Constitution was enacted 44 years ago, but the clause that deals with improving the preventive detention framework has still not been brought into force. This goes against all that we hold to be legally just and reasonable.

The last day of last month, 30 April 2023, marked the 44th year since the 44th Amendment to the Constitution was assented to by the president. The amendment was a major constitutional overhaul, passed by the Janata Party government to undo the regressive constitutional changes made during the Emergency of 1975–77 through the 42nd Amendment, and to bring in safeguards against similar abuses of power by future governments.

In particular, given the mass detentions of opposition political leaders during the Emergency, significant safeguards were added to Article 22 of the Constitution to tackle the "evil" of preventive detention – the arrest of people *before* they commit an offence and without a trial on grounds of suspicion alone (Dhavan 1978). Forty-four years on, all the constitutional changes made via the 44th Amendment have been enforced, except the one that deals with improving the preventive detention framework under the Constitution (Sections 1[2] and 3 of the amendment).

That preventive detention laws in India have a controversial history is well known (Seervai 1978). Some of the most significant judgements of the Supreme Court concern preventive detention laws. The first quote above is from the dissenting judgement of Justice Fazl Ali in *A.K. Gopalan*, which dealt with the Preventive Detention Act, 1950 and was the first ever fundamental rights case argued before the Supreme Court.

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The second quote is from a famous dissenting judgement of the court – Justice H.R. Khanna in *ADM Jabalpur*. That case involved another preventive detention law, the Maintenance of Internal Security Act (MISA), 1971, and the majority judgement permitting large-scale detentions without judicial review at the height of the Emergency is viewed as a low point in the court's history.

While both these celebrated dissents have now been resurrected approvingly by the Supreme Court in *Puttaswamy-I* (the right to privacy case), preventive detention laws continue to be used widely by the central and state governments. More than 12,000 persons found themselves in preventive detention in 2021, according to the National Crime Records Bureau (NCRB). Both union and state governments have enacted multiple preventive detention laws, dealing with everything from national security to the prevention of gambling, video piracy, and bootlegging.

Persons detained under such laws have few rights, with courts having limited powers to review detention orders, which are based on the executive's suspicion that a person might engage in illegal activity (for example, Section 3 of the National Security Act, 1980). Abuses of preventive detention are common with people often being preventively detained to thwart their release by courts (Sekhri 2020: 182), or with multiple detention orders being issued against persons to keep them in prison under a "revolving door" policy, or with near-routine detention orders passed during events such as elections. It is in this context that the non-enforcement of the preventive detention clauses of the 44th Amendment assumes significance.

Preventive detention and the Constitution

The Indian Constitution is one of the few constitutions in the world that explicitly permits preventive detention. Preventive detention was introduced to India during the colonial period and was largely used to target freedom fighters. It would therefore seem surprising that the Constitution allows both the union and state to enact preventive detention laws. While Parliament is exclusively entitled to enact preventive detention laws related to defence, foreign affairs, and the security of India (List I, entry 9), both Parliament and the state legislatures can make such laws for reasons to do with the maintenance of public order and ensuring supplies and services

essential to the community and the security of a state (List III, entry 3).

> Under the administrative review framework, no law can authorise the preventive detention of a person for more than three months unless an advisory board pronounces that there is sufficient cause.

Article 22, which is ironically located in the chapter on fundamental rights of the Constitution, expressly excludes preventive detention cases from direct judicial scrutiny and instead creates an administrative review framework. Under this provision, no law can authorise the preventive detention of a person for more than three months unless an advisory board pronounces that there is sufficient cause. It also outlines that this advisory board will comprise "persons who are, or have been, or are qualified to be appointed as, Judges of a High Court". However, it effectively leaves the matter of selecting the members of the advisory board to the government. Further, even the minimal review of these government-appointed advisory boards can be dispensed with by law.

Although many founders of the Indian republic considered preventive detention to be necessary given the communal violence of Partition and other security threats that accompanied the independence of India (Constituent Assembly Debates, 15 Sept–16 Nov 1949), the inclusion of this colonial and fundamentally illiberal practice in the Constitution has been criticised by scholars and practitioners over the years (Seervai 1978). It has also been noted that India's post-colonial preventive detention laws are often harsher than colonial era laws and wartime preventive detention laws in England (*ADM Jabalpur*; Sekhri 2020: 181). In this sense, preventive detention laws represent one of the many unfortunate post-colonial legal innovations in India.

Changes to the preventive detention framework

Although preventive detention was considered necessary and was retained in the 44th Amendment, three key changes were introduced to the constitutional framework surrounding it. First, the chief justice of the high court would select the persons on advisory boards and not the government. Second, while the original provision required advisory boards to consist of persons who are, or have been, or are qualified to be appointed as high court judges (Article 22(4)(a), Constitution), the 44th amendment requires the chairperson of the advisory board to be a sitting judge of the high court, and the other two members to either be sitting judges or retired judges.

Minister of Law Shanti Bhushan highlighted that the aim of these changes was to introduce a separation of powers within the preventive detention framework by ensuring that judges who are free from the control and influence of the executive are made to independently review whether there are adequate grounds for detaining a person. He believed independent review of preventive detention by the judiciary, and not the executive, would command the confidence of the people (Lok Sabha Debates, 7 Aug 1978).

> Ram Jethmalani, despite being a member of the ruling Janata Party, lambasted the retention of the practice stating, "The institution of preventive detention starts when the rule of law ends."

Third, the amendment took away the authority of Parliament to permit the preventive detention of a person without any reference to an advisory board. This would ensure that all cases where preventive detention exceeded two months would have to undergo judicial scrutiny. Notably, many at the time strongly argued for the complete removal of peacetime preventive detention powers from the Constitution.

For instance, Ram Jethmalani, despite being a member of the ruling Janata Party, lambasted the retention of the practice stating, "The institution of preventive detention starts when the rule of law ends" (Lok Sabha Debates, 7 Aug 1978). In response, Bhushan defended the retention of this admittedly "evil" power citing the prevailing "conditions in the country" and the new composition of the advisory boards as a check on abuse of power (Lok Sabha Debates, 10 Aug 1978).

Amended Article 22 not notified

Since the 44th Amendment was such a comprehensive overhaul of the Constitution (it contained 45 clauses) and required the establishment of institutions such as advisory boards, Section 1(2) of the Amendment permitted the central government to bring into force different provisions of the amendment on different dates. While the many provisions of the Amendment have been brought into force, successive central governments have refused to bring the amendments to Article 22 into force even after 44 years. The current government says that it cannot even give a specific time frame for this.

In *A.K. Roy v Union of India* (1981), the government's non-enforcement of the amendments to Article 22 was challenged before the Supreme Court. At that point, two and a half years had passed without these safeguards being notified and it was contended that this amounted to the executive defeating the will of Parliament. The court, by a slim 3:2 majority, rejected the argument on the questionable basis that Parliament itself had, under Section 1(2) of the Amendment, given "unfettered" power to the executive to decide the time and manner of implementing the amendment without prescribing any objective norms as to how the power was to be exercised.

> It must be said that while a delay of two and a half years in implementing the amended Article 22 could be understood to some extent, it is quite impossible to explain a delay of 44 years.

In contrast, Justice A.C. Gupta's powerful dissent (joined by Justice V.D. Tulzapurkar on this point) reasoned that Parliament only gave the executive limited discretion to notify the provision within a "reasonable" time frame. He also noted that the executive clearly was in a position to implement the amendment as a preventive detention law with similar safeguards had been passed initially, but these safeguards were removed from subsequent iterations of the law.

It must be said that while a delay of two and a half years in implementing the amended Article 22 could be understood to some extent, it is quite impossible to explain a delay of 44 years. Even the majority in *A.K. Roy* observed that "Parliament could not have intended that the central government may exercise a kind of veto over its constituent will by not ever bringing the Amendment or some of its provisions into force." Forty-four years later, one wonders whether successive central governments have indeed effectively vetoed Parliament. That it is time to review this decision is glaringly obvious.

Conclusion

In 2021, 100 former civil servants wrote an open letter to the law minister demanding that the amended Article 22 be notified in the context of a "brazen abuse of preventive detention laws in gross violation of human rights and a progressive erosion of our cherished democratic values."

While the importance of enforcing the amended Article 22 is clear, we also need to understand its limitations. As already mentioned, there are many who view preventive detention laws in peacetime as inherently undemocratic, something the 44th Amendment does not address. Even if enforced, an amended Article 22 would only protect persons in the presence of executive and judicial will. Though courts have often insisted on strict adherence to procedural requirements in preventive detention cases to protect personal liberty and check abuse, there have been multiple instances of courts falling woefully short (Bellary 2012).

The Supreme Court has often sided with the executive in denying important rights to detainees, such as the rights to cross-examination, to legal representation, and to oral hearings, and not requiring advisory boards to record detailed reasons for denying release. Such restrictive judgements have been rendered despite the existence of possibilities of more liberal interpretations. For instance, the right to cross-examination has been denied by the court despite B.R. Ambedkar stating in the Constituent Assembly that only "stark mad" governments would deny this to detainees (Constituent Assembly Debates, 16 September 1949).

Even at the height of its judicial activism, the court has largely deferred to the executive in matters of personal liberty (Bhuwania 2014: 321). In this regard too, the recent record of the Supreme Court is not compelling. Not only has it upheld draconian laws providing for extended periods of pre-trial detention, it has also repeatedly sided with the executive in restricting the ordinary rights to bail of persons.

> An amended Article 22 would be of little use without a strong and independent judiciary that is willing to stand up to the executive in the interests of the constitutional guarantee of personal liberty.

One of the proposed mechanisms through which the independence of advisory boards would be ensured is by ensuring judicial control over appointments (with chief justices of high courts in charge of selections). However, ostensible judicial control over appointments to the Supreme Court and high courts through the collegium system has failed to stem extensive executive interference – to the point that a retired Supreme Court judge has termed the collegium system on the verge of a "technical knockout."

Therefore, an amended Article 22 would be of little use without a strong and independent judiciary that is willing to stand up to the executive in the interests of the constitutional guarantee of personal liberty. This, in turn, requires sustained political pressure from the electorate and other democratic institutions.

At a time when the Supreme Court seeks to make great strides in developing rights such as those to privacy and equality, we hope that the executive is held accountable for blatantly disregarding the Constitution, and that it notifies the 44th Amendment's changes to Article 22.

John Sebastian is a PhD scholar at Melbourne Law School and an assistant professor at OP Jindal Global University, Sonipat. Faiza Rahman is a PhD scholar at Melbourne Law School, University of Melbourne.

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