



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL**
**ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

BALANCING RULE OF LAW AND INDIVIDUAL LIBERTIES: A CRITICAL ANALYSIS OF PREVENTIVE DETENTION LAWS IN INDIA

AUTHORED BY - YASH DIXIT

ABSTRACT

Preventive detention remains one of the most controversial facets of India's legal framework, primarily due to its allowance for the deprivation of an individual's liberty without the traditional safeguards of a formal charge or a fair and open trial. Unlike punitive detention, which follows a criminal conviction, preventive detention is rooted in the presumption that an individual may act in a manner prejudicial to public order or national security in the future. This speculative nature of detention, often carried out in the absence of transparent procedures or timely judicial oversight, has long raised serious questions about its alignment with democratic principles and constitutional guarantees.

This research paper undertakes a critical examination of the constitutional and statutory framework governing preventive detention in India, with particular emphasis on laws such as the National Security Act (NSA), 1980¹, and the Unlawful Activities (Prevention) Act (UAPA)², 1967. These laws, although ostensibly enacted to safeguard national integrity and public safety, have often been criticized for being broad in scope and susceptible to misuse, thereby enabling arbitrary detentions and undermining the spirit of constitutionalism.

The paper interrogates the compatibility of these laws with the fundamental principles of the rule of law and individual liberties, especially as embodied in Articles 21³ and 22⁴ of the Indian Constitution. Article 21 guarantees the right to life and personal liberty, while Article 22 specifically deals with protections against arbitrary arrest and detention—albeit with notable exceptions for preventive detention. This inherent constitutional tension is further explored through an analysis of judicial pronouncements, highlighting the evolving interpretation of due

¹ The National Security Act (NSA), 1980 (No. 65 of 1980).

² The Unlawful Activities (Prevention) Act (UAPA), 1967 (No. 35 of 1967).

³ The constitution of India, A.21.

⁴ The constitution of India, A.22.

process and personal liberty by Indian courts.

In addition to a historical overview tracing the colonial origins and post-independence evolution of preventive detention laws, the paper offers comparative insights from other democracies, such as the United Kingdom and the United States, to contextualize India's legal stance in the global human rights landscape.

KEYWORDS

Preventive detention, rule of law, individual liberties, national security, Constitution of India, Article 21, Article 22, National Security Act (NSA), Unlawful Activities (Prevention) Act (UAPA), judicial review, civil liberties, human rights, arbitrary detention, due process, constitutional safeguards, security laws in India, administrative detention, fundamental rights, comparative constitutional law.

INTRODUCTION

The tension between national security and individual rights has long been a central dilemma in constitutional democracies, and India is no exception. The protection of the State and its citizens from threats—whether internal insurrections, terrorist activity, or acts that disrupt public order—necessitates the existence of laws that equip the government to act swiftly and effectively. However, when such laws infringe upon the liberty of individuals, bypassing conventional safeguards like due process, legal representation, and judicial oversight, they pose serious risks to the rule of law, democratic accountability, and fundamental freedoms. At the heart of this legal and moral debate lies the concept of preventive detention—a tool that allows for the incarceration of a person without trial, merely on the suspicion that they may commit a prejudicial act in the future. It is a legal mechanism that treads a dangerous line between protection and oppression, between security and freedom.⁵

In the Indian context, preventive detention has had a long and complicated history, originating during the British colonial era. The British Raj made extensive use of preventive detention laws to suppress dissent and control freedom fighters. Laws such as the Bengal Regulation III of

⁵ Tarali Neog, “Balancing Act: Navigating National Security And Civil Liberties In Anti-Terrorism Legislation Under The Indian Constitution”.

1818⁶, the Rowlatt Act of 1919⁷, and later the Defence of India Acts⁸ during both World Wars, enabled the colonial government to detain individuals without charge or trial. These laws were roundly criticized by Indian nationalists and leaders of the freedom movement, including Mahatma Gandhi, for their draconian nature and their blatant disregard for civil liberties. Ironically, after India gained independence, rather than discarding this colonial legacy, the newly formed Indian State institutionalized preventive detention through the Preventive Detention Act, 1950⁹. Justified on grounds of maintaining internal security in a fragile post-Partition scenario, this Act laid the foundation for a modern preventive detention regime that continues to exist today in various forms.¹⁰

In post-independence India, the practice of preventive detention has not only persisted but has expanded through statutory enactments like the Maintenance of Internal Security Act (MISA)¹¹ during the Emergency of 1975–77, the National Security Act (NSA), 1980¹², and the Unlawful Activities (Prevention) Act (UAPA), 1967¹³, which has seen significant and controversial amendments in recent years. These laws provide the executive with vast discretionary powers, often with minimal or no scope for timely judicial intervention. Although justified on grounds of combating terrorism, insurgency, communal violence, or threats to public order, such laws have frequently been criticized for being vague, arbitrary, and prone to misuse. Data from various state and central authorities reveal frequent use of preventive detention laws against political activists, journalists, dissenters, and even ordinary individuals for reasons ranging from minor offenses to vague apprehensions of threat. In many cases, detainees are held without formal charges or meaningful access to legal counsel, which raises serious questions about the violation of constitutional rights, especially under Articles 21¹⁴ and 22¹⁵ of the Indian Constitution.¹⁶

⁶ The Bengal Regulation III of 1818 (No. 3 of 1818).

⁷ The Rowlatt Act of 1919 (No. 82 of 1919).

⁸ The Defence of India (Criminal Law Amendment) Act, 1915 (No. 4 of 1915).

⁹ The Preventive Detention Act, 1950 (No. 4 of 1950).

¹⁰ Ramneet Kaur, "Preventive Detention Laws During the Colonial Era in India: An In-Depth Appraisal", available at: <https://reflections.live/articles/21736/preventive-detention-laws-during-the-colonial-era-in-india-an-in-depth-appraisal-article-by-ramneet-kaur-21283-m8uigonx.html> (last visited on April 30, 2025).

¹¹ The Maintenance of Internal Security Act (MISA) 1971, (No. 26 of 1971).

¹² The National Security Act (NSA), 1980 (No. 65 of 1980).

¹³ The Unlawful Activities (Prevention) Act (UAPA), 1967 (No. 37 of 1967).

¹⁴ *Supra* note 3.

¹⁵ *Supra* note 4.

¹⁶ Mridusmita Sarkar, "Preventive Detention Laws In India And Violation Of Human Rights: A Study With Special Reference To Article 22 Of The Indian Constitution", 2018.

This paper aims to critically examine the legal, constitutional, and ethical dimensions of preventive detention laws in India. It interrogates whether the current legal framework upholds the principles of justice, fairness, and the rule of law, or whether it facilitates a regime of executive dominance and civil liberties suppression. The paper begins by tracing the historical evolution of preventive detention in both colonial and post-colonial contexts, followed by an analysis of key legislations such as the NSA¹⁷ and UAPA¹⁸. It then explores the constitutional safeguards enshrined in Articles 21¹⁹ and 22²⁰, and assesses how courts have interpreted and applied these provisions in preventive detention cases over time—from the early deferential judgments such as *A.K. Gopalan v. State of Madras*²¹ to the transformative jurisprudence in *Maneka Gandhi v. Union of India*²² and subsequent cases. It also evaluates whether India's preventive detention regime aligns with international human rights standards, including those under the International Covenant on Civil and Political Rights (ICCPR), to which India is a signatory.²³

HISTORICAL EVOLUTION OF PREVENTIVE DETENTION IN INDIA

Preventive detention laws in India have deep colonial roots, originating during British rule as a tool for suppressing political dissent and safeguarding imperial interests. The first such law, Bengal Regulation III of 1818²⁴, allowed the British authorities to detain individuals without trial if they were deemed a threat to public order or the British administration. This regulation lacked any procedural safeguards, such as the need for charges, evidence, or the right to appeal, and was often used to target political activists and nationalists.

The Government of India Act, 1935²⁵ further entrenched preventive detention powers, enabling both provincial and central governments to enact laws related to national security and public order. During World War II and the Quit India Movement, the British extensively used preventive detention to imprison leaders like Jawaharlal Nehru and Mahatma Gandhi, contributing to the perception of these laws as tools of colonial oppression. Despite this legacy,

¹⁷ *Supra* note 12.

¹⁸ *Supra* note 13.

¹⁹ *Supra* note 3.

²⁰ *Supra* note 4.

²¹ AIR 1950 SC 27.

²² AIR 1978 SC 597.

²³ Kamalleshwar.S & Sarah Rose P, “Balancing Security And Liberty: A Critical Examination Of Preventive Detention Laws In India”, Volume IV Issue II, 2021.

²⁴ *Supra* note 6.

²⁵ The Government of India Act, 1935 (26 Geo. 5 & 1 Edw. 8. c. 2).

the Indian state retained these powers after independence.²⁶

In the post-independence period, the Constituent Assembly Debates reflected deep divisions on the issue of preventive detention. While some members, including Dr. B.R. Ambedkar, justified its retention due to the national security needs following Partition and internal unrest, others strongly opposed it, citing the threat to civil liberties. As a result, preventive detention was included in the Constitution under Article 22(3) to (7)²⁷, with some procedural safeguards, though these were weak compared to other legal protections.

The first major preventive detention law after independence was the Preventive Detention Act (PDA), 1950²⁸, which granted the government broad powers to detain individuals deemed a threat to national security or public order. Although initially meant as a temporary measure, it remained in effect for nearly two decades and set the precedent for future laws like MISA (1971)²⁹ and the National Security Act (1980)³⁰. Despite its eventual repeal, the PDA³¹'s legacy continues to shape the legal landscape for preventive detention in India.

CONSTITUTIONAL FRAMEWORK

The Indian Constitution guarantees fundamental rights to protect citizens from arbitrary state action, with Article 21³² offering a crucial safeguard for life and personal liberty. This provision, interpreted expansively by the Supreme Court, ensures that no one can be deprived of liberty except through a "just, fair, and reasonable" process. However, preventive detention laws, as outlined in Article 22(3) to (7)³³, create an exception to this protection. These laws, allowing detention without trial or charges, introduce a tension between safeguarding individual liberty and ensuring national security.

Article 21³⁴ forms the foundation of civil liberties in India, demanding that any deprivation of liberty follow due process. In the landmark case of *Maneka Gandhi v. Union of India* (1978)³⁵,

²⁶ *Supra* note 16.

²⁷ The Constitution of India, A.22(3)-(7).

²⁸ *Supra* note 9.

²⁹ *Supra* note 11.

³⁰ *Supra* note 12.

³¹ *Ibid.*

³² *Supra* note 3.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Supra* note 22.

the Court emphasized that this procedure must be fair and reasonable, aligning with international human rights standards. Yet, preventive detention laws—allowing the executive to detain individuals without charges or trial—pose a significant challenge to these principles. Article 22³⁶, designed to protect arrested individuals, specifically carves out exceptions for preventive detention, limiting key safeguards like the right to be informed of the grounds for detention and access to legal counsel.

Article 22(3) to (7)³⁷ allows preventive detention for up to three months without the detainee's right to be informed of all the grounds for detention or to consult a lawyer. Despite provisions for an Advisory Board, the law often lacks sufficient judicial oversight, undermining procedural fairness. The inclusion of preventive detention in the Constitution sparked intense debates during the Constituent Assembly, with some members fearing it could undermine democracy, while others, like Dr. B.R. Ambedkar, argued it was necessary to preserve state security amid post-independence instability. This debate highlights the constitutional tension between ensuring national security and protecting individual freedom.

The tension between Article 21³⁸ and Article 22³⁹ creates a constitutional paradox: while Article 21 guarantees liberty, Article 22 allows exceptions that weaken its enforcement. Preventive detention laws thus bypass the protections of Article 21, granting the executive unchecked power to detain individuals. This contradiction challenges the rule of law, as the very framework intended to safeguard individual liberties becomes a tool for potential state overreach. Any reform of these laws must address this inherent tension to ensure a balance between security and fundamental rights.

KEY PREVENTIVE DETENTION LAWS IN INDIA

Despite constitutional protections under Article 21 and Article 22, India's legal framework includes several preventive detention laws that empower the executive to detain individuals without trial. While these laws are framed to maintain national security or public order, they have been controversial due to their vague definitions, broad scope, and limited procedural safeguards. This section examines three major preventive detention laws: the National Security

³⁶ *Supra* note 4

³⁷ *Supra* note 27.

³⁸ *Supra* note 3.

³⁹ *Ibid.*

Act (NSA)⁴⁰, the Unlawful Activities (Prevention) Act (UAPA)⁴¹, and the Jammu and Kashmir Public Safety Act (PSA)⁴².

National Security Act, 1980 (NSA)⁴³

The NSA allows both the Central and State Governments to detain individuals for up to 12 months, based on national security or public order concerns. However, the law permits detention without formal charges, denies detainees the right to trial, and allows grounds of detention to remain undisclosed if it is deemed against public interest. The law's vague language, especially around "public order," and the limited judicial review make it prone to misuse, especially for political or communal purposes.

Unlawful Activities (Prevention) Act, 1967 (UAPA)⁴⁴

The UAPA, initially aimed at dealing with secessionist activities, has evolved into India's primary anti-terror law. The law allows detention without charge for up to 180 days and empowers the government to designate individuals as "terrorists" without trial. Its broad and vague definition of "unlawful activity" has led to the detention of activists, journalists, and protestors, with limited judicial oversight and a reversal of the presumption of innocence. These provisions make it a tool of punishment rather than prevention.

Jammu and Kashmir Public Safety Act, 1978 (PSA)⁴⁵

The PSA permits detention without trial for up to two years based on "acts prejudicial to the security of the State" or "public order." The law has been widely criticized for allowing detention based on police dossiers, without full disclosure of the grounds of detention or the right to legal representation. Its use has escalated in Kashmir, particularly after the abrogation of Article 370⁴⁶ in 2019, leading to detentions of political leaders and activists, often without evidence or judicial review.

While justified as necessary for national security, these laws have been criticized for violating fundamental rights and enabling executive overreach. They often serve as tools of political

⁴⁰ *Supra* note 1.

⁴¹ *Supra* note 2.

⁴² The Jammu and Kashmir Public Safety Act (PSA), 1978 (No. 6 of 1978).

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ The Constitution of India, A.370.

repression, curbing freedom of expression and targeting dissent, particularly among marginalized communities. The laws represent a troubling departure from due process and judicial accountability, undermining the balance between national security and individual rights.

RULE OF LAW VS. NATIONAL SECURITY

The tension between national security and individual rights is a central challenge in any democracy, particularly in India, where preventive detention laws are invoked under the guise of safeguarding public order or national security. While national security is undeniably vital, these laws often come at the cost of essential individual freedoms, especially the right to liberty, due process, and a fair trial. Preventive detention laws, such as the National Security Act (NSA)⁴⁷ and the Unlawful Activities (Prevention) Act (UAPA)⁴⁸, have been heavily criticized for their lack of transparency and accountability, which undermines the very principles of the rule of law.

One of the key principles of the rule of law is non-arbitrariness—laws must be applied in a fair, clear, and predictable manner. However, preventive detention laws often operate in ways that violate this principle. For example, the vague criteria used to justify detention under the NSA⁴⁹ and UAPA⁵⁰, such as terms like “threat to national security” or “unlawful activity,” are often open to subjective interpretation, leading to arbitrary detention. This undermines the ability of individuals to understand why they are being detained and what they must do to contest such actions. Similarly, the principle of proportionality—that any restriction on fundamental rights must be necessary and appropriate to the threat posed—often fails to be met in preventive detention cases. Detentions are routinely prolonged without sufficient evidence or judicial oversight, suggesting that the measures are disproportionate to the security concerns they are supposed to address.⁵¹

Another critical issue is the lack of transparency and accountability in the detention process.

⁴⁷ *Supra* note 1.

⁴⁸ *Supra* note 2.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Aman Saraf, “Sedition And Statutory Stability: Decoding The Defects Of India’s National Security Laws”, Vol. X, 2021.

Laws such as the NSA⁵², UAPA⁵³, and the Jammu and Kashmir Public Safety Act (PSA)⁵⁴ often permit detention without full disclosure of the reasons for detention, claiming national security concerns as a justification for withholding information. Detainees may not be informed of the exact grounds for their detention, making it difficult for them to challenge the decision effectively. Moreover, the Advisory Boards, which are supposed to review these detentions, often serve as mere formalities. They fail to provide meaningful oversight or scrutiny, and the executive is given undue discretion to decide who should be detained and for how long. As a result, these laws give rise to a system that lacks accountability and makes it harder for detainees to access justice.⁵⁵

The absence of effective judicial review is another significant problem. Courts in India have generally been reluctant to interfere in matters related to national security, often deferring to the executive's judgment. The limited scope of judicial review in preventive detention cases means that the executive holds significant power over the liberty of individuals with minimal checks. This not only enables arbitrary detention but also undermines the judicial system's role as a safeguard against state excesses. In this context, the failure of the judiciary to effectively challenge the misuse of preventive detention laws reflects a weakening of the rule of law in such cases.

Moreover, India's obligations under international human rights treaties complicate the justification for preventive detention laws. As a signatory to the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR), India is bound by certain international standards that protect individual freedoms, including the right to freedom from arbitrary detention and the right to a fair trial. Article 9⁵⁶ of the ICCPR, which prohibits arbitrary detention, and Article 14⁵⁷, which guarantees the right to a fair trial and bail, clearly contradict the provisions of India's preventive detention laws, which often detain individuals without trial for extended periods. The lack of judicial oversight, non-disclosure of detention grounds, and extended periods of detention all violate international human rights

⁵² *Supra* note 1.

⁵³ *Supra* note 2.

⁵⁴ *Supra* note 42.

⁵⁵ Nando Bhakto, "The UAPA and PSA are being used as tools of coercion in Kashmir", *available at*: <https://frontline.thehindu.com/cover-story/the-uapa-and-psa-are-being-used-as-tools-of-coercion-in-kashmir/article34125067.ece> (last visited on April 30, 2025).

⁵⁶ The International Covenant on Civil and Political Rights (ICCPR), A.9.

⁵⁷ The International Covenant on Civil and Political Rights (ICCPR), A.14.

norms. By relying on these laws, India falls short of its international obligations and undermines the rule of law both domestically and internationally.⁵⁸

In conclusion, while national security remains a valid concern, preventive detention laws in India often fail to strike a proper balance between the need for security and the protection of individual liberties. These laws are frequently used arbitrarily, without proper accountability or judicial review, and often violate India's international human rights obligations. To uphold the rule of law, India must reconsider the use of preventive detention and make necessary reforms that ensure greater judicial scrutiny, transparency, and respect for fundamental rights. Only through these reforms can India hope to reconcile its need for national security with its obligation to protect the liberties of its citizens.

CONCLUSION

Preventive detention laws in India, such as the National Security Act (NSA), the Unlawful Activities (Prevention) Act (UAPA), and the Jammu and Kashmir Public Safety Act (PSA), continue to present significant challenges to the rule of law and the protection of civil liberties. These laws, though intended to protect national security, often tip the scale heavily in favor of state power, undermining individual freedoms, particularly the right to personal liberty, due process, and the right to a fair trial. While the state has a legitimate interest in ensuring public safety and national security, the discretionary power vested in the executive under these laws frequently leads to their misuse, compromising fundamental democratic principles.

One of the primary concerns with these preventive detention laws is their overreach and lack of safeguards. The vague grounds for detention, the absence of transparency in the process, and the failure to provide sufficient judicial review contribute to a system that can too easily be manipulated for political control or to silence dissent. This undermines the legitimacy of the laws themselves and erodes public trust in the legal system. The executive's power to detain individuals without trial for extended periods, often based on scant or undisclosed evidence, creates an environment ripe for arbitrary decisions and abuses of power.

However, there have been instances in recent years where the judiciary has shown promise in asserting its role in protecting fundamental rights against executive overreach. Through judicial

⁵⁸ National Human Rights Commission India, "A Handbook on International Human Rights Conventions", 2012.

interventions, the courts have occasionally reaffirmed the constitutional guarantees enshrined in Articles 21 and 22, as well as the rights set forth in international human rights instruments. Yet, the inconsistent enforcement of these rights remains a concern, as preventive detention continues to be employed with little effective oversight. The judiciary must remain vigilant in consistently enforcing constitutional protections and challenging any measures that threaten the balance between state power and individual rights.

Striking a balance between national security and individual freedom is not merely a legal necessity but a democratic imperative. Democracy requires that individual freedoms are protected from state overreach, and that the rule of law remains the cornerstone of governance. National security, while crucial, cannot justify indefinite detention without trial or the erosion of fundamental rights. The judiciary must play a proactive role in ensuring that preventive detention laws are applied in a manner that is not only consistent with the letter of the law but also with its spirit—ensuring that civil liberties are never sacrificed in the name of security.

In conclusion, India's approach to preventive detention, though rooted in national security concerns, must be reformed to reflect the democratic principles enshrined in its Constitution. Greater judicial scrutiny, enhanced procedural safeguards, and transparency in detention practices are essential to protect the rule of law and the rights of individuals. Only through such reforms can India achieve a delicate equilibrium between national security and the protection of civil liberties, which will uphold the democratic values that the Constitution seeks to preserve. In this manner, India can create a system of governance that is not only secure but also just, transparent, and accountable to the people it serves.

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