

**INTERNATIONAL JOURNAL OF LAW**  
**MANAGEMENT & HUMANITIES**

**[ISSN 2581-5369]**

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**Volume 4 | Issue 3**

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**2021**

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# Preventive Detention Laws in India: An Analysis

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## ABSTRACT

*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. The author emphasizes how the preventive detention law is, by nature, repugnant to democratic ideas and an anathema to the rule of law in India. Author further brings his views in comparative to the law that exists in the USA and in England which is exclusively used during war time. The author puts that if the ordinary law of the land (Indian Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal in India. An individual incident of an offence under the Penal Code, however heinous, is insufficient to make out a case for issuance of an order of preventive detention and that is practiced in India as the law is static one it has to be amended according to the welfare of the society. Further the author emphasis the Principle of Natural Justice in consonance with Article 22(3) and how it to be amended accordingly. Section 7 of T.N Act 14, 1982 how it has to be reformed is focused by the author. The author has concluded that apart from disciplinary action against the police, there is no Penal provisions available against the police to punish for their wrongful act against the innocents in India.*

**Keywords:** Preventive, Detention, natural justice, punitive.

## I. HISTORICAL LANDMARKS RELATED TO PREVENTIVE DETENTION IN INDIA - AN

### INTRO

In India the history of preventive detention dates back to the early days of the British rule when under the Bengal Regulation— III of 1818 (the Bengal State Prisoners Regulation) the government was empowered to detain anybody on mere suspicion.

Rule 26 of the Rules framed under the Defences of India Act 1939 allowed the detention of a person if it was “satisfied with respect to that particular person that such detention was necessary to prevent him from acting in any manner prejudicial” to the defence and safety of

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the country.

**Post-Independence:** The first Preventive Detention Act was passed in 1950. The validity of this act was challenged in the Supreme Court in the *A.K Gopalan Vs. State of Madras* Court<sup>2</sup>. The Supreme Court held this act constitutionally valid except some provisions. This act expired in 1969, and before it expired, it was amended for 7 times, each expansion was to make it valid for 3 more years and this it was extended till 31 December 1969.

In 1971, the Maintenance of Internal Security Act (**MISA**) was passed by the parliament; the act was basically a modified version of the PDA Act (1950). The Maintenance of Internal Security Act (MISA) giving the administration of Prime Minister Indira Gandhi and Indian law enforcement agencies super powers - indefinite preventive detention of individuals, search and seizure of property without warrants, and wiretapping - in the quelling of civil and political disorder in India, as well as countering foreign-inspired sabotage, terrorism, subterfuge and threats to national security. During the period of national emergency (1975-1977) as thousands of innocent people were believed to have been arbitrarily arrested, tortured and in some cases, forcibly sterilized. some 1,00,000 people, which included journalists, scholars, activists and opposition politicians were detained without trial for a period of up to eighteen months. Some people were even detained for opposing forced sterilization drives or demolition of slums carried out during this period. The law was repealed in 1977 following the election of a Janata Party-led government; the 44th Amendment Act of 1978 similarly removed MISA from the 9th Schedule.

Another law, Conservation of Foreign exchange and Prevention of Smuggling Activities (**COFEPOSA**) was enacted in 1974, under this Act preventive detention in certain cases for the purposes of conservation and augmentation of foreign exchange and prevention of smuggling activities and for matters connected therewith because violating of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy and thereby a serious adverse effect on the security of the State. The maximum punishment has been mentioned under section 10 of the above act.

In the heat of the terrorism in Punjab the Terrorist & Disruptive Activities (Prevention) Act or infamous **TADA** was enacted in 1985. It was renewed in 1989, 1991 and 1993 and lapsed in 1995 due to increasing unpopularity due to widespread allegations of abuse. The main abuse was that a confession before a police officer, even though being given under torture, was admissible as evidence in court. According to this Act the arrested person has to be produced

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<sup>2</sup> AIR 1950 SC 27

before the Magistrate within 24 hours but he has to be detained up to 180 days without filling any charge sheet, which is similar to the later act POTA Act (2002)

Another similar act Prevention of Terrorism Ordinance (**POTO**) of 2001 came into force. Both the TADA & POTO were later succeeded by another controversial Prevention of Terrorist Activities Act (POTA) during 2002-04. This act was supported by the NDA Government but later was scrapped by the UPA government.

After the Bombay attacks of November 26, 2008 parliament enacted another anti-terror law known as unlawful Activities (Prevention) Act.<sup>3</sup>

## **II. APPLICATION OF PREVENTIVE DETENTION LAWS IN INDIA**

### **National Security Act, 1980**

Allows for detention without charge or trial for up to 12 months to prevent a person "from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, or the security of India" or "from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community"

### **Conservation of Foreign Exchange and Prevention of Smuggling Act, 1974**

Allows for detention without charge or trial for up to two years to prevent a person from "i) smuggling goods, or (ii) abetting the smuggling of goods, or (iii) engaging in transporting or concealing or keeping smuggled goods, or (iv) dealing in, smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or (v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods."

### **Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988**

The Act allows for detention without charge or trial for up to two years to prevent a person "from engaging in illicit traffic in narcotic drugs and psychotropic substances".

### **Prevention of Black marketing and Maintenance of Supplies of Essential Commodities Act, 1980**

Allows for detention without charge of trial for up to six months to prevent a person "from acting in any manner prejudicial to the maintenance of supplied of commodities essential to

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<sup>3</sup> *Availible at* : <http://www.gktoday.in/article-22-and-preventive-detention-in-india> (Last Modified on Feb 22,1999)

the community"

#### **TN ACT 14, 1982**<sup>4</sup>

Allows for detention without charge or trial of up to 12 months of "any bootlegger or drug offender or forest offender or goonda or immoral traffic offender or sand offender or offender or slum grabber or video pirate...to prevent him from acting in any manner prejudicial to the maintenance of public order"

#### **Karnataka Prevention Act, 1985**<sup>5</sup>

Allows for detention without charge or trial of up to 12 months of "any acid attacker or bootlegger or depredator of environment or digital offender or drug offender or gambler or goonda or immoral traffic offender or land-grabber or money launderer or sexual predator or video or audio pirate...to prevent him from acting in any manner prejudicial to the maintenance of public order". Similarly, in Kerala it allows for detention without charge of trial for up to six months to prevent "any known goonda or known rowdy...from committing any anti-social activity"<sup>6</sup>

#### **Andhra Pradesh Prevention of Dangerous Activities of Boot-Leggings, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986**

It allows for detention without charge of trial of up to 12 months of any 'bootlegger, dacoit, drug-offender, goonda, immoral traffic offender or land grabber...with a view to preventing him from acting in any manner prejudicial to the maintenance of public order. Another similar Act in Andhra Pradesh allows for detention without charge of trial for up to six months to prevent "a communal offender from acting in any manner prejudicial to the maintenance of public order".<sup>7</sup>

#### **Telangana Prevention of Dangerous Activities of Boot-Leggings, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986**

The Act allows for detention without charge of trial of up to 12 months of any 'bootlegger, dacoit, drug-offender, goonda, immoral traffic offender or land grabber...with a view to preventing him from acting in any manner prejudicial to the maintenance of public order.'

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<sup>4</sup> Tamil Nadu Prevention Of, Boot-Leggings, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers, Sexual Offenders, Slum-Grabbers And Video Pirates Act, 1982.

<sup>5</sup> Karnataka Prevention of Dangerous Activities of Acid Attackers, Bootleggers, Depredator of Environment, Digital Offenders, Drug Offenders, Gamblers, Goondas, Immoral Traffic Offenders, Land Grabbers, Money Launderers, Sexual Predators and Video or Audio pirates Act, 1985

<sup>6</sup> Kerala Anti-Social Activities (Prevention) Act, 2007

<sup>7</sup> Andhra Pradesh Prevention of Dangerous Activities of Communal Offenders Act, 1984

Likewise, another similar Act<sup>8</sup> allows for detention without charge of trial for up to six months to prevent "a communal offender from acting in any manner prejudicial to the maintenance of public order".

### **Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders, Dangerous Persons and Video Pirates Act, 1981**

Allows for detention without charge of trial for up to six months to prevent a person "from acting in any manner prejudicial to the maintenance of public order". In another state enactment of Maharashtra allows for detention without charge of trial for up to six months to prevent a person "from acting in any manner prejudicial to the maintenance of public order".<sup>9</sup>

### **Gujarat Prevention of Anti-social Activities Act, 1985**

Allows for detention without charge of trial for up to one year to prevent a person "from acting in any manner prejudicial to the maintenance of public order".

### **Odisha Prevention of Dangerous Activities of Communal Offenders Act, 1993**

Allows for detention without charge of trial for up to twelve months to prevent a communal offender from acting in any manner prejudicial to the maintenance of public order.

### **Rajasthan Prevention of Anti-Social Activities Act, 2006**

It allows for detention without charge of trial for up to one year preventing a person "from acting in any manner prejudicial to the maintenance of public order".

### **Himachal Pradesh Preservation of Forest and Maintenance of Supplies of Forest-Based Essential Commodities Act, 1984**

Allows for detention without charge of trial for up to one year to prevent a person "from acting in any manner prejudicial to the prevention of the forests in the State and the maintenance of forest-based supplies and services essential to the community and for matters connected therewith".

### **Jharkhand Control of Crimes Act, 2002**

Allows for detention without charge of trial for up to 12 months to prevent a person "from acting in any manner prejudicial to the maintenance of public order".

### **West Bengal (Prevention of Violent Activities) Act, 1970**

Allows for detention without charge or trial for up to twelve months prevent a person "from

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<sup>8</sup> Telangana Prevention of Dangerous Activities of Communal Offenders Act, 1984

<sup>9</sup> Maharashtra Prevention of Communal, Anti-Social and other Dangerous Activities Act 1980

acting in any manner prejudicial to the security of the State or the maintenance of public order"

### **Assam Preventive Detention Act, 1980**

The above Act allows for detention without charge or trial for up to two years to prevent a person "from acting in any manner prejudicial to the security of the State, the maintenance of public order or the maintenance of supplies and services essential to the community"

### **III. ICCPR VS PREVENTIVE DETENTION LAWS IN INDIA**

Preventive detention is not explicitly prohibited by the ICCPR. Whether preventive detention is a permissible deprivation of liberty depends on whether it falls within the prohibition on arbitrary arrest and detention under **Article 9(1) of the ICCPR**.

This Article states:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Consistent with **Article 31(1) of the Vienna Convention**, this paper will firstly apply a textual analysis to the ordinary meaning of Article 9(1) of the ICCPR as a starting point for interpretation. This Article of the Vienna Convention recommends:

A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

#### **Narrow Interpretation of ‘Arbitrary’**

There are two possible interpretations of the word ‘**arbitrary**’:

An arrest or detention is ‘arbitrary’ if it is *unlawful*, that is, not in accordance with procedure as laid down by law; (‘narrow interpretation’) or

An arrest or detention is ‘arbitrary’ if it is *unlawful* or *unjust*, that is, under the provisions of a law that do not accord with the principles of justice.

Arrest or detention is ‘arbitrary’ if under a law the purpose of which is incompatible with respect for the right to liberty and security of person (‘wide interpretation’).

#### **Wide Interpretation of ‘Arbitrary’**

Given the effect of the narrow interpretation of ‘arbitrary’ for preventive detention, it is contended the wide interpretation of ‘arbitrary’ is more persuasive. The word ‘arbitrary’ should not just require a deprivation of liberty to be in accordance with procedures as established by

law, but also imposes an additional higher requirement. The word ‘arbitrary’ is concerned with the actual content of laws, not just compliance with procedures in accordance with law.

### **Ordinary meaning of ‘arbitrary’**

The dictionary meaning of the word ‘arbitrary’ supports a contention that the term in the ICCPR should be accorded a wide interpretation. The ‘ordinary meaning’ of the word ‘arbitrary’ clearly contemplates more than just ‘unlawful’.

The plain meaning of ‘arbitrary’ is:

- (1) depending on individual discretion (as of a judge) and not fixed by law;
- (2a) not restrained or limited in the exercise of power: ruling by absolute authority; an arbitrary government.
- (2b) marked by or resulting from the unrestrained and often tyrannical exercise of power protection from arbitrary arrest and detention;
- (3a) based on or determined by individual preference or convenience rather than by necessity or the intrinsic nature of something; an arbitrary standard;
- (3b) Existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will.<sup>10</sup>

### **Structural analysis of Article 9(1) ICCPR**

That the word ‘arbitrary’ should be accorded a wide meaning is also supported by a structural analysis. Article 9(1) is comprised of three sentences: Everyone has the right to liberty and security of person No one shall be subjected to arbitrary arrest or detention No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law

In this Article:

- (a) There is a right accorded to personal liberty and security in the first sentence;
- (b) There is a prohibition on arbitrary arrest and detention in the second sentence; and
- (c) There is a requirement that a deprivation of liberty be in accordance with procedures established by law (‘the principle of legality’) in the third sentence. If the drafters had intended a restrictive interpretation of the word ‘arbitrary’, there would be no point in including both the second and third sentences of the Article.

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<sup>10</sup> Available at: <http://www.mw.com/cgi-bin/dictionary?book=Dictionary&va=arbitrary>.



The prohibition on arbitrary arrest and detention would be entirely superfluous because protection against solely unlawful arrest and detention would be covered by the principle of legality. On a structural analysis, a different meaning must have been intended for the prohibition on arbitrary arrest and detention, distinct from the principle of legality, protecting unlawful arrest and detention. As drafted, the Covenant is consistent if a distinct meaning is attributable to the prohibition on arbitrary detention (focusing on unlawful arrest and detention), and the principle of legality (concerned with the protection from arbitrary laws in addition to unlawful acts).<sup>11</sup>

### ***Contextual analysis of ‘unlawful’ in other Articles of the ICCPR***

The context of the word ‘arbitrary’ and ‘unlawful’ in other Articles of the ICCPR support the proposition that a wide interpretation should be accorded to the word ‘arbitrary’ in Article 9(1).

Three other Articles of the ICCPR are relevant:

a) **Article 17** – The right to privacy provides:

No one shall be subjected to *arbitrary* or *unlawful* interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

b) **Article 6(1)** – The right to life provides:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be *arbitrarily* deprived of his life.

In *Toonen Vs. Australia*, the Human Rights Committee interpreted this requirement of reasonableness in Article 17 of the ICCPR to ‘imply that any interference with the privacy must be proportional to the end sought and be necessary in the circumstances of any given case’.<sup>12</sup>

### **The Prohibition on Arbitrary Arrest and Detention Applied To Preventive Detention**

Preventive detention is not explicitly provided for in international human rights law, nor does the prohibition on arbitrary arrest and detention exclude preventive detention *per se*. That preventive detention is not prohibited under the arbitrary arrest and detention provisions of the international human rights instruments is supported by the fact that the authoritative international institutions have refused on several occasions to condemn the practice in unequivocal terms.<sup>13</sup>

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<sup>11</sup> Laurent Jr Marcoux, “Protection from Arbitrary Arrest and Detention Under International Law” (1982) 5(2) Boston College International And Comparative Law Review 345, 359.

<sup>12</sup> Toonen Vs. Australia, Communication No.488/1992, UN Doc CCPR/C/50/D/488/1992 (1994), para 8.3

<sup>13</sup> Derek P Jinks, “The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India” (2001) 22 Michigan Journal of International Law 311, 27.

In fact, preventive detention was clearly contemplated by the General Comments of the Human Rights Committee on Article 9 of the ICCPR: Also, if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions i.e. it must not be arbitrary, and must be based on grounds and procedures established by law.<sup>14</sup>

That preventive detention is consistent with the right to personal liberty and security and does not offend the prohibition on arbitrary arrest and detention is a view similarly evidenced by India's reservation to Article 9 of the ICCPR.<sup>15</sup>

Preventive detention is provided for in Article 22 of the Constitution of India, permitting preventive detention in non-emergency situations, allowing the detention of a person without charge or trial for a period of up to three months without judicial review. Article 22(3) of the Constitution of India excludes procedural guarantees to any person who is arrested or detained under any law providing for preventive detention. A person in preventive detention is not entitled to be informed of the grounds for such arrest nor entitled to judicial review before a Magistrate. Article 22(4) of the Constitution of India prohibits preventive detention for a period of longer than three months unless an Advisory Board finds sufficient cause for continued detention. In respect of the preventive detention provisions of the Constitution of India, the Indian Government entered a reservation to Article 9 of the ICCPR:

With reference to Article 9 [the right to personal liberty] the Government of the Republic of India takes the position that the provisions of the Article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of Article 22 of the Constitution of India. A reservation in international law is a statement that purports to exclude or modify the legal effect of a treaty in its application to a State.<sup>16</sup>

According to General Comment 24 of the Human Rights Committee, 'if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation'. The reservation by India does not purport to exclude or modify Article 9 of the ICCPR, but instead puts the other State Parties on notice that India's interpretation of Article 9 is consistent with and reflected in its Constitution.

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<sup>14</sup> Human Rights Committee, General Comment 8, Article 9 (Sixteenth Session, 1982), UNDOC.HRI/GEN/1/Rev.1, 8 (1994).

<sup>15</sup> David H Bayley, "Preventive Detention in India": A Case Study in Democratic Social Control (1962) and Derek P Jinks, 'The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India' (2001)

<sup>16</sup> Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, CCPR/C/21/Rev.1/Add.6 (04/11/94), 2.

The Indian Government's view is that preventive detention laws under Article 22 of the Constitution of India do not involve an arbitrary or an unlawful deprivation of liberty. That Article 9(1) can be used in cases of preventive detention has also been confirmed by the Human Rights Committee in *Campora Schweizer Vs. Uruguay*, in which it was stated:

According to Article 9(1) of the Covenant, no one shall be subjected to arbitrary arrest or detention. Although administrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner, the Committee emphasizes that the guarantees enshrined in the following paragraphs of article 9 fully apply in such instances.<sup>17</sup>

In this case the applicant was kept under 'prompt security measures' without charges at the disposal of the executive authorities. He had been arrested on grounds of 'association to break the law'. The Court held that the applicant's imprisonment violated Article 9(3) and (4) since he had not been brought before a judge and could not take proceedings to challenge his arrest and detention. Although preventive detention is not in itself a violation of the ICCPR, the wide definition of 'arbitrary' discussed above has significant consequences for preventive detention.

The wide definition of 'arbitrary' means unjust preventive detention legislation will violate Article 9(1) ICCPR. If the provisions of a law authorizing preventive detention have elements of inappropriateness, injustice and lack of predictability, it will be 'arbitrary' for the purposes of the right to personal liberty and security. For example, when preventive detention is used to counter-terrorism it may be considered *arbitrary*, an issue beyond the scope of this paper.

Further, although preventive detention is not, *per se*, excluded by the prohibition on arbitrary arrest and detention, detention will be 'arbitrary' when a detainee is not accorded procedural safeguards. In cases where preventive detention abrogates the safeguards in Article 9, there will be a breach of the prohibition on arbitrary arrest and detention, as well as a violation of the specific Article in question.

#### IV. VICTIM RIGHTS UNDER ICCPR

**Article 9(1)** of the **ICCPR** states: 'No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law'. By referring to the procedure as established by law, it could be argued the word 'arbitrary' is simply requiring arrest and detention to be 'lawful', that is, in accordance with legislative procedures. The provisions of the ICCPR providing for judicial review of detention similarly support a

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<sup>17</sup> *David Alberto Campora Schweizer Vs. Uruguay*, "Communication No. 66/1980 (15 March 1980), UN Doc.Supp.No.40 A/38/40), 117 (1983), [18.1]"

restrictive interpretation of the word ‘arbitrary’.

**Article 9(4)** of the **ICCPR** provides: who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

#### **Article 9(5) Right to Compensation for Unlawful Arrest or Detention**

Article 9(5) of the ICCPR provides:

Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. The ICCPR applies to all ‘unlawful detentions’. This would include detentions which are unlawful under the ICCPR, or detentions which are unlawful under a State’s own domestic law.<sup>18</sup>

The fact that the Article refers to ‘lawful’ and ‘unlawful’ arrest and detention arguably militates in favor of a restrictive interpretation of the word ‘arbitrary’, that is, contrary to a procedure established by law. If the narrow interpretation of ‘arbitrary’ is correct, preventive detention is permissible under the ICCPR once it is within the scope of, and in accordance with, the legislative or executive authorization permitting the detention to occur. Preventive detention, even as a result of despotic, tyrannical, objectively unreasonable legislation, would therefore be acceptable under this Article of the ICCPR.

## **V. CONCLUSION & SUGGESTIONS**

Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time).<sup>19</sup> Therefore, that if the ordinary law of the land (Indian Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal.<sup>20</sup>

The personal liberty of an individual is the most precious and prized right guaranteed under the Constitution in Part III thereof. The State has been granted the power to curb such rights under criminal laws as also under the laws of preventive detention, which, therefore, are required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are in any way prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order, warranting the issuance of such an order. An individual incident of an offence under the Penal Code, however heinous, is insufficient to make out a

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<sup>18</sup> Stephen Bailey, “Rights in the Administration of Justice” in David Harris and Sarah Joseph (eds), (1995).

<sup>19</sup> Yumman Ongbi Lembi Leima Vs. State Of Manipur ( (2012) 2 SCC 176)

<sup>20</sup> Stephen Bailey, “Rights in the Administration of Justice” in David Harris and Sarah Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995).

case for issuance of an order of preventive detention.<sup>21</sup>

- Law is not a static one it has to be amended according to the welfare of the society.
- Article 22(3) has to be amended as it is against the Principle of Natural Justice.
- Section 7 of T.N Act 14, 1982 has to be reformed.

Apart from disciplinary action against the police, there is no Penal provisions are available against the police to punish for their wrongful act against the innocents.

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<sup>21</sup> Supra Note 19