



PROCEDURAL FAIRNESS IN PREVENTIVE DETENTION: MYTH OR REALITY?

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Abstract

Preventive detention remains one of the most contested features of constitutional democracies, particularly in India where it is explicitly sanctioned under Article 22 of the Constitution. While the constitutional framework incorporates procedural safeguards—such as communication of grounds of detention, review by Advisory Boards, and judicial oversight—their actual effectiveness remains deeply debated. This article critically examines whether these safeguards meaningfully protect individual liberty or merely function as formal legitimizing devices for executive action. Through doctrinal analysis, judicial interpretation, and engagement with scholarly literature, the paper argues that despite the presence of safeguards in law, structural deficiencies, executive dominance, and judicial deference significantly undermine their practical efficacy. The study concludes that procedural fairness in preventive detention operates more as a constitutional ideal than a lived reality, thereby necessitating urgent reforms to align practice with constitutional guarantees and international human rights standards.

Keywords: Preventive Detention; Procedural Fairness; Article 22; Advisory Boards; Judicial Review; Natural Justice; Civil Liberties; Constitutional Law

I. Introduction

Preventive detention, by its very nature, presents a paradox within constitutional democracies. It allows

the state to detain individuals without trial based on anticipated threats rather than proven guilt. This deviation from the traditional criminal justice model raises fundamental concerns regarding liberty, due process, and abuse of power.

In India, preventive detention is constitutionally recognized under Article 22, making it distinct from many liberal democracies where such measures are either severely restricted or abolished. The Constitution attempts to reconcile this exceptional power with safeguards intended to ensure procedural fairness. However, the effectiveness of these safeguards remains contested.

This article interrogates the central question: Do procedural safeguards in preventive detention genuinely protect individual liberty, or do they merely create an illusion of fairness?

II. Historical and Constitutional Context

A. Colonial Legacy and Continuity

Preventive detention in India has deep roots in colonial governance, where executive authority was prioritised over individual liberty. One of the earliest legal instruments was the Bengal Regulation III of 1818, which authorised the colonial administration to detain individuals on mere suspicion of threatening state security, without the requirement of trial or judicial scrutiny. This Regulation reflected the British colonial objective of maintaining political control rather than ensuring justice, particularly in suppressing dissent and nationalist movements.¹

Subsequent enactments, including the Defence of India Acts during the World Wars and the Rowlatt Act of 1919, further entrenched the practice of detention without trial. These laws institutionalised extraordinary executive powers, often bypassing procedural safeguards and normal criminal processes.² The colonial state justified such measures on grounds

¹ R.C. Nigam, *Law of Preventive Detention in India* (Asia Publishing House, 1963) 10–15.

² A.G. Noorani, “Preventive Detention and the Rule

of Law” (1996) 38 *Journal of the Indian Law Institute* 12.



of necessity and security, thereby normalising preventive detention as an instrument of governance. At the time of independence, despite strong opposition from several members of the Constituent Assembly, preventive detention was retained within the constitutional framework. The inclusion of Article 22 reflects a compromise between civil liberties and perceived security needs of the newly independent state.³ However, rather than marking a departure from colonial practices, the post-independence legal regime largely continued the same structure, albeit with formal safeguards.

Scholarly analysis suggests that modern preventive detention laws, such as the National Security Act, 1980, exhibit significant continuity with colonial legislation in both rationale and operation.⁴ The persistence of broad executive discretion and limited judicial intervention indicates that the transformation has been more formal than substantive. Consequently, preventive detention in India represents not a break from the past but an adaptation of colonial mechanisms within a constitutional framework.

B. Constitutional Framework under Article 22

The constitutional legitimacy of preventive detention in India is derived from Article 22(4)–(7) of the Constitution, which creates a distinct framework separate from ordinary criminal procedure. While clauses (1) and (2) guarantee rights available to arrested persons, clauses (4) to (7) carve out an exception by permitting detention without trial, subject to certain procedural safeguards.⁵ These provisions reflect a constitutional compromise, acknowledging the necessity of preventive detention in exceptional circumstances while attempting to mitigate its potential for abuse.

A key safeguard under Article 22(5) is the obligation of the detaining authority to communicate the grounds

of detention to the detainee “as soon as may be.” This requirement is intended to enable the detainee to make an effective representation against the detention order.⁶ Closely linked to this is the right to representation, which, although not equivalent to a full-fledged legal defence, allows the detainee to challenge the basis of detention before the appropriate authority.

Further, Article 22(4) mandates that no detention shall extend beyond three months unless the case is reviewed by an Advisory Board consisting of persons qualified to be judges of a High Court. The Board is tasked with examining whether sufficient cause exists for continued detention.⁷ Additionally, the Constitution imposes time limits on detention, ensuring that executive power is not exercised indefinitely without periodic review.

The constitutional scheme also permits Parliament to prescribe the maximum period of detention and the procedure to be followed by Advisory Boards under Article 22(7). This delegation of power has resulted in the enactment of several preventive detention statutes, such as the National Security Act, 1980, which operationalise constitutional provisions while often expanding executive discretion.⁸ Such legislative frameworks frequently determine the duration of detention, procedural timelines, and the extent of disclosure to detainees, thereby shaping the practical application of constitutional safeguards.

Judicial interpretation has attempted to infuse fairness into this framework by insisting on strict compliance with procedural requirements. Courts have repeatedly held that even minor procedural lapses such as delay in communicating grounds or failure to consider representations expeditiously can vitiate detention orders.⁹ Nevertheless, judicial review remains largely

³ M.P. Jain, *Indian Constitutional Law* (8th edn., LexisNexis, 2018) 1342–1345.

⁴ Upendra Baxi, “The Crisis of the Indian Legal System” (Vikas Publishing, 1982) 221.

⁵ M.P. Jain, *Indian Constitutional Law* (8th edn.,

LexisNexis, 2018) 1346.

⁶ A.K. Roy v. Union of India, (1982) 1 SCC 271.

⁷ Constitution of India, art. 22(4).

⁸ National Security Act, 1980.

⁹ Khudiram Das v. State of West Bengal, (1975) 2



confined to procedural scrutiny rather than substantive evaluation of the necessity of detention.

Moreover, the constitutional allowance for non-disclosure of facts in the interest of public security significantly dilutes the right to representation. By enabling the executive to withhold relevant material, this provision restricts the detainee's ability to effectively challenge the detention order. Scholars argue that this exception undermines the very rationale of procedural safeguards, as it creates an imbalance between state power and individual rights.¹⁰

Despite these limitations, Article 22 continues to be defended as a pragmatic necessity in a complex security environment. It embodies an attempt to reconcile competing interests individual liberty and collective security within a constitutional framework. However, the breadth of executive discretion and the limited scope of enforceable safeguards indicate that the balance is not entirely even.

Thus, while Article 22 formally incorporates procedural protections against arbitrary detention, its structural design and operational realities reveal an inherent tension. The framework aspires to uphold fairness, yet its effectiveness remains contingent upon executive restraint and judicial vigilance, both of which have proven inconsistent in practice.

III. Conceptualizing Procedural Fairness

Procedural fairness constitutes a foundational principle of constitutional governance, grounded in the doctrines of natural justice particularly *audi alteram partem* (the right to be heard) and the rule against arbitrariness. In the Indian context, this principle has been significantly expanded through the interpretation of Article 21, which mandates that any deprivation of life or personal liberty must follow a procedure that is

“just, fair, and reasonable,” and not arbitrary, fanciful, or oppressive.¹¹ This transformative interpretation has enabled courts to read substantive due process into the constitutional framework, thereby strengthening protections against state excesses.

However, the application of procedural fairness becomes complex in the context of preventive detention. Unlike ordinary criminal proceedings, preventive detention does not involve a formal trial, nor does it guarantee the full spectrum of procedural safeguards such as the presumption of innocence, the right to cross-examine witnesses, or access to all evidentiary material.¹² The detainee is often placed in a position where liberty is curtailed based on executive satisfaction rather than judicial determination.

This deviation from conventional criminal justice norms significantly narrows the scope of procedural fairness. The limited disclosure of grounds, absence of open hearings, and restricted opportunities for representation create a framework where fairness is procedural in form but constrained in substance.¹³ As a result, the evaluation of fairness in preventive detention must account for these structural limitations and the dominant role of executive discretion.

Scholarly commentary suggests that procedural fairness in this domain operates within a diluted framework, where the safeguards are designed more to regulate rather than eliminate arbitrariness.¹⁴ Consequently, the concept of fairness in preventive detention remains inherently qualified, reflecting a tension between constitutional ideals and security imperatives.

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¹⁰ Upendra Baxi, “Preventive Detention and the Rule of Law” (1982) 24 *Journal of the Indian Law Institute* 123.

¹¹ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

¹² M.P. Jain, *Indian Constitutional Law* (8th edn., LexisNexis, 2018) 1350.

¹³ H.M. Seervai, *Constitutional Law of India* (4th edn., Universal Law Publishing, 1996) Vol. 1, 761.

¹⁴ Upendra Baxi, “The Crisis of the Indian Legal System” (Vikas Publishing, 1982) 224.



IV. Communication of Grounds: Substantive Right or Formal Compliance?

A. Legal Framework

The requirement to communicate the grounds of detention to a detainee constitutes one of the most crucial procedural safeguards within the preventive detention regime. Article 22(5) of the Constitution mandates that the detaining authority must inform the detainee of the grounds on which the detention order has been made, “as soon as may be,” in order to enable the detainee to make an effective representation against such detention.¹⁵ This safeguard reflects the broader principles of natural justice, particularly the right to be heard, which is an essential component of fairness in any system that permits deprivation of liberty.

Judicial interpretation has consistently reinforced the importance of this requirement. The Supreme Court has held that the communication of grounds must not be a mere formality but must be real, meaningful, and sufficient to enable the detainee to challenge the detention order.¹⁶ In *Khudiram Das v. State of West Bengal*, the Court emphasized that the grounds must be relevant, precise, and based on material facts, rather than vague or indefinite allegations.¹⁷ Similarly, in *A.K. Roy v. Union of India*, it was observed that the constitutional mandate requires effective communication, not merely formal compliance.¹⁸

Further, courts have stressed that the grounds must be communicated in a language understood by the detainee, as failure to do so would render the right to representation illusory.¹⁹ Thus, the legal framework envisages communication as a substantive right designed to provide the detainee with a meaningful opportunity to contest the detention.

B. Practical Challenges

Despite the clarity of the constitutional and judicial mandate, the practical implementation of this safeguard reveals significant deficiencies.

1. Vagueness of Grounds

One of the most persistent issues is the use of vague and generalized grounds in detention orders. Authorities often rely on broad assertions such as threats to “public order” or “state security” without providing specific factual details. Such vagueness prevents the detainee from effectively understanding the allegations or responding to them. The Supreme Court has repeatedly cautioned against this practice, holding that vague grounds violate constitutional requirements; however, such deficiencies continue to appear in practice.²⁰

2. Language Barriers

Another critical limitation arises from the failure to communicate grounds in a language known to the detainee. In a linguistically diverse country like India, this issue assumes particular significance. Courts have held that communication in an unfamiliar language undermines the detainee’s right to representation, as it deprives them of the ability to comprehend and respond to the allegations.²¹ Nevertheless, instances of non-compliance persist, especially in cases involving marginalized or less educated detainees.

3. Non-Disclosure in Public Interest

Article 22(6) permits the state to withhold facts that it considers against public interest to disclose. While this provision is intended to protect sensitive information, it also creates a significant limitation on the detainee’s right to know the full basis of detention.²² In practice, this exception is often invoked broadly, allowing authorities to avoid disclosing critical material. As a

¹⁵ Constitution of India, art. 22(5).

¹⁶ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

¹⁷ *Khudiram Das v. State of West Bengal*, (1975) 2 SCC 81.

¹⁸ *A.K. Roy v. Union of India*, (1982) 1 SCC 271.

¹⁹ *Harikisan v. State of Maharashtra*, AIR 1962 SC

911.

²⁰ *Dr. Ram Manohar Lohia v. State of Bihar*, AIR 1966 SC 740.

²¹ *Hadibandhu Das v. District Magistrate, Cuttack*, AIR 1969 SC 43.

²² Constitution of India, art. 22(6).



result, the detainee is left to challenge the detention order without access to all relevant information, thereby weakening the effectiveness of representation.

C. Critical Evaluation

The gap between the normative framework and its practical application raises serious concerns regarding the effectiveness of this safeguard. While the Constitution and judiciary envision communication of grounds as a substantive right, its implementation frequently reduces it to a procedural ritual. The use of vague language, failure to ensure intelligibility, and reliance on non-disclosure provisions collectively undermine the purpose of the safeguard.

Scholarly analysis suggests that this dilution reflects a broader structural imbalance within the preventive detention regime, where executive convenience often takes precedence over individual rights.²³ The inability of detainees to access complete and clear information significantly weakens their capacity to make effective representations, thereby eroding the very foundation of procedural fairness.

In effect, the communication of grounds, though formally robust, operates within a constrained framework that limits its practical utility. It serves as an important constitutional safeguard in theory, but in practice, it often functions as a mechanism of formal compliance rather than substantive protection.

V. Advisory Boards: Institutional Safeguard or Executive Extension?

A. Constitutional Role

Advisory Boards occupy a central position within the constitutional scheme of preventive detention as envisaged under Article 22(4). The Constitution mandates that no person shall be detained beyond a period of three months unless an Advisory Board,

consisting of individuals qualified to be High Court judges, reports that there exists sufficient cause for such detention.²⁴ This mechanism is intended to introduce an element of independent scrutiny over executive action and to ensure that detention is not prolonged without justification. In theory, the Advisory Board functions as a quasi-judicial body that reviews the legality and necessity of continued detention, thereby acting as a safeguard against arbitrary exercise of executive power.

B. Structural Limitations

Despite its intended role, the functioning of Advisory Boards is marked by several structural limitations that raise doubts about their effectiveness.

1. Lack of Independence

The process of appointment of members by the executive gives rise to concerns regarding institutional independence. Although members are required to possess judicial qualifications, their selection by the same authority responsible for detention orders creates an inherent risk of bias or deference.²⁵

2. Limited Procedural Safeguards

Proceedings before Advisory Boards do not follow the strict standards of judicial trials. Detainees are generally not entitled to legal representation as a matter of right, nor are they allowed to cross-examine witnesses or access all evidentiary materials relied upon by the state.²⁶ This restricted procedure limits the detainee's ability to effectively contest the grounds of detention.

3. Endorsement of Executive Decisions

Empirical and scholarly studies indicate that Advisory Boards seldom invalidate detention orders.²⁷ The low

²³ Upendra Baxi, "Preventive Detention and the Rule of Law" (1982) 24 *Journal of the Indian Law Institute* 123.

²⁴ Constitution of India, art. 22(4).

²⁵ M.P. Jain, *Indian Constitutional Law* (8th edn.,

LexisNexis, 2018) 1348.

²⁶ A.K. Roy v. Union of India, (1982) 1 SCC 271.

²⁷ Upendra Baxi, "Preventive Detention and the Rule of Law" (1982) 24 *Journal of the Indian Law Institute* 123.



rate of intervention suggests that the review process often functions as a formality, with Boards largely endorsing executive determinations rather than critically examining them.

C. Evaluation

The cumulative effect of these limitations significantly weakens the role of Advisory Boards as an independent safeguard. Instead of acting as a robust check on executive authority, they frequently operate within a framework that favours validation over scrutiny. As a result, their contribution to ensuring procedural fairness remains limited, reinforcing the perception that they serve more as instruments of legitimisation than as effective mechanisms of accountability.

VI. Judicial Review: A Limited but Crucial Safeguard

A. Scope of Judicial Intervention

Judicial review constitutes the primary constitutional mechanism for testing the legality of preventive detention orders. Courts exercise this power through their writ jurisdiction under Articles 32 and 226 of the Constitution, most notably by issuing writs of habeas corpus.²⁸ This remedy enables the judiciary to examine whether a detention order conforms to constitutional and statutory requirements, thereby offering detainees a vital avenue to challenge unlawful deprivation of liberty.

B. Constraints on Judicial Review

Notwithstanding its importance, the scope of judicial review in preventive detention matters remains significantly circumscribed.

1. Subjective Satisfaction Doctrine

A central limitation arises from the doctrine of subjective satisfaction, under which courts generally refrain from assessing the sufficiency or correctness of the grounds of detention. Instead, judicial scrutiny is

confined to examining whether procedural requirements have been complied with.²⁹ This approach restricts courts from engaging with the substantive merits of detention decisions.

2. Judicial Deference

In cases involving national security or maintenance of public order, courts have traditionally shown deference to executive judgment. This tendency reflects institutional caution but often results in limited scrutiny of detention orders.³⁰

3. Delay and Accessibility

Practical barriers such as delays in adjudication and limited access to legal resources further weaken the effectiveness of judicial remedies. In preventive detention, where liberty is at stake, such delays can render relief largely ineffective.

C. Progressive Developments

Despite these constraints, the judiciary has, in certain instances, adopted a more rights-oriented approach by insisting on strict adherence to procedural safeguards. Courts have invalidated detention orders for even minor procedural lapses, thereby reinforcing the importance of constitutional compliance.³¹

D. Evaluation

Judicial review remains the most significant safeguard against arbitrary detention. However, its limited scope, combined with judicial deference and procedural constraints, reduces its capacity to ensure substantive fairness. While it provides an essential check on executive power, its effectiveness in safeguarding individual liberty remains partial and context-dependent.

VII. Systemic Interaction of Safeguards

The procedural safeguards embedded within the framework of preventive detention are not isolated guarantees; rather, they operate as an interconnected system intended to collectively protect individual

²⁸ Constitution of India, arts. 32 & 226.

²⁹ State of Bombay v. Atma Ram, AIR 1951 SC 157.

³⁰ M.P. Jain, *Indian Constitutional Law* (8th edn.,

LexisNexis, 2018) 1352.

³¹ Rekha v. State of Tamil Nadu, (2011) 5 SCC 244.



liberty. The effectiveness of this framework depends upon the proper functioning of each component communication of grounds, representation, Advisory Board review, and judicial oversight. However, weaknesses in any one element tend to undermine the overall efficacy of the system.³²

Inadequate or vague disclosure of grounds directly affects the detainee's ability to make a meaningful representation. When the material facts underlying detention are either insufficiently communicated or partially withheld, the right to representation becomes largely ineffective.³³ This limitation is further compounded by the functioning of Advisory Boards, which are expected to independently assess the validity of detention orders. Structural concerns, including limited procedural safeguards and lack of institutional independence, often result in a review process that does not rigorously scrutinise executive action.³⁴

The restricted scope of judicial review further diminishes the corrective capacity of the system. Courts, bound by the doctrine of subjective satisfaction and principles of judicial restraint, frequently limit their inquiry to procedural compliance rather than substantive justification.³⁵ Consequently, even where deficiencies exist in disclosure or review, judicial intervention may not fully address the underlying issues.

Scholarly analysis suggests that these interrelated deficiencies produce a cumulative effect, weakening the protective framework envisaged under the Constitution. Instead of functioning as mutually reinforcing safeguards, they operate in a manner that allows gaps in one area to persist uncorrected by

others. This systemic imbalance ultimately leads to a dilution of procedural fairness, raising serious concerns about the adequacy of protections against arbitrary detention.

VIII. Comparative and International Perspective

Preventive detention laws must also be assessed in light of international human rights standards, particularly those embodied in the International Covenant on Civil and Political Rights (ICCPR), to which India is a party. Article 9 of the ICCPR recognises the right to personal liberty and explicitly restricts arbitrary detention, requiring that any deprivation of liberty must be lawful, necessary, and accompanied by adequate procedural safeguards.³⁶

A central requirement under international law is **prompt judicial review**, whereby any detained person must be brought before a judicial authority without undue delay. This ensures that executive action is subjected to immediate and independent scrutiny.³⁷ Additionally, international standards emphasise the need for **independent oversight mechanisms**, free from executive influence, to examine the legality and necessity of detention. Such bodies must function with procedural transparency and fairness, allowing detainees meaningful participation.³⁸

Further, the ICCPR mandates the availability of **effective remedies**, including the right to challenge detention before a court and obtain release if the detention is found unlawful. These safeguards are designed to ensure that detention without trial does not become arbitrary or indefinite.

³² M.P. Jain, *Indian Constitutional Law* (8th edn., LexisNexis, 2018) 1353.

³³ Khudiram Das v. State of West Bengal, (1975) 2 SCC 81.

³⁴ A.K. Roy v. Union of India, (1982) 1 SCC 271.

³⁵ State of Bombay v. Atma Ram, AIR 1951 SC 157.

³⁶ International Covenant on Civil and Political Rights, 1966, art. 9.

³⁷ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn., N.P. Engel, 2005) 211.

³⁸ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd edn., Oxford University Press, 2013) 308.



When evaluated against these standards, India's preventive detention framework reveals notable deficiencies. While the Constitution provides for review by Advisory Boards and access to judicial remedies, the lack of full independence in oversight mechanisms and the limited scope of judicial review weaken their effectiveness.³⁹ Moreover, procedural practices such as delayed hearings, restricted disclosure of information, and executive dominance reduce transparency and accountability.⁴⁰

Scholarly analyses have observed that the Indian model, though constitutionally structured, does not fully align with the rigorous procedural guarantees envisaged under international law. Consequently, the gap between domestic practice and international standards raises concerns about the adequacy of protections against arbitrary detention.

IX. Procedural Fairness: Myth or Reality?

A. Arguments Supporting Effectiveness

The constitutional framework governing preventive detention in India is often justified on the basis that it incorporates procedural safeguards intended to check arbitrary state action. Article 22 provides for communication of grounds, the opportunity to make a representation, and periodic review by an Advisory Board, thereby embedding elements of accountability within the system.⁴¹ These safeguards are supplemented by the availability of judicial remedies under Articles 32 and 226, which enable detainees to approach constitutional courts through writ petitions, particularly habeas corpus.⁴²

Judicial intervention has, at times, played a significant role in enforcing these safeguards. Courts have repeatedly stressed that procedural requirements must be strictly complied with, and even minor deviations such as delay in considering representations or failure to supply relevant documents have been held sufficient to invalidate detention orders.⁴³ Such decisions indicate that the judiciary has sought to ensure that preventive detention does not operate entirely beyond constitutional scrutiny.

Moreover, it is argued that preventive detention serves an important function in addressing threats to national security and public order, where traditional criminal processes may prove inadequate. From this perspective, procedural safeguards are viewed as a pragmatic compromise that allows the state to act preemptively while maintaining a minimum level of legal oversight.⁴⁴

B. Arguments Highlighting Ineffectiveness

Despite these formal safeguards, a substantial body of scholarship points to their limited effectiveness in practice. One of the central concerns is the predominance of executive discretion at every stage of the detention process, from the issuance of orders to the control over information disclosed to the detainee.⁴⁵ This concentration of power often diminishes the practical value of procedural protections.

Structural deficiencies further weaken the framework. Advisory Boards, though intended as independent bodies, operate within constraints that limit their ability to conduct rigorous scrutiny. The absence of adversarial procedures, combined with restricted

³⁹ M.P. Jain, *Indian Constitutional Law* (8th edn., LexisNexis, 2018) 1354.

⁴⁰ Upendra Baxi, "Preventive Detention and Human Rights in India" (1982) 24 *Journal of the Indian Law Institute* 123.

⁴¹ H.M. Seervai, *Constitutional Law of India* (4th edn., Universal Law Publishing, 1996) Vol. 1, 758–760.

⁴² V.N. Shukla, *Constitution of India* (13th edn.,

Eastern Book Company, 2017) 245.

⁴³ *Ichhu Devi Choraria v. Union of India*, (1980) 4 SCC 531

⁴⁴ Law Commission of India, 44th Report on Preventive Detention Laws (1971) 32.

⁴⁵ A.G. Noorani, "Preventive Detention: A Necessary Evil?" (2002) 44 *Journal of the Indian Law Institute* 412.



access to evidence, reduces their role to a largely confirmatory exercise.⁴⁶

Judicial review, while available, is similarly constrained by the doctrine of subjective satisfaction and a tendency towards institutional deference in matters involving security concerns.⁴⁷ Courts often confine themselves to examining procedural compliance rather than the substantive necessity of detention, thereby limiting their capacity to act as robust guardians of liberty.

Additionally, the lack of transparency—particularly through the use of public interest exceptions to withhold information—impairs the detainee's ability to mount an effective challenge. Empirical studies and law reform reports have highlighted that these limitations cumulatively result in a system where safeguards are observed in form but not always in substance.⁴⁸

C. Final Assessment

A holistic evaluation suggests that the preventive detention regime embodies a tension between constitutional ideals and administrative realities. While the existence of safeguards and judicial remedies cannot be denied, their operation is frequently undermined by structural and constitutional constraints. The cumulative effect is a system in which procedural fairness is unevenly realised and often dependent on judicial intervention in individual cases. Accordingly, procedural fairness in preventive detention may be characterised as **partly substantive but largely formal in operation**. The framework provides the appearance of protection, yet its practical effectiveness remains limited in ensuring consistent and meaningful safeguards against arbitrary detention.

X. Recommendations for Reform

The continuing concerns surrounding preventive detention necessitate a re-examination of the existing framework with a view to strengthening procedural fairness. One of the foremost reforms required is ensuring the independence of Advisory Boards. Although members are required to possess judicial qualifications, their appointment by the executive raises apprehensions of institutional bias. A more transparent and independent appointment mechanism, possibly involving the judiciary, would enhance credibility and impartiality.⁴⁹

Another critical reform relates to the disclosure of detention grounds. The constitutional safeguard under Article 22(5) can only be meaningful if detainees are provided with complete and intelligible information. While Article 22(6) permits non-disclosure in the interest of public security, its broad application often undermines the right to representation. Narrowing the scope of this exception and mandating fuller disclosure would strengthen the detainee's ability to effectively challenge detention.⁵⁰

The scope of judicial review also requires expansion. At present, courts largely confine themselves to procedural scrutiny, refraining from examining the substantive necessity of detention. A more robust standard of review, allowing limited scrutiny of the material basis of detention, would serve as a stronger check on arbitrary executive action.⁵¹

Further, the introduction of periodic judicial oversight could address concerns of prolonged detention without meaningful review. Regular judicial scrutiny at defined intervals would ensure that detention remains justified and proportionate over time.⁵²

⁴⁶ S.P. Sathe, *Judicial Activism in India* (Oxford University Press, 2002) 198.

⁴⁷ Additional District Magistrate, Jabalpur v. Shivkant Shukla, (1976) 2 SCC 521.

⁴⁸ Law Commission of India, 177th Report on Law Relating to Arrest (2001) 89.

⁴⁹ M.P. Jain, *Indian Constitutional Law* (8th edn.,

LexisNexis, 2018) 1356.

⁵⁰ H.M. Seervai, *Constitutional Law of India* (4th edn., Universal Law Publishing, 1996) Vol. 1, 762.

⁵¹ S.P. Sathe, *Judicial Activism in India* (Oxford University Press, 2002) 201.

⁵² Law Commission of India, 44th Report on Preventive Detention Laws (1971) 45.



Finally, aligning domestic preventive detention laws with international human rights standards is essential. Instruments such as the ICCPR emphasise prompt judicial control, transparency, and effective remedies against unlawful detention. Incorporating these principles into domestic law would help bridge the gap between constitutional guarantees and actual practice.⁵³

Collectively, these reforms aim to recalibrate the balance between state security and individual liberty, ensuring that preventive detention operates within a framework that genuinely upholds procedural fairness.

X. Recommendations for Reform

The concerns surrounding the operation of preventive detention laws necessitate targeted reforms aimed at strengthening procedural safeguards and ensuring meaningful protection of individual liberty. A primary reform lies in securing the independence of Advisory Boards. Although constitutionally envisaged as impartial reviewing bodies, their appointment by the executive raises doubts regarding neutrality. Introducing a more transparent selection process, with judicial involvement, would enhance institutional credibility and reduce the risk of executive influence.⁵⁴ Another significant reform involves mandating fuller disclosure of detention grounds. The right to representation under Article 22(5) can only be effective if detainees are provided with clear, specific, and complete information. The existing provision allowing non-disclosure in the public interest has often been interpreted broadly, limiting transparency. A narrower and more carefully regulated application of this exception would better protect the detainee's ability to challenge detention.⁵⁵

Expanding the scope of judicial review is equally essential. At present, courts generally restrict themselves to examining procedural compliance, avoiding inquiry into the substantive basis of detention. A calibrated expansion allowing limited scrutiny of the material relied upon by the executive would provide a stronger safeguard against arbitrary action.⁵⁶

Further, the introduction of periodic judicial oversight would ensure that continued detention is subject to regular and independent evaluation. Such a mechanism would prevent prolonged detention without adequate justification.⁵⁷

Finally, aligning domestic preventive detention laws with international human rights standards, particularly those under the ICCPR, would promote greater accountability⁵⁸ and transparency. Incorporating these norms into domestic practice would help ensure that preventive detention operates within a framework consistent with constitutional and global human rights principles.

XI. Conclusion

Preventive detention occupies a deeply contested space within the Indian constitutional framework, embodying a tension between the preservation of state security and the protection of individual liberty. While the Constitution formally legitimises such detention under Article 22, it simultaneously incorporates procedural safeguards intended to prevent arbitrary exercise of power.⁵⁹ This dual structure has often been described as a constitutional compromise, attempting to reconcile competing imperatives within a single legal framework.

⁵³ International Covenant on Civil and Political Rights, 1966, art. 9; see also Manfred Nowak, *CCPR Commentary* (2nd edn., 2005) 215.

⁵⁴ M.P. Jain, *Indian Constitutional Law* (8th edn., LexisNexis, 2018) 1356.

⁵⁵ A.K. Roy v. Union of India, (1982) 1 SCC 271.

⁵⁶ S.P. Sathe, *Judicial Activism in India* (Oxford

University Press, 2002) 202.

⁵⁷ Law Commission of India, 44th Report on Preventive Detention Laws (1971) 47.

⁵⁸ International Covenant on Civil and Political Rights, 1966, art. 9.

⁵⁹ M.P. Jain, *Indian Constitutional Law* (8th edn., LexisNexis, 2018) 1357.



However, the functioning of these safeguards in practice reveals significant limitations. The procedural protections relating to communication of grounds, representation, Advisory Board review, and judicial oversight, though well-articulated in law, frequently suffer from inconsistent implementation. Structural constraints, such as executive dominance and limited institutional independence, diminish their effectiveness.⁶⁰ Judicial review, while an important corrective mechanism, is itself constrained by doctrines of deference and restricted scope, often focusing on procedural compliance rather than substantive justification.⁶¹

Scholarly analysis has consistently highlighted that preventive detention laws, owing to their colonial lineage and broad executive discretion, remain susceptible to misuse. The persistence of vague detention orders, limited disclosure of material, and ineffective oversight mechanisms further underscores the gap between constitutional ideals and operational realities.

In this context, procedural fairness cannot be viewed as fully realised. Rather, it exists in a qualified and uneven form, dependent largely on judicial intervention in individual cases rather than systemic guarantees.⁶² The cumulative effect of these deficiencies supports the argument that procedural safeguards often function more as formal requirements than as substantive protections.

Accordingly, preventive detention continues to represent a constitutional anomaly where the promise of fairness is not consistently translated into practice. Addressing this imbalance requires not only doctrinal clarity but also institutional reforms aimed at strengthening accountability and safeguarding civil liberties in a meaningful manner.⁶³

⁶⁰ H.M. Seervai, *Constitutional Law of India* (4th edn., Universal Law Publishing, 1996) Vol. 1, 763.

⁶¹ *State of Bombay v. Atma Ram*, AIR 1951 SC 157.

⁶² A.G. Noorani, "Preventive Detention and Constitutional Safeguards" (2002) 44 *Journal of the*

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