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# **JUDICIAL REVIEW OF PREVENTIVE AND SECURITY-BASED DETENTION IN INDIA: PARADOX OF PERSONAL LIBERTY AND NATIONAL SECURITY**

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## **ABSTRACT**

The bedrock of Indian democracy is the promise of personal liberty under Article 21. However, this promise is increasingly strained by the "necessary evil" of preventive detention. Preventive detention constitutes one of the most drastic departures from the constitutional guarantee of personal liberty in India.<sup>1</sup> Although the Constitution explicitly permits preventive detention under Article 22, such power was intended to operate as an exceptional measure subject to strict procedural and judicial safeguards.<sup>2</sup> Over time, however, the combined effect of executive discretion, deferential judicial review, and the expansion of national security legislation has resulted in the dilution of meaningful protection of liberty. This article critically examines the evolution of judicial review of preventive detention in India, tracing its trajectory from the formalistic approach adopted in early constitutional jurisprudence to the substantive due process framework articulated in later cases. It argues that despite this doctrinal evolution, courts have often prioritised national security considerations over individual liberty. The article further contends that contemporary security statutes, particularly the Unlawful Activities (Prevention) Act, 1967, have created a regime of de facto preventive detention through prolonged pre-trial incarceration and restrictive bail provisions. While traditionally understood as a short-term measure to prevent imminent harm, the application of the Unlawful Activities (Prevention) Act (UAPA) has effectively created a system of "judicial preventive detention." By situating Indian detention jurisprudence within international human rights standards, the article calls for a reassertion of substantive judicial review, robust proportionality analysis, and periodic judicial oversight.

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<sup>1</sup> Indian Const. art. 21.

<sup>2</sup> Indian Const. art. 22(3)–(7).

## I. INTRODUCTION

Personal liberty is a foundation of the Indian constitutional order. Article 21 of the Constitution guarantees that no person shall be deprived of life or personal liberty except according to procedure established by law. This guarantee has been interpreted to ensure dignity, autonomy, and the freedom to make meaningful choices. Yet, preventive detention—authorising incarceration without trial on the basis of anticipated future conduct—stands in sharp contrast to these ideals. While preventive detention is constitutionally sanctioned, it represents an extraordinary exception rather than the norm.<sup>4</sup>

The persistence of preventive detention laws in independent India reflects an enduring tension between liberty and security. Originally justified by post-Partition instability and threats to public order, preventive detention has continued to occupy a prominent place in the legal system. In recent decades, this tension has been exacerbated by the expansion of national security legislation, which, though formally punitive, often produces consequences indistinguishable from preventive detention. This article examines whether judicial review has adequately functioned as a safeguard against the erosion of liberty in this context.

## II. CONSTITUTIONAL FRAMEWORK OF PREVENTIVE DETENTION

The Indian Constitution adopts a distinctive approach to preventive detention. Article 22 expressly permits preventive detention while simultaneously excluding such detention from several procedural safeguards ordinarily available to arrested persons.<sup>5</sup> Unlike ordinary criminal law, which triggers after a crime is committed, preventive detention is based on "executive satisfaction" regarding future conduct. Clauses (3) to (7) of Article 22 deny preventive detainees the right to be produced before a magistrate within twenty-four hours and the right to consult and be defended by a legal practitioner of their choice. This constitutional design reflects a deliberate choice by the framers to balance individual liberty against perceived security imperatives.

Constituent Assembly debates reveal deep unease regarding preventive detention. Dr. B.R. Ambedkar defended its inclusion as a necessary evil, while acknowledging the risk of misuse.<sup>6</sup> The framers sought to mitigate this risk through procedural safeguards such as communication of grounds of detention, representation to the detaining authority, and review by advisory

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<sup>3</sup> Indian Const. art. 21.

<sup>4</sup> H.M. Seervai, *Constitutional Law of India* Vol. I (4th ed., 2013).

<sup>5</sup> Indian Const. art. 22

<sup>6</sup> Constituent Assembly Debates, Vol. VII (Dec. 16, 1948).

boards. However, the reality of the 21st century has proven these safeguards to be insufficient. When a statute like the UAPA is applied, the "grounds of detention" are often based on protected speech and "intellectual authorship" of protests, making the advisory and judicial review process a struggle against shadows.

### III. EVOLUTION OF JUDICIAL REVIEW: FROM FORMALISM TO SUBSTANTIVE DUE PROCESS

The Supreme Court's foundational approach to preventive detention was defined by a cold, literalist formalism that prioritized state stability over individual autonomy. In the landmark case of *A.K. Gopalan v. State of Madras (1950)*, the Court was asked to determine the constitutionality of the Preventive Detention Act, 1950. The petitioner, a communist leader, argued that "procedure established by law" under Article 21 should be interpreted with the same breadth as the American concept of "Due Process," thereby requiring any law to be inherently just.<sup>7</sup>

However, the majority bench adopted an "isolationist" or "silo" approach to fundamental rights. The Court held that the Constitution was a collection of independent compartments; if a person was detained under a law that satisfied the specific procedural requirements of Article 22, they could not simultaneously invoke the freedoms of Article 19 (speech and movement) or the fairness of Article 21. By viewing Article 22 as a "complete code" for detention, the Court effectively shielded preventive laws from the scrutiny of reasonableness. This meant that as long as a detention law was enacted by a competent legislature and the state followed its own self-made rules, the judiciary would refuse to look at whether the law itself was oppressive or arbitrary.

This restrictive reading was eventually dismantled through a series of judgments that recognized what is now famously called the "Golden Triangle" of the Indian Constitution—the inseparable bond between Articles 14, 19, and 21. The shift began with *R.C. Cooper v. Union of India (1970)*, which rejected the *Gopalan* theory by ruling that fundamental rights are not mutually exclusive. The Court established that a law depriving a person of liberty must not only satisfy Article 21 but must also pass the test of "reasonableness" and "non-arbitrariness."<sup>8</sup>

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<sup>7</sup> *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.

<sup>8</sup> *R.C. Cooper v. Union of India (1970)*

This doctrinal evolution reached its zenith in *Maneka Gandhi v. Union of India* (1978). In a post-Emergency moment of judicial soul-searching, the Court held that the "procedure" mentioned in Article 21 must be "just, fair, and reasonable," and not "fanciful, oppressive, or arbitrary."<sup>9</sup> This infusion of substantive due process meant that the judiciary finally had the mandate to scrutinize not just the *method* of detention, but the *moral and legal logic* behind it. In theory, this should have signaled the death knell for arbitrary preventive detention, as every detention order would now have to be proportionate to the threat.

However, as the Unlawful Activities (Prevention) Act (UAPA) began to swallow the space of ordinary criminal law, the judiciary triggered a silent counter-revolution. We have entered an era of "Neo-Formalism." While the Court continues to use the expansive language of *Maneka Gandhi* in matters of ordinary crime, it has largely suspended these principles in "National Security" cases. By adhering strictly to the restrictive bail conditions of Section 43D(5), the judiciary has reverted to a *Gopalan*-style deference.

The paradox is stark: while our constitutional doctrine celebrates substantive due process, our security jurisprudence treats the prosecution's narrative as an unassailable truth. In cases like that of Umar Khalid, the "just and fair" standard is bypassed in favor of a "prima facie" check. The Court no longer asks if five years of incarceration without trial is "reasonable"; it only asks if the police have filed a paperwork-heavy conspiracy theory that meets the technical definitions of the Act. In doing so, the "Golden Triangle" is effectively dimmed for political dissidents, rendering the *Maneka Gandhi* revolution an illusory protection for those the State labels as "terrorists."

#### IV. PREVENTIVE DETENTION, EMERGENCY POWERS, AND JUDICIAL DEFERENCE

Judicial deference to executive authority was discussed in *ADM Jabalpur v. Shivkant Shukla*, where the Supreme Court held that even the right to life and personal liberty could be suspended during an emergency.<sup>10</sup> The decision has since been widely criticised and was expressly disapproved in *Justice K.S. Puttaswamy (Retd.) v. Union of India*.<sup>10</sup> Nonetheless, *ADM Jabalpur* remains a cautionary reminder of the judiciary's vulnerability to security-driven reasoning.

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<sup>9</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

<sup>10</sup> *ADM Jabalpur v. Shivkant Shukla*, (1976) 2 SCC 521.

Although the post-Emergency era witnessed renewed emphasis on liberty, the legacy of deference persists in preventive detention cases. Courts often continue to accept executive assertions of necessity without rigorous scrutiny.

## V. JUDICIAL REVIEW OF PREVENTIVE DETENTION STATUTES IN PRACTICE

Preventive detention statutes such as the National Security Act (NSA), 1980<sup>11</sup> and the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA), 1974<sup>12</sup> represent a legal anomaly: the permanent integration of emergency powers into the peacetime administrative fabric of India. Despite the constitutional evolution toward substantive due process, judicial review under these statutes has remained stubbornly confined to a "checklist" approach. Instead of acting as a bulwark against the arbitrary deprivation of liberty, the courts have often limited their role to that of a procedural auditor. They examine whether the grounds of detention were communicated in a language the detainee understands, whether there was an "undue delay" in considering representations, and whether statutory timelines were strictly adhered to. While these safeguards are important, they fail to address the fundamental question: Is the detention necessary in a democratic society?

The Supreme Court has, on occasion, expressed deep anxiety regarding the misuse of these statutes. In the seminal case of *Rekha v. State of Tamil Nadu (2011)*, the Court issued a stern warning: preventive detention must not be used as a "lazy substitute" for ordinary criminal law. The Court noted that if a person could be tried under the Indian Penal Code, there is no justification for the State to bypass the trial process through a detention order.<sup>13</sup>

This judgment hit at the heart of the "Executive's Comfort." Often, when the police fail to gather enough evidence for a conviction, they resort to the NSA to keep a suspect "off the streets." By focusing on this, the *Rekha* judgment attempted to reclaim the "exceptional" nature of Article 22. However, in practice, the State often bypasses this by arguing that the "ordinary law of the land" is insufficient to deal with the "special threat" posed by the individual—a claim that the judiciary rarely cross-examines with any rigor.

The judiciary's most potent tool in these cases has been the "Doctrine of Strict Compliance." In *Huidrom Konungjao Singh v. State of Manipur (2012)*, the Court held that an unexplained delay in executing a detention order or considering a representation is "fatal" to the detention

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<sup>11</sup> National Security Act, 1980.

<sup>12</sup> Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

<sup>13</sup> *Rekha v. State of Tamil Nadu (2011)*

itself. The logic is simple: if the detention is truly "preventive" and "urgent," any delay by the State suggests that the perceived threat is not actually imminent.<sup>14</sup>

While this has led to the release of many detainees, it creates a "Procedural Fetishism." The State learns to perfect its paperwork rather than its evidence. If a detention order is quashed because it was served two days late, the State often simply issues a fresh order the next day, correcting the clerical error but maintaining the incarceration. This results in a "revolving door" of detention where the citizen is trapped in a loop of litigation, while the substantive grounds—the "why"—remain buried in sealed covers.

Despite the rhetoric of *Maneka Gandhi*, substantive review remains a judicial rarity. Courts continue to rely on the doctrine of "Subjective Satisfaction" of the executive. Under this doctrine, if the District Magistrate says they are "satisfied" that a person poses a threat to public order, the Court refuses to substitute that satisfaction with its own judgment.

This is where the "Proportionality Test" should ideally intervene. A robust judicial review would ask: *Could the State have achieved its goal by putting the person under house arrest? Could they have merely seized their passport?* Instead, the judiciary often treats national security as a "black box" that, once invoked, shuts down the constitutional inquiry into proportionality. This deference ensures that while the "procedure established by law" is checked, the "justice" of that law remains an afterthought.

## VI. SECURITY-BASED DETENTION AND DE FACTO PREVENTIVE DETENTION

The expansion of national security legislation has fundamentally altered the landscape of detention in India. The Unlawful Activities (Prevention) Act, 1967, originally enacted to curb unlawful associations, has evolved into a comprehensive counter-terrorism statute. Section 43D(5) imposes stringent conditions on the grant of bail, effectively reversing the presumption of liberty.<sup>15</sup>

In *National Investigation Agency v. Zahoor Ahmad Shah Watali*, the Supreme Court held that courts must not conduct a detailed evaluation of evidence at the bail stage under the UAPA.<sup>16</sup> This interpretation has contributed to prolonged pre-trial incarceration. Recognising this concern, the Court in *Union of India v. K.A. Najeeb* held that constitutional courts may grant

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<sup>14</sup> Huidrom Konungjao Singh v. State of Manipur (2012)

<sup>15</sup> Unlawful Activities (Prevention) Act, 1967, s. 43D(5).

<sup>16</sup> National Investigation Agency v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1.

bail where prolonged detention violates Article 21.<sup>17</sup> These developments illustrate how security-based detention can function as de facto preventive detention.

## VII. PROPORTIONALITY, NATIONAL SECURITY, AND JUDICIAL REVIEW

The principle of proportionality has emerged as a cornerstone of constitutional adjudication in India. In *Anuradha Bhasin v. Union of India*, the Supreme Court held that restrictions on fundamental rights, even on grounds of national security, must satisfy the test of proportionality.<sup>18</sup> Similarly, in *Justice K.S. Puttaswamy (Retd.) v. Union of India*, the Court emphasised that any restriction on liberty must be necessary, proportionate, and accompanied by procedural safeguards.<sup>19</sup>

Even after these doctrinal progresses, proportionality is however seldom applied rigorously in detention cases. Courts rarely inquire whether less restrictive alternatives could achieve the same security objectives.

## VIII. INTERNATIONAL HUMAN RIGHTS LAW AND COMPARATIVE PERSPECTIVES

India is a party to the International Covenant on Civil and Political Rights, which guarantees protection against arbitrary detention and the right to a fair and speedy trial.<sup>20</sup> The United Nations Human Rights Committee has emphasised that preventive detention must be exceptional and subject to effective judicial control.<sup>21</sup> Comparative jurisprudence from other constitutional democracies reflects heightened scrutiny of security-based detention.

In *A v. Secretary of State for the Home Department*, the House of Lords struck down indefinite detention of terror suspects as disproportionate.<sup>22</sup> Similarly, in *Boumediene v. Bush*, the US Supreme Court recognised the right of detainees to judicial review even in the context of national security.<sup>23</sup> These decisions can offer valuable guidance for Indian courts.

## IX. CRITICAL ANALYSIS: HAS JUDICIAL REVIEW BEEN DILUTED?

Despite progressive constitutional rhetoric, judicial review of preventive and security-based detention in India remains constrained. Executive claims of national security are often treated

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<sup>17</sup> *Union of India v. K.A. Najeeb*, (2021) 3 SCC 713.

<sup>18</sup> *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637.

<sup>19</sup> *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

<sup>20</sup> International Covenant on Civil and Political Rights, arts. 9, 14.

<sup>21</sup> UN Human Rights Committee, General Comment No. 35 (2014).

<sup>22</sup> *A v. Secretary of State for the Home Department*, [2004] UKHL 56.

<sup>23</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

as non-justiciable, insulating detention decisions without meaningful challenge. This deference can lead to normalising exceptional powers and undermining the rule of law.

A rights-oriented approach demands that courts rigorously assess necessity, proportionality, and procedural fairness. Without such scrutiny, constitutional guarantees of liberty can become illusory.

## **X. RECOMMENDATIONS AND WAY FORWARD**

Reform of detention jurisprudence requires a multi-pronged approach. Courts must move beyond procedural review and engage in substantive evaluation of detention orders. Periodic judicial review should be mandated for all forms of preventive and security-based detention. Prolonged pre-trial incarceration must be recognised as a violation of Article 21, warranting judicial intervention.

Legislative clarity distinguishing dissent from genuine security threats is essential. Ultimately, national security cannot be pursued at the cost of constitutional morality.

## **XI. CONCLUSION**

Preventive detention represents a constitutional paradox—permitted yet inherently suspect. While the Indian judiciary has articulated robust principles of liberty and proportionality, their application in detention cases remains uneven. In an era of expanding national security powers, judicial review must reclaim its substantive role as the guardian of personal liberty. Liberty must remain the rule, and detention the exception.