

Human Rights Challenges in Preventive Detention Laws

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Abstract— Preventive detention, the executive practice of depriving individuals of liberty in anticipation of future harm rather than as punishment for a proven past offence, occupies one of the most contested spaces in contemporary human rights discourse. Although international instruments such as the International Covenant on Civil and Political Rights (ICCPR) and regional conventions permit narrowly circumscribed deprivations of liberty, preventive detention regimes applied in counter-terrorism, immigration control, public-order, and forensic-psychiatric contexts routinely test the boundaries of legality, necessity, and proportionality. This paper presents a conceptual and doctrinal analysis of the human rights challenges generated by preventive detention laws across national and international legal systems. Drawing on a thematic review of scholarship spanning international human rights law, comparative constitutional law, criminology, and forensic psychiatry, the paper identifies four recurring tension points: the adequacy of judicial oversight, the indeterminacy of "dangerousness" as a legal and clinical

criterion, the disproportionate application of preventive powers against political dissidents and marginalised populations, and the fragmented character of international enforcement mechanisms. The review finds that although a substantial body of literature critiques individual detention regimes, comparative and interdisciplinary synthesis remains limited, and existing scholarship rarely translates doctrinal critique into an operational safeguard framework. Addressing this gap, the paper proposes a conceptual framework of graduated safeguards, comprising periodic independent review, evidentiary thresholds for dangerousness determinations, statutory sunset clauses, and enforceable compensation mechanisms, that can be adapted across jurisdictional contexts. The paper does not report new empirical data; rather, it synthesises existing evidence to advance a structured basis for future comparative and empirical research on reforming preventive detention practice.

Keywords— preventive detention; human rights; arbitrary detention; right to liberty; due process; judicial review; national security

Introduction

The right to personal liberty is among the most foundational guarantees of international human rights law, codified in Article 9 of the ICCPR and mirrored in regional instruments such as the European Convention on Human Rights and the American Convention on Human Rights. Yet nearly every legal system also authorises some form of preventive detention: the deprivation of liberty grounded not in an adjudicated offence but in an official prediction that a person may, in future, endanger public order, national security, or the safety of others (de Zayas, 2005). Preventive detention is distinguished from ordinary pre-trial or punitive detention in that it is explicitly forward-looking, and it is precisely this anticipatory character that generates enduring tension with due-process guarantees, the presumption of innocence, and the principle that liberty may be restricted only on grounds that are "established by law" and free of arbitrariness (Macken, 2007).

The contemporary landscape of preventive detention is heterogeneous. States rely on such powers to manage suspected terrorists (Cassel, 2008), habitual or "dangerous" offenders assessed by forensic psychiatric opinion (Kosenko et al., 2024), non-citizens awaiting removal (Human Rights Watch, 2021), and, in some jurisdictions, political dissidents and journalists detained under public-order or national-security statutes (Bari & Naz, 2020). Because these regimes operate under different constitutional traditions and international obligations, the human rights challenges they raise are often analysed in isolation, jurisdiction by jurisdiction or sector by sector. This fragmentation limits the field's capacity to identify shared structural weaknesses and to propose safeguards capable of

general application. This paper responds to that fragmentation. It synthesises literature from international human rights law, comparative constitutional law, and forensic psychiatry to map the recurring human rights challenges posed by preventive detention, to identify the central research gap in existing scholarship, and to propose a conceptual framework of graduated safeguards intended to reconcile legitimate security interests with the right to liberty.

Literature Review

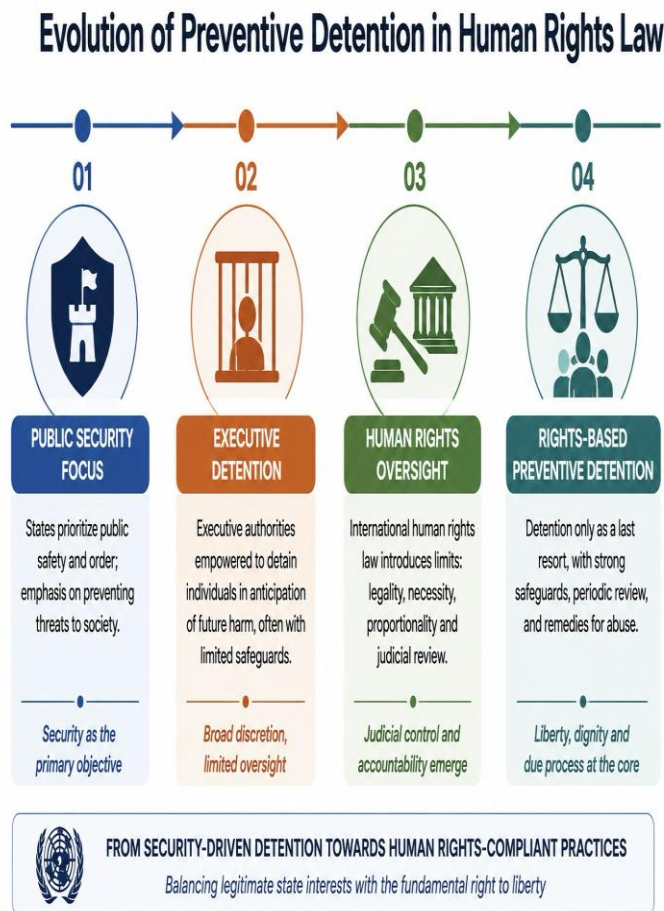
The literature on preventive detention can be organised around four broad themes: (a) the doctrinal boundaries of lawful preventive detention under international human rights law; (b) sector-specific applications in counter-terrorism and national security; (c) preventive detention in immigration and forensic-psychiatric contexts; and (d) the political misuse of preventive powers in specific national settings.

Doctrinal Foundations and the Prohibition of Arbitrariness

A foundational strand of scholarship addresses whether preventive detention can ever be reconciled with the prohibition on arbitrary arrest and detention. de Zayas (2005) argues that international human rights law "abhors a legal black hole," holding that even initially lawful detention becomes arbitrary if not subject to periodic independent review, and that indefinite detention is incompatible with Article 9 of the ICCPR. Macken (2007, 2011) extends this analysis by examining Article 5 of the European Convention on Human Rights and concluding that preventive detention is not per se prohibited but must satisfy strict conditions of legality, non-discrimination, and judicial control; detention lacking prompt access to a court reviewing its lawfulness will, on her account, always be considered arbitrary. Cassel (2009) similarly concludes that where security detention is permitted at all, its use should be confined to a

formally declared emergency, subject to derogation requirements, and limited in duration and scope, endorsing what he terms the "European model" of exceptional, judicially supervised detention. These doctrinal accounts converge on a shared normative core: legality, necessity, proportionality, and independent review are the four cumulative conditions that separate permissible preventive detention from arbitrary deprivation of liberty. Their principal limitation is that they are primarily normative and interpretive, offering limited empirical or comparative evidence of how consistently these standards are applied in practice.

A second cluster of research examines preventive detention as a counter-terrorism instrument. Cassel (2008) analyses the grounds, procedures, and conditions required by international human rights and humanitarian law for the detention of suspected terrorists, concluding that indefinite detention for intelligence-gathering purposes is generally unlawful, whereas narrowly justified security detention may be permissible if subject to registration, judicial review, and compensation for unlawful detention. Macken (2011) develops a comparative account of state practice, proposing a "model law" that would confine the detention of suspected terrorists within an ordinary criminal law framework rather than an indefinite executive one. This literature demonstrates a consistent finding: the prediction of future dangerousness required to justify security detention is inherently difficult to evidence, creating incentives for executives to lower evidentiary thresholds and to extend detention periods beyond what independent review can meaningfully supervise. A limitation of this scholarship is its heavy reliance on the Anglo-American and European experience, with comparatively less integration of South and Southeast Asian counter-terrorism regimes, despite these being among the most extensive users of preventive detention.



Immigration Detention and Administrative Deprivation of Liberty

A third theme concerns administrative detention of non-citizens. Human Rights Watch (2021) documents that immigration detention is, in the majority of cases, neither necessary nor proportionate to the goal of enforcing immigration law, given the availability of less restrictive case-management alternatives, and reports that the UN Working Group on Arbitrary Detention has called for the gradual abolition of immigration detention. The Center for Victims of Torture (2021) similarly argues that administrative detention without individualised risk assessment violates the principle of

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proportionality embedded in international human rights standards, while Physicians for Human Rights and its research partners document that prolonged solitary confinement within immigration detention facilities constitutes inhuman treatment under both domestic constitutional and international human rights law. This literature is strong on documenting harm and on articulating rights-based objections to detention as a default administrative response, but it is comparatively weaker in offering doctrinally grounded, generalisable reform mechanisms that extend beyond the immigration sector.

Preventive Detention, Dangerousness Assessment, and Political Misuse

A fourth and increasingly interdisciplinary theme concerns how "dangerousness," the substantive criterion justifying detention, is constructed and contested. Kosenko et al. (2024) provide a historical case study of West German preventive detention (Sicherungsverwahrung) for "dangerous habitual offenders," showing that forensic psychiatric assessments of dangerousness were shaped by pre-existing bias, contested diagnostic criteria, and value-laden judgments rather than by objective clinical standards, a finding with direct relevance to contemporary debates on algorithmic and clinical risk assessment. Parallel scholarship on national jurisdictions documents how preventive detention statutes ostensibly designed for security purposes have been used against political opponents, journalists, and activists. Bari and Naz (2020) show, in the Malaysian context, that weak constitutional safeguards have allowed successive executives to use preventive detention statutes to arbitrarily detain political adversaries outside any genuine emergency, while Indian legal scholarship documents extensive use of laws such as the National Security Act and the Unlawful Activities (Prevention) Act against activists and journalists, alongside judicial findings, including that of the Supreme Court of India in *Union of India v. K.A. Najeed* (2021), acknowledging the

constitutional tension between prolonged pre-trial incarceration and the right to a speedy trial. This body of work is descriptively rich and jurisdiction-specific but rarely aggregates its findings into a cross-national account of the institutional conditions, such as weak judicial independence or vague statutory language, that make political misuse more likely.

Research Trends, Strengths, Limitations, and the Research Gap

Across these four themes, three trends are apparent. First, scholarship has moved from purely doctrinal treatments of Article 9 ICCPR toward sector-specific and interdisciplinary analysis, incorporating forensic psychiatry, criminology, and comparative constitutional law. Second, there is growing recognition that "dangerousness" is not a neutral technical criterion but a socially and institutionally constructed judgment vulnerable to bias (Kosenko et al., 2024). Third, empirical and doctrinal critiques of specific national regimes, particularly in South and Southeast Asia, have expanded substantially in recent years, documenting misuse alongside judicial attempts at reform (Bari & Naz, 2020).

Notwithstanding these strengths, the literature exhibits a persistent limitation: it is predominantly organised around single jurisdictions or single sectors (counter-terrorism, immigration, or forensic psychiatry) rather than around the cross-cutting structural features that make preventive detention prone to rights violations regardless of its specific application. Comparative work capable of identifying transferable safeguards across sectors remains scarce, and existing doctrinal critique is rarely translated into an operational, adoptable framework of institutional safeguards. This represents the central research gap addressed by the present paper: the absence of a synthesised, cross-sectoral conceptual framework of graduated safeguards that draws on the shared doctrinal core

identified across counter-terrorism, immigration, and forensic-psychiatric detention literatures.

order detention regimes remains fragmented, limiting the identification of safeguards that could be generalised across contexts. Third, the literature on politically motivated misuse of preventive detention statutes (Bari & Naz, 2020) is largely descriptive and jurisdiction-specific, with limited attention to the structural and institutional design features, such as mandatory periodic judicial review, sunset clauses, and independent compensation mechanisms, that could reduce the risk of misuse across different legal systems. This paper addresses these gaps by synthesising the doctrinal, empirical, and comparative literatures into a single conceptual framework of graduated safeguards applicable across sectors.

Objectives

The objectives of this study are to: (1) identify and thematically synthesise the principal human rights challenges raised by preventive detention laws across counter-terrorism, immigration, and forensic-psychiatric contexts; (2) evaluate the doctrinal standards, legality, necessity, proportionality, and independent review, against which preventive detention regimes are assessed under international human rights law; (3) examine the institutional and evidentiary weaknesses that enable the misuse of preventive detention against political dissidents and vulnerable populations; and (4) propose a conceptual framework of graduated safeguards capable of application across jurisdictions and sectors, to guide future comparative and empirical research on preventive detention reform.

Methodology

This paper adopts a conceptual, doctrinal research design rather than an empirical one, consistent with its aim of synthesising existing legal and interdisciplinary scholarship rather than

Graduated Safeguards for Human Rights-Compliant Preventive Detention

Balancing Security Interests with the Right to Liberty



Research Gap

Existing scholarship offers strong sector-specific and doctrinal critiques of preventive detention but has not adequately integrated these strands into a unified, cross-sectoral account of the institutional safeguards required to render preventive detention compatible with international human rights obligations. Three specific gaps follow from the review. First, there is limited synthesis between the legal-doctrinal literature (de Zayas, 2005; Macken, 2007, 2011; Cassel, 2008, 2009) and the empirical and clinical literature on dangerousness assessment (Kosenko et al., 2024), despite both bearing directly on the legality of detention decisions. Second, comparative analysis across counter-terrorism, immigration, and public-

generating new primary data. The methodology proceeds in three stages.

First, a thematic literature synthesis was conducted, drawing on peer-reviewed journal articles, scholarly monographs, and reports from recognised human rights bodies published primarily between 2005 and 2024, supplemented by a small number of foundational earlier works. Sources were identified through targeted searches of legal and interdisciplinary databases and organisational repositories, using search terms including "preventive detention," "arbitrary detention," "security detention," "administrative detention," and "dangerousness assessment," in combination with "human rights."

Second, doctrinal analysis was applied to the core international human rights instruments relevant to preventive detention, principally Article 9 of the ICCPR and Article 5 of the European Convention on Human Rights, together with the interpretive practice of the UN Human Rights Committee and the UN Working Group on Arbitrary Detention, in order to extract the cumulative legal conditions, legality, necessity, non-arbitrariness, and independent review, against which national preventive detention regimes can be assessed.

Third, a comparative-thematic synthesis was undertaken across the counter-terrorism, immigration, forensic-psychiatric, and public-order literatures identified in the review, in order to isolate structural features common to instances of rights violation (absence of periodic review, indeterminate dangerousness criteria, lack of enforceable compensation) and to translate these into the proposed conceptual framework of graduated safeguards. As a conceptual and doctrinal study, this paper does not involve human participants, primary data collection, or statistical analysis, and its conclusions should be

understood as propositions for future comparative and empirical testing rather than as empirically validated findings.

Discussion

The thematic synthesis presented above suggests that the human rights challenges of preventive detention are not confined to any single sector but recur, in structurally similar form, across counter-terrorism, immigration, and forensic-psychiatric detention. Four cross-cutting challenges merit particular attention.

The first is the adequacy of judicial oversight. Doctrinal scholarship consistently identifies prompt, independent, and periodic judicial review as the single most important safeguard distinguishing lawful preventive detention from arbitrary detention (de Zayas, 2005; Macken, 2007). Yet sector-specific literature shows that this safeguard is frequently diluted in practice, whether through executive detention orders issued without prior court involvement, through evidentiary standards for bail that approximate a conviction standard at the pre-trial stage, or through prolonged administrative detention of non-citizens absent individualised risk assessment (Human Rights Watch, 2021). The persistence of this problem across otherwise dissimilar legal systems suggests that the gap lies less in the absence of doctrinal consensus, which is considerable, than in the absence of enforceable institutional design requirements translating that consensus into practice.

The second challenge concerns the indeterminacy of "dangerousness" as the substantive criterion for detention. The historical case analysis by Kosenko et al. (2024) demonstrates that clinical and legal judgments of dangerousness are vulnerable to confirmation bias, contested diagnostic criteria, and unexamined value judgments, even within legal systems possessing developed procedural safeguards. Because

contemporary preventive detention decisions increasingly rely on predictive judgments, whether clinical, actuarial, or algorithmic, this historical finding carries forward: without a transparent and contestable evidentiary threshold for dangerousness, judicial review risks becoming a formal safeguard without substantive content.

The third challenge is the disproportionate application of preventive detention powers against political dissidents, journalists, and marginalised groups. This pattern is documented across markedly different legal traditions, from Malaysia (Bari & Naz, 2020) to counter-terrorism and public-order statutes elsewhere, indicating that broadly worded statutory grounds, such as "public order" or "activities prejudicial to national security", function as an institutional vulnerability independent of the specific constitutional or political system in which they operate. This suggests that statutory precision in defining the grounds for detention is itself a human rights safeguard, not merely a matter of legislative drafting convenience.

The fourth challenge is the fragmented character of international enforcement. Although the ICCPR, regional human rights conventions, and the UN Working Group on Arbitrary Detention provide interpretive guidance and, in some systems, avenues for individual complaint, enforcement remains dependent on domestic implementation and political will, and remedies such as compensation for unlawful detention are inconsistently available (Cassel, 2008, 2009). This weak enforcement layer compounds the first three challenges, since even a well-designed system of substantive standards has limited effect without a reliable mechanism for holding states accountable when those standards are breached.

Taken together, these four challenges support the conceptual framework proposed in this paper: a set of graduated safeguards

applicable irrespective of the specific ground for detention, comprising (a) mandatory judicial review within a fixed short period following the initial detention order, with periodic re-review thereafter; (b) a defined evidentiary threshold for dangerousness or risk determinations, subject to independent challenge; (c) statutory sunset clauses requiring renewed legislative justification for extraordinary detention powers; and (d) an enforceable right to compensation for detention subsequently found unlawful or arbitrary. This framework does not resolve the underlying tension between security and liberty, which is likely irreducible, but it offers a structured basis against which existing and future preventive detention statutes can be evaluated, and around which comparative empirical research, for example, assessing compliance rates with judicial review timelines across jurisdictions, could usefully be built.

Conclusion

Preventive detention sits at an uneasy intersection between the state's legitimate interest in preventing future harm and the individual's fundamental right to liberty. This paper's thematic review of doctrinal, sectoral, and interdisciplinary literature shows that while the legal standards required to render preventive detention non-arbitrary, legality, necessity, proportionality, and independent review, are well established in international human rights law, their translation into consistent institutional practice remains uneven across counter-terrorism, immigration, and forensic-psychiatric contexts, and preventive powers remain vulnerable to misuse against political dissidents and marginalised populations. The research gap identified in this paper, the absence of a synthesised, cross-sectoral framework of safeguards, was addressed through a conceptual framework of graduated safeguards centred on timely judicial review, evidentiary thresholds for dangerousness, sunset clauses, and enforceable compensation. As a conceptual and

doctrinal contribution, this paper does not test these propositions empirically; it instead offers them as a structured foundation for future comparative and empirical research into the reform of preventive detention practice across jurisdictions.

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