

**PREVENTIVE DETENTION IS MOST  
CONTESTED LETTERS OF GOVERNMENT  
MIGHT: AN OVERVIEW**

التدابير الاحترازية هي اكثر التحديات والاسئلة التي تواجه الحكومة : نظرة عامة

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**Abstract:**

In general, preventive detention is a practice that would be good because it would help to prevent crime; but bad because it would infringe on the basic right that people have to liberty unless they are convicted or a crime through the due process of law. In this article an attempt is made to describe briefly what preventive detention in general and legal manner. And the democratic countries provided provisions for preventive detention in nutshell. With this the nature, of preventive detention and advantages and disadvantages of pre-trial detention in some selected countries us focused. Reference is also made to elaborate the significance of liberty lastly arguments against preventive detention and justification for it discussed. Together they give can idea of balance in public interest and individual right.

**Introduction:**

General Assembly of the United Nations Organizations adopted Universal Declaration of Human Right on 10<sup>th</sup> December 1948 which has paved way significantly for Humanities. The human rights organizations have been working throughout the world to enforce human rights in different countries. It is a universal right which the entire mankind can enjoy freely irrespective of race, colour, sex, language, religion, political or other opinion. National or Social origin, property birth or other status. Life and liberty has great importance in all the freedoms because without it other freedoms are meaningless and can't exists.

Jacques Maritain says, “ The human person possesses right because of the very fact that it is a person, a whole, a master of itself and its acts and which consequently is not merely a means to can and but an end which must be treated as such .... These are things which are owed to man because of the very fact that he is a man.”<sup>1</sup>

Sometime right possessed by man because of the very fact that he is a man may be curtailed down in the interest of the society to balance between individual liberty and public interest is become herculean task on behalf of concern authority. Preventive detention is one of them. Preventive detention entails the incarceration of a person who has not been convicted of a criminal offence. Based on his dangerousness, in order to prevent him from causing public harm. Its primary manifestation are pretrial detention, the administrative detention of person suspected of being terrorists or enemy combatants, and the involuntary civil commitment of sex offenders following the completion of their prison terms. Despite the various contexts of these cases, dangerousness constitutes the sole basis for depriving same persons of their liberty in the absence of convictions. Although there Exists preventive detention laws directly or indirectly in all the countries of the world, yet there is no universal definition, procedure and patterns of law in the world. Normally, society uses the criminal trials to cope with the dangerousness of sane person.<sup>2</sup> However, the criminal trial, conducted according to traditional roles of evidence and procedure, is not always adequate for punishing an offender. Evidence may be inadmissible or insufficient to prove guilt beyond a reasonable doubt. Additionally, the prosecution may not be able to bring evidence at trial for reasons having nothing to do with reliability of the evidence itself, such as concern for a witnesses life and safety or to avoid exposing sources.<sup>3</sup> Moreover, the trial process is inadequate for dealing with future offences. Since the state is forbidden from inflicting punishment for a future act. On this background questions arises in mind such as, whether in the interest of public state can entail personal liberties? Whether individual liberties arc meaningless? Monastery compensation is only solution for deprivation of life & liberty? What will the scope of personal life and liberty? To save the society from future dangers preventing individual through detention will be the only recourse? and so many. Hence, it is not irrelevant to see its meaning and definition, nature and reasonableness and practice in the world as need of hour as right to life and liberty is the mother of all freedoms. Although there exists preventive detention laws directly or indirectly in all the countries of the world, yet there is no universal definition of the preventive detention due to the difference in the application of law.

**Meaning / Definition of Preventive Detention**

There is no universal definition of preventive detention in the world. But in cases by different countries judge has interpreted the term preventive detention which is become its meaning in general parlance. In *R.V.Halliday*<sup>4</sup> the expression, “preventive detention” was used for the first time in Britain. The word “preventive” means that restraint, whose object is to prevent probable or possible activity which is apprehended from a detenué would be on grounds of his past activities.<sup>5</sup> The word “detention”

means keeping back.<sup>6</sup>The parliaments of various countries have enacted laws regarding preventive detention. The term “preventive detention” means the detention the aim of which is to prevent a person from doing something which is likely to endanger the public peace or safety or ceasing public disorder.<sup>7</sup> In *A.K. Gopalan V. state of Madras*.<sup>8</sup> it was held that: “there is no authoritative definition of the term ‘preventive detention’..” It is not a punitive but a precautionary measure. In *R.V. Halliday*<sup>9</sup> it has been stated that, “One of the obvious means of taking precaution against dangers such as are enumerated is to impose some restriction on the freedom of movement of person whom may be any reason to suspect of being disposed to help the enemy.” Preventive detention is an abnormal measure whereby the executive is authorized to impose restraints upon liberty of a man who may not have committed a crime but who, it is apprehended, is about to commit acts that are prejudicial to public safety.<sup>10</sup> Preventive detention means a detention of a person only on suspicion in the mind of the executive authority without trial and without conviction by the court.<sup>11</sup> preventive detention is not to punish an individual for any wrong done by him but to prevent him from acting in manner prejudicial to the state.<sup>12</sup> It is a pretrial internment. Preventive detention is serious encroachment upon the personal liberty of a person, for a simple reason that unlike ordinary arrest or imprisonment. Preventive detention is effected without trial.<sup>13</sup> Preventive detention on a peculiar measure in the sense that it imposes restrictions on the liberty of a citizen to the extent that a person who has not committed any offence may be presumed that he is about to commit an offence, which has been defined as prejudicial . As David H Bailey said, “A law of preventive detention sanctions the confinement of individuals in order to prevent them from engaging in forms of activity injurious to the community and the likelihood of which is indicated by their past actions.<sup>14</sup>In guise of preventive detention law, the executive authority exercises discretionary power regarding arrest and detention. Preventive detention is an imprisonment that is putatively justified for non-punitive purpose. The imprisonment of a person with the aim of preventing them for committing further offences or of maintaining public order.<sup>15</sup> Further the your dictionary.com has also provided the meaning of preventive detention as:

1. The detention in jail, prior and during criminal trial, of a defendant deemed to dangerous for release.
2. Imprisonment without trial of a person identified by authorities as a danger society.<sup>16</sup> Preventive detention, the practice of incarcerating accused individuals before trial on the assumption that their release would not be in the best interest of society-specifically, that they would be likely to commit additional crimes if they were released. Preventive detention is also used when the release of the accused is felt to be detrimental to the states ability to carry out its investigation. In some countries the practice has been attacked as a denial of certain fundamental rights of the accused.<sup>17</sup>

#### **Legal Definition:**

A confinement of an accused person pending trial, under terms of a status authorizing denial of bail to defendants charged with having committed certain offences and/or are considered to be a danger to themselves or to the public at large.<sup>18</sup> Preventive detention is the confinement in a secure facility of a person who has not found guilty of a crime. Preventive detention as a special form of imprisonment most persons held in preventive detention are criminal defendant but state and federal laws also authorize the preventive detention of persons who have not been accused of crimes. Such as such mentally ill persons.<sup>19</sup> After taking into account all above definitions and meanings of preventive detention one can say that, a person can be put in jail / custody for two reasons . . . The custody arising out of the later is preventive detention and in this, a person is deemed likely to commit a crime. Thus preventive detention is done before the crime has been committed by a sane or mentally ill person. The definition of preventive detention itself is confusing so to see its nature is important.

#### **Nature of preventive detention:**

Everything has its own identity and characteristics by it the thing has its nature, so the nature of preventive detention is different from other detention namely punitive detention. Because, detention may be of two types punitive detention and preventive detention. The term preventive detention is wed in contradiction to punitive detention. The preventive detention is the detention of a person without trial in such a circumstances that the evidence in the possession of the authorities is not sufficient to draw up a legal charge or secure the conviction of detenu by legal proof; but all the same, it is justified, no offence is proved nor any charge formulated but the justification is dictated by suspicion. It is an anticipatory

measure and doesn't relate to can offence while criminal proceedings is to punish persons for an offence committed by him. Thus preventive detention of a person without trial and convicted by a court, out merely on suspicion in the minds and executive authority.<sup>20</sup> Justice Mukherjee<sup>21</sup> described the distinction between preventive and punitive, by which one can easily understand the nature of both. He observed "A person is punitively detained only after a trial for committing a crime and after his guilt has been established competent court of justice, preventive detention on the other hand; is not a punitive but a precautionary measure. the subject is not to punish a man for having done some things but to interrupt him before he does it and to prevent him from doing it. No offence is proved nor any charge formulated and the justification is suspicion or reasonable probability and not criminal conviction which only can be warranted by legal evidence. According to justice Vinan Bose.<sup>22</sup> preventive detention has three special features.

1. It is an detention not imprisonment.
2. It is detention by the executive authority without trial or inquiry by a court and;
3. The object is preventive and not punitive.

Thus it is precautionary measure and its objects not to punish but to prevent doing something prejudicial act against public. Justice Mukherjee defined preventive detention as which consists in restraining a man from committing a crime, which he may commit but has not yet committed, or doing some act injuries to the members of the community which he may do but has not yet done. Thus when a person comes within the satisfaction of executive e.g. the government authority that a person is going to commit prejudicial act against state or public interest, he may be detained through preventive detection to prevent/defend him from doing such act. Thus the act itself mentioned that prejudicial act against Bangladesh but it's matter of sorrow that no government and state, the act says for prejudice act against the state, not to the government.<sup>23</sup> But preventive detention is a armed measure where by the executive is authorized to impose restraints upon the liberty of a man who may not have committed a crime but who, it is apprehended, is about to commit acts that are prejudicial to public safety etc. preventive detention makes an inroad on the personal liberty of a citizen without safeguards inherent in a formal that before a judicial tribunal and it must be jealously kept within the bounds fixed for it by the constitution and relevant law. The Indian supreme court observed, " preventive detention is a serious invasion of personal liberty and such meager safeguard as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the court. Since the preventive detention laws allows much unlimited powers to executive authorities to arrest and detention a person, as a result, every government use this law in order to protect their political interest, stability etc. in the name of security and interest of the state consequently many times detaining authorities violate fundamental rights of the citizens and abuse the powers given under preventive detention laws to satisfy the government. Preventive detention is a relatively recent phenomenon. Before the 1970 the general practice in criminal courts was to set a bail for almost all criminal defendants. For defendants accused particularly heinous crimes courts would set the amount of bail so high that the defendants were unlikely to be released. Defendants in murder cases were held in jail without bail through the end of trial.<sup>24</sup> Preventive detention may also be imposed on persons other than criminal defendants. States may detain mentally unstable individuals who present a danger to the public including criminal defendants found not guilty by reason of insanity. In *Addington v. Texas*<sup>25</sup> the high court ruled that a state may place mentally unstable persons in preventive detention for an in definitive period of time, but only after the government has shown by at least a preponderance of Evidence that person presents a danger to himself or herself or to others. If the person becomes mentally stable and shows no sign of mental illness, continued confinement of the person violates due process.<sup>26</sup>

The supreme court has ruled that persons accused of dangerous crimes who become incompetent before trial may be placed in preventive detention until they are competent.<sup>27</sup> The court also ruled that potentially dangerous resident aliens may be detained pending deportation proceeding.<sup>28</sup> Finally, juveniles who have been arresting on the suspicion that they have committed a crime may be placed in preventive detention if they present a danger to the community.<sup>29</sup> Moreover, preventive detention is concerned with the future and not the past. For example, while the punishment for membership in a terrorist organization

is relatively mind, the dangers of terrorism are severe. Preventive detention may be used in this circumstance to eliminate threat of more dangerous offences occurring in the future.

### **Preventive Detention in Few Countries: at Glance**

#### **Australia :**

Australian laws authorize preventive detention in a variety of circumstances. For example, mandatory detention in Australia (a form of immigration detention) is applied to asylum seekers who arrive in Australian water or territory, until their status as an asylum seeker is established.<sup>30</sup>

**Canada** Anyone declared a dangerous offender by the courts is subject to an indefinite period of detention.

**Costa Rica :**In Costa Rica, the 1998 criminal proceeding code allowed for a normal pre trial “prison preventive” or remand.<sup>31</sup> of 12 months if the person is considered a “flight risk”, but if the case is declared “complex” it can be increased to up to three years and a half imprisonment without conviction on even more in some cases. As on 23 may 2013 over 3000 people were in pre-trial detention.

**Denmark:**In Denmark police can detain people for 16 years without involving the courts or pay compensation for wrongful arrest. In relation to the ongoing gang war in Copenhagen between the wiker gangs and second generation youth gangs it has been suggested to extend the 6 hour limit to several weeks. Before the Copenhagen climate council a new set of emergency laws was introduced allowing the police to detain people for up to 12 hours without charging them for a crime.<sup>32</sup>

**Malaysia:**In Malaysia the internal security Act, 1960 was a preventive detention law that was enacted after Malaysia gained independent from Britain in 1957. The ISA allowed for detention without trial or criminal charges under limited, legally defined circumstances. the ISA was invoked against terrorism activity and against anyone deemed a threat to national security, on 15<sup>th</sup> September 2011, Nazib Rozak , the prime minister of Malaysia, said that legislation would be repealed and replaced by two new laws. On 17 April 2012, The security offences (specials measures) Act, 2012 was approved by the Malaysian Parliament as a replacement for the ISA. It was given the royal assent on 18 June 2012 and Gazetted on 22 June 2012.<sup>33</sup>

**South Africa :**Under Apartheid, the Government of South Africa used preventive detention laws to target its political opponents. These include, notably, The Terrorism Act of 1967 which gave police commanders the power to detain terrorist or people with information about terrorist – without warrant.<sup>34</sup>

#### **United Kingdom:**

England and Wales used to have provisions, introduced by the labor Government in 2003 to deal with dangerous offenders similar to what is used in Canada. However, the Legal Aid , sentencing and punishment of offenders Act ,2012 abolished what was called imprisonment for public protection without replacement , although offences committed prior to the coming into force of the 2012 Act may still trigger IPP.<sup>35</sup>

**Germany:** Germany’s Constitution forbids a person to be punished twice for the same crime. But Germany also has relatively start person sentences compared to other European countries. Preventive detention was sometimes used to keep people deemed dangerous in custody longer but there was a cap of ten years.<sup>36</sup> This ten years limit was lifted in 1998. Six years later another law allowed exerts to order preventive detention retroactively to priories up until shortly before they were to be released, effectively allowing a person's sentence to be extended. at the will of the courtThe number of people in preventive detention began to increase as did appeals to the European court of Human Right in Strausbourg, many detainees argued that the practice violated both article 5 (Liberty and Severity) and Article 7 (retroactively). The former ensure the right to due process, the later says a court can't reach back in time and extend a person's sentence. Germany’s Federal Constitution Court Rules in 2011 that German law–despite some reforms–were in breach of the German Constitution and ordered tens of thousands of Euros paid in compensation to for offenders convicted of child rape and attempted murder but had each been held for more than a decade after completing their sentences.<sup>37</sup>

#### **A Mental Illness Rationale:**

Germany has changed its laws again . New amendments in force since 2013 ended the power to impose preventive detention retroactively. It also brought in the arguments that those in preventive

detention suffered a mental disorder or were of “unsound mind”, keeping it in line with the European Convention Human Rights.

### Flash Forward to 2016

Germany’s institution now treat detainees differently than ordinary prisoners. Larger ,more comfortable cells have been designed to draw a distinction between prisoners serving fixed sentences and those confined indefinitely under preventive detention.<sup>38</sup> But there are cities who say the reasoning to offer enhanced therapy for mental disorders and enhanced condition is more legal gymnastics to satisfy legal requirements than a good faith effort to rehabilitate.

**United States of America:** In United states, the sixth Amendment to the United States Constitution guarantees the right “to speedy and public trial” Thus arrested persons may not be held for extended periods of time without trial . however, since the passage of the National Defence Authorization Act for fiscal year 2012 controllers has broken out as to whether or not the U.S . Government now has the power to identify detain citizens. Section 1021 and 1022 of legislation enacted policies described by “The Guardian” as allowing indefinite Detention “without trials (of) American terrorism suspect, arrested on U.S. soil who could then be shipped to Guantanamo Bay.<sup>39</sup> Convicted person can be held indefinitely as a dangerous offender<sup>40</sup>

### Key Characteristics of Pre-Trial Detention Framework Countries:

In each of pre-trial detention framework countries “preventive detention” is Considered to be a tool of the criminal justice system that may only be employed during a criminal justice system that may only be employed during a period of pre-trial detention.<sup>41</sup> pretrial detention framework Countries characteristics can be described as follow.

#### A) Legal basis for detention :

In the pre-trial detention framework countries, in common with almost all other nations there are provision in their penal codes and in other laws governing the administration of criminal justice that stipulate when and how individuals may be held pending criminal charges and trial for terrorist acts . some of the pre-trial detention framework Countries, such as Ireland, Norway, German, and Brazil apply exactly the same pre-trial detention rules to all criminal suspect, including those charged with terrorist acts.<sup>42</sup> Other nation, such as France, Italy Greece , and Turkey .have enacted special provision and exceptions within their penal codes governing the treatment including detention- of terrorist suspects what might be called a “penal code plus” approach . In all instances, though the legal basis for pre-trial “preventive” detention is found in the regular criminal laws.

**B) Notification of charges:** Under these criminal laws, the pre-trial detention countries have substantially similar standards for the notification of charges against terrorist suspects. In all but one of the pre- trial detention are afforded the some notification of the charges that they face as all other criminal suspects are afforded in regular criminal proceedings. In Denmark, individuals must be notified “as soon as” possible<sup>43</sup> of the charges they face, and in Ireland individuals must be notified “as soon as practicable” of any charges.<sup>44</sup> In Brazil, Italy, Turkey and the United Kingdom a terrorist suspect is entitled to notification of the charges he faces promptly and “as soon as is reasonable practicable” in the case of England.<sup>45</sup>

In Colombia, a detained suspect must appear before a judge within thirty-six hours of arrest, which is the latest point at which he may be informed of the charges that he faces.<sup>46</sup> Similarly in France, Germany, Greece and Norway the latest point at which a detained individual may informed of the totality of the charges against him is at is first hearing before a judicial authority which in all instances occurs within a maximum of three days after the individuals initial arrest. In case of India they said period is within 24 hours of the arrest of an individual.<sup>47</sup>

#### C) Indian appearance / Review:

In case of the pretrial detention framework countries, similar standards of initial judicial review of the detainees confinement are enforced. In each of these nations, terrorists suspects held in pre-trial detention are entitled to prompt initial review of that detention by an officer of the regular criminal court, rather than by an agent of the executive or by an administrative appointee. In Greece, all arrested persons, including terrorist suspects, must be brought before the public prosecutor within twenty-four hours of arrest and referred to an examining magistrate who deals with all types of crimes.<sup>48</sup> In France, a judge of

the special terrorist section of the trial court of pans must authorize any detention of terrorist suspects for more the Forty-eight hours. In Germany, any individual who are being held without charge must appear before a local district court judge, “without delay, not later than on the day after his apprehension”.<sup>49</sup> which in practice, means that individuals are ordinary detained for twenty four hours, but may be held for up to forty-eight hours. In different countries the period of appearance or review by prescribed judge or magistrate is differ according to the law of countries.

**D) Period of detention without charge or trial:**

The early use of judicial review, as oppose to administrative review, in each of these countries is an important reason for why these countries are classified as within the pre-trial detention frame work of preventive detention. There is wide Varian among the pre-trial frame work countries time limits for pre-trial detention. One or two can be taken as examples in representative manner. In Denmark, for example, pre-charge detention shall not exceed three days, and pre-trial detention “shall be as short as possible and must not exceed for weeks” but this time limit may be extended with a judge’s approval by four-weeks blocks.<sup>50</sup> In Colombia, the Constitution prohibits indefinite detention, but provides no explicit limit for pre-trial detention and prolonged pretrial detention is common.<sup>51</sup> Similarly in Brazil, the law does not provide for a maximum period for pre-trial detention, the length of which is determined instead on a case-by-case basis.<sup>52</sup>

**E) Access to legal council :**

In all of the pre-trial detention framework countries, there is right to counsel for individuals held pending trial for terrorism related activity and, in most (but not all) countries, there is a right state-funded counsel as amicus curia. In Brazil, Colombia, Denmark, Norway, and Ireland there is a right to counsel and a right to legal aid for those who cannot afford to pay for their own lawyers.<sup>53</sup> In the United Kingdom, the same is true, and if a detainee can’ not afford counsel, the court will appoint one to represent the detainee.<sup>54</sup> In Germany, there is also a right to counsel and government funded legal aid, but pre-trial detainees do not receive legal aid until they have been detained for three months, or the United Kingdom for government funded counsel to be appointed to represent detainee. In all respects, there is no difference in any of these countries between the access to counsel afforded terrorist suspects held in preventive detention and the access to counsel provided for all other criminal suspects.

**F) Right to a fair and public hearing:**

The right to a fair hearing is enshrined in most of the legislation and jurisprudence relating to terrorist suspects being held in “preventive detention” in the pre-trial detention framework countries. In Norway, Denmark, and Germany, terrorist suspects held in pre-trial detention are also guaranteed a “public” hearing in the regular criminal courts.<sup>55</sup> In Greece terrorism suspects are brought to trial in the regular court of appeal before a there member panel composed of a senior jurist. In Colombia, before cases are heard exclusively by the criminal judges, of the specialized circuit, but all defendants, including terrorists suspects, enjoy the Constitutional right to a and public hearing.<sup>56</sup>

**G) Judicial Review:** The availability of periodic ongoing judicial review is another hallmark of the pre-trial detention framework. In each pre-trial detention frame work country, pre-trial detainees have the right to appeal their detention through the regular criminal justice system, up to the highest court in the land. In Denmark, after the lower city court has ruled that an individual should be detained. It must review the detention order every four weeks by law detainees have the right of appeal to the high court.<sup>57</sup> In Greece detainees may appeal their detention to the council of the court of misdemeanors; pre-trial detention of longer than a year must be approval by the council of the court of Appeals. In Ireland, detained terrorist suspects have the right of appeal to the High Court, including a right to habeas corpus.<sup>58</sup> In Colombia, terrorism cases are heard exclusively by the criminal judges of the specialized circuit, and accused individuals have the right of appeal and the right to habeas corpus. In the U.K., individuals detained charges have a right to challenge extension of their pre-trial detention in the court of appeal and, ultimately, the Supreme court of the United Kingdom.<sup>59</sup>

**H) Rules regarding interrogation :**

The pre-trial detention framework countries have adopted a similar approach to interrogation and detention questioning. Denmark, France, Germany, Greece the Republic of Ireland, Norway, Spain, Italy

and the United Kingdom are all signatories to the European Convention on Human Rights.<sup>60</sup> Article 3 of the European convention on Human Rights states that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment,<sup>61</sup> and the European convention for the prevention of torture establishes that a European committee. Will have unfettered access to all party signatories places of detention to ensure that no inhumane or degrading treatment or torture is being carried out.<sup>62</sup> There are therefore strict and binding prohibitions in all of pre-trial detention framework countries against torturing or inhumanly treating detainees in their charge, or using any information collected by overseas allies who use such techniques.

### **Advantages and Disadvantages of the Pre-Trial Detention Framework**

At first glance, there seem to be many advantages to the pre-trial detention framework of preventive detention. Terrorist acts almost invariably involve violations of the criminal’s law, so treating terrorist in a manner similar to the way others who violate the law are treated is not obviously illogical. Using the criminal justice system to try suspected terrorist enables experienced and qualified individuals to investigate, prosecute, and convict suspected terrorists trials within the regular court system, and granting members of the judiciary oversight of pre-trial preventive detention also confers considerable legitimacy on the process. in all of the pre trial detention framework countries, as in the United states, the judiciary is dependant the executives same is India.<sup>63</sup> the independence and impartiality of the judge ordering the initial period of preventive detention combined with a detainees right or appeal to a higher tribunal of independent jurist guarantees a certain degree of fairness in proceeding exists and, compares favourably to the criticisms of illegitimacy that have been levelled against the opaque, executive controlled U.S. national security detention regime in operation on Guantanamo . The final argument in favour of the pre-trial detention framework is that it appears to work. It appears to have worked in France where the 1995 Paris metro bombers were brought to trial in 1999.<sup>64</sup> It also appears that to have worked in Spain, where the authorizes have arrested, integrated, and brought to trial a number of individual involved in the Madrid train bombings.<sup>65</sup> Critics of the pre trial detention framework of ‘preventive detention’ argue however, that there are difficulties in using the criminal law as an anti- terrorism tool , and the criminal law system to determine who should be preventively detained such critics suggest that effective counter – terrorism measures prevent to torments act from taking place at all, a and this prospective orientation fundamentally at odds with the criminal laws primarily retrospective focus son punishing individuals past acts. This may be an accurate description of the primary focus of the criminal justice system generally . but is far from the whole story in the whole story in the terrorism context. Some critics of the pre-trial detention framework also argue that it would be foolhardy to rely entirely Upon a pre-trial detention scheme because of the evidentiary and procedural challenges. to building and presenting a case against terrorist suspects. In answer to such concern, advocate of the pre-trial detention framework point to the successful use of the criminal justice system to try and convict terrorists.<sup>66</sup> A more fundamental criticism of the pre-trial detention framework is one the has been advanced by some civil rights advocates- namely, that by relying on the criminal justice system alone to prevent terrorist attacks, the pre-trial detention framework countries risk distorting the criminal justice system purpose. One frequently cited example of this proposition is that by creating overly board definitions of “criminal” also to control speech “free” that would ordinarily be protected becomes subject to sanction. This is a criticism that has been levelled against anti-hate speech legislation in both the United Kingdom and France.<sup>67</sup> A further argument against the pre-trial detention framework is specific to its current implementation : the long period of time that many terrorist suspects actually spend in detention actuating trial .The pre-trial detention framework is clearly not perfect particularly when viewed from the perspectives of governments engaged in prospective efforts to thwart potential terrorist attacks. The response of three countries – Canada, New Zealand and south Africa has been to adopt a more “flexible” approach to preventive detention, by applying pre-existing immigration law practices and procedures to the detention of theorist suspects.

### **Arguments in Opposition to Preventive Detention**

Preventing detention is often criticized on ground that it is punishment without a conviction. Detention without a trial is an enigma which still haunts the progressing society. Worldwide the despotic regimes have used arbitrary detention law as a certified weapon to curb any kind of opposition or contrary opinion to their official propaganda.<sup>68</sup> preventive detention is considered so treacherous and such

anathema to civilized through and democratic policy. That safeguards against undue exercise of the power to detain without trial, have been built in the Constitution itself. Although the supreme court has held that preventive detention is not a form of punishment, critics argue that it is a deprivation of liberty of individuals who are innocent in the eyes of law. In the In the United States, all persons are presumed innocent until proven guilty in a court of law.<sup>69</sup> While preventive detention proceedings provide certain procedural due process rights, such as counsel and a hearing, they do not provide all due process rights found in the U.S Constitution. Specifically, hearing is not the same as a trial, is required before a guilty verdict and before any punishment. Can occur However , without a trial preventive detention hearing can result in the detainment of individuals who have not been convicted. Many see this detention as a violation of due rights. It is revealed that pre-trial detention can impact. The course of an entire case. More specifically , defendants who are detained are not able to participate fully in their defense, even more drubbing are findings that pre-trial detention increases both the likelihood of conviction and a sentence of incarceration.<sup>70</sup> Additionally, even when it is not used for pre-trial detention, preventive is a form of incarceration, and the range of negative effects associated with incarceration is well- documented. Preventive detention is bad because it would infringe on the basic right that people have to liberty unless they are convicted of a crime through the due process of law. However, allowing more expansive preventive detention prograones would infringe on basic right to due process. The 5<sup>th</sup> and 14<sup>th</sup> Amendments of U.S. Constitution guarantee that person cannot generally be imprisoned unless he or she are convicted of crime. Imprisoning people for what they might do in the future would see to go against the spirit of this guarantee.<sup>71</sup> This is a case in which there is a tradeoff. We Could expand preventive detention if we wanted to increase our ability to control crime, but we would pay for it by losing some of the liberty that we prize so dearly.

#### **Justification of Preventive Detention**

Though preventive detention is a serious invasion on personal liberty and an abnormal measure of curtailing personal liberty of an individual but many countries certain or concept preventive detention laws either in war or in peace time . What is the justification action or philosophy behind enacting such law? Preventive detention in case of emergency of war is well recognized because national security and interest are more important that the personal liberty of citizen. Personal liberty depends upon the safe security of the state. Considering the justification for preventive detention lord Atkinson in *R.V. Halliday* observed,<sup>72</sup> “where preventive justice is putted in force. Some suffering and inconvenience may be caused to the suspected person.” This is inevitable. But the sufferings is infected for something much more important than his liberty or convenience. Namely for squirting public safety and the defence of the team. Similar view also exposed by lord Alfred Denning.<sup>73</sup> He said that if there are traitors in our midst, we cannot afford until we catch them in the act of blowing up our bridges or giving our military secrets to the enemy. We cannot run the risk of leaving them at large . We must detain them on suspicion. All international and regional documents of human rights recognized and made provision for derogation of rights in case of emergency and national crisis. In recent times, the necessity of having such provision in time of peace has been felt to prevent anti-social and subversive elements from imperiling existence existence and welfare of states. The rolling government justifies the practice of preventive detention by saying without this law country could not be administered and this law is a must to run the government and to suppress terrorism, is essential to control anti-social activates. The former general secretary of Bangladesh Awami League was said,<sup>74</sup> “The special power Act was introduced to combat looting of police station, setting fire on jute godowns, slogan Muslim Bengal, Naxlite activities and above all to combat the nefarious tendency to destroy the sovereignty of the State. Though there are justifications behind the practice of preventive detention in peace time but times of peace preventive detention is not at all known in all democratic countries, specially developed countries. The greatest Constitutional expertise of India has explained one of the reasons of incorporation preventive detention in India as “there may be many parties and persons who may not be patient enough to follow Constitutional methods but are impatient in Reaching their objective and for that purpose they resort to unconstitutional methods, and then there may be a large number of people who have to be detained by the executive. In a situation, would it possible for the executive to prepare the cases only to all that necessary to satisfy the elaborate

legal procedure prescribed. Hence the virtually necessity of the law of preventive detention in certain situation can hardly be overestimated.

**Conclusion:**

Though preventive detention is a tool of Constitution for Social needs. But now it is working for other purposes behind its legal or theoretical purposes. The excessive use of laws of preventive detention affects the liberty of the individuals and at the same time dangerous for a big community. The law related to person should not target that this law is for the protection of the society and state and not for the possession too the people who are in different community or thought. The philosophy lying behind the preventive detention is the safety of the community at large, but may create atmosphere which affects the community in general and the liberty of the person in particular. The government should remember that in an organized society it exists for the welfare of the people. The power of detention is necessary no doubt, but it should be used only in exceptional circumstances. The liberties then will usher in better standards of civil. So, in order to show respect and follow the constitution and to exercise the practice of true democracy. Every government should give its attention to establish the fundamental human right of the citizen but not to violate their rights. Governments should remember that in an organized society preventive detention exists for the welfare of people but not to encroach their basic human rights.

<sup>1</sup> Hamid kazi Akhata, *Human Rights, self-determination and the right to resistance*, P.24, Dhaka

<sup>2</sup> Christopher Slobogion, *A Jurisprudence of dangerousness*, 98 N.W.U.L Rev.1 28-29 (2003)

<sup>3</sup> Emanuel Gross, *Human Rights, Terrorism and the protection of Administrative detention*  
<sup>4</sup> (1917) AC 260

<sup>5</sup> *Sunil Kumar sammadar V/S Superintendent* . Hooghly jail 75 Cal WN 51

<sup>6</sup> *Alamgir V/S the state* AIR 1957 pat . 285

<sup>7</sup> Choudhary, Badrul Haider, *The long echoes*, Dhaka P.3, 1990

<sup>8</sup> AIR 1950 S.C. 27

<sup>9</sup> *Supra* note 4

<sup>10</sup> Brohi A.K., *Fundamental laws of Pakistan*: 424, Karachi, 1958.

<sup>11</sup> Patel T, *personal Liberty cinder the Constitution of India*: 48, Delhi 1993

<sup>12</sup> Hussain F, *personal Liberty and preventive detention* : 101, Peshawar 1989

<sup>13</sup> Arrif Hussain, *The Judiciary as a Bull work against illegal detention*: 143 Dhaka 1997

<sup>14</sup> Bayley. David H: *Public Liberty In The New State*: 23, Chicago, 1964

<sup>15</sup> <https://en.m.wikipedia.org>. (accessed on 2-12-2016)

<sup>16</sup> [www.yourdictionary.com](http://www.yourdictionary.com) (accessed on 5-12-2016)

<sup>17</sup> [https:// www.britanica.com](https://www.britanica.com) (accessed on 5-12-2016)

<sup>18</sup> Webster's new world law Dictionary copyright[c] 2010 by Willey Publishing, Inc, Hoboken,

<sup>19</sup> Legal-dictionary. The free dictionary.com (accessed on 5-12-2016)

<sup>20</sup> [www.primeuniversity.edu.bd](http://www.primeuniversity.edu.bd). (accessed on 10-12-2016)

<sup>21</sup> Former Judge of Indian Supreme Court.

<sup>22</sup> *Supra* note 20

<sup>23</sup> *Ibid*.

<sup>24</sup> *Supra* note 19

<sup>25</sup> 441 U.S. 418,995 ct. 1804, 601 Ed. 2<sup>nd</sup> 323 (1979)

<sup>26</sup> *Foucha v. Lousiane*, 504 U.S. 71, 112, S. ct. 1780,118 [Ed.2<sup>nd</sup> 437 {1992}]

<sup>27</sup> *Jackson v. Indiana*, 406 U.s. 715, 92 S. ct. 1845 32 L.E.d. 2<sup>nd</sup> 435[1972]

<sup>28</sup> *Carison v London*, 342, U.S. 524, 72 S. ct. 525, 96, L. Ed. 547 [1952]

<sup>29</sup> *Schall v. Martin*,467 U.S., 253, 104, S.ct. 2403, 81 L.Ed. 2<sup>nd</sup> 207[1984]

<sup>30</sup> <https://en.wikipedia.org/wiki/preventivedetention> (accessed on 15-12-2016)

<sup>31</sup> Q Costarica.com.QMedia. 30 June 2013 (accessed on 21-12-2016)

<sup>32</sup> *Supra* note 30

<sup>33</sup> *Ibid*.

<sup>34</sup> *Id*; at.3

<sup>35</sup> *Ibid*.

- <sup>36</sup> M.dw.com/en/pitfalls-of-Germany's-preventive-detention (accessed on 21-12-2016)
- <sup>37</sup> *Ibid.*
- <sup>38</sup> *Id;* at 3
- <sup>39</sup> *Supra* note 30 at 5
- <sup>40</sup> See The General Civil Penal Code (Straffeloven), Act of 22 may 1902 No.10
- <sup>42</sup> <http://www.irishstatutebook.ie/1984/en/act/pub/oo22/print.html> (accessed on 15-12-2016)
- <sup>43</sup> Retsplejeloven (Administration of justice Act) Art.758(2) (Den.)
- <sup>44</sup> *Supra* note 42
- <sup>45</sup> *Terrorism Act*, 2006 C. 11, Sched.8 (Eng)
- <sup>46</sup> *Constitution of Colombia*, Art.28
- <sup>47</sup> *Constitution of India* Art.22
- <sup>48</sup> [www.fco.gov.uk/resources/en/pdf/4175218/counter-terrorism-oct-05](http://www.fco.gov.uk/resources/en/pdf/4175218/counter-terrorism-oct-05) (accessed m1-12-16)
- <sup>49</sup> *Code de procedure penal* [C.pr.pen] Art. 706-23 (fr)
- <sup>50</sup> *Supra* note 43
- <sup>51</sup> *Supra* note 46
- <sup>52</sup> <http://www.state.gov/g/dri/r/s/hrrpt/2008/what/119150.htm> (accessed on 2-12-16)
- <sup>53</sup> *Supra* note 43 Art. 784
- <sup>54</sup> Legal aid Act, 1988 ch.34 21(U.K.)
- <sup>55</sup> *Supra* note 41
- <sup>56</sup> *Supra* note 46 Art.29
- <sup>57</sup> Retsplejeloven (Administration of justice Act) Art.767 (1), (2) (Den.)
- <sup>58</sup> *Jr. Constitution*, 1937, Art.40 .4.
- <sup>59</sup> *Supra* note 45 c.11 23 (Eng)
- <sup>60</sup> <http://convention.coe.int/treaty/common/cherehesig-asp?> (accessed on 20-12-16)
- <sup>61</sup> ECHR Art.3
- <sup>62</sup> *European torture convention* Art.8.
- <sup>63</sup> *Constitution of India* Art.50
- <sup>64</sup> <http://soholarlycommons-law.northwestern.edu/jcic> (accessed on 25-11-16 )
- <sup>65</sup> *Ibid* 152
- <sup>66</sup> *Id;* at 157
- <sup>67</sup> <http://news.bbc.co.UK/1/hi/UK-politics/4075442.stm> (accessed on 10-10-2016)
- <sup>68</sup> Mohad. Ismail khan: preventive detention Law: The commandment of Arbitrary punitive stool
- <sup>69</sup> <http://books.google.co.in> (accessed on 21-12-2016)
- <sup>70</sup> *Ibid*
- <sup>71</sup> [www.businessdictionary.com](http://www.businessdictionary.com) (accessed on 20-12-2016)
- <sup>72</sup> *Supra* note 4
- <sup>73</sup> [www.primeuniversity.edu.bd](http://www.primeuniversity.edu.bd). (accessed on 22-12-2016)
- <sup>74</sup> *Ibid*