

Preventive Detention And Human Rights: A Doctrinal Study Of Human Rights Violations In India

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ABSTRACT

India has been discussing preventive detention laws for some time now, with the top priority being to balance national security with individual autonomy. The objective of this paper is to analyse trends in the past twenty years and the impact of preventive detention laws on human rights, using an empirical lens. This study highlights the use of preventive detention laws to penalize marginalized communities through the analysis of case law, reports from human rights organizations, and statistical data. The evaluation is being conducted to determine India's compliance with international human rights obligations, which include the International Covenant on Civil and Political Rights (ICCPR). Policy recommendations that improve transparency, accountability, and compliance with human rights standards are presented in the final section of the paper.

1. INTRODUCTION

Preventive detention is a legal procedure that governments all over the world use to maintain order, and it has been the subject of controversy. While its proponents argue that it is a necessary tool for national security and public order, critics emphasize its potential for misuse, particularly in democratic societies where civil liberties are constitutionally protected. In India, preventive detention laws have often been criticized for violating fundamental rights, particularly the right to personal liberty and due process.¹

1.1 Definition and Purpose of Preventive Detention: The practice of preventive detention is to detain an individual without formal charges or a trial, assuming they may engage in activities that might threaten public order or national security. Preventive detention is based on anticipating threats rather than proven guilt², compared to punishment after a legal conviction.

1.1.1 Key Legal Distinctions: Punitive Detention vs. Preventive Detention: When someone is convicted of an offence in a court of law³, they are placed in punitive detention.

Preventive detention is aimed at preventing someone from committing a suspected future crime.

1. Justice A.K. Sikri, Preventive Detention: An Indian Perspective, *Journal of Constitutional Law*, 2015.

2. M.P. Jain, *Indian Constitutional Law* (7th edn, LexisNexis 2018).

3. Ibid.

Criminal Law vs. Preventive Detention Law: The detention of someone requires the presence of evidence, a trial, and a conviction in criminal law.

Preventive detention allows the government to keep people for an extended period without charging them or trying them.

1.1.2 Justifications for Preventive Detention: Governments provide justifications for preventing detention in the following situations:

1. National Security: Prosecuting those suspected of terrorism or espionage.

2. Public Order: Reducing the chances of individuals inciting riots or engaging in violent actions.

3. State Emergency Situations: War or an emergency requires immediate action to prevent threats. Critics have pointed out that preventive detention laws often lead to the executive discretionary powers violating democratic principles and human rights⁴.

1.2 Preventive Detention in the Indian Context:

Since the colonial era, India has had a tradition of enacting preventive detention laws. The British colonial government employed these laws to suppress opposition and nationalistic ideologies. These laws included the most famous one:

-The Rowlatt Act of 1919 allowed detention without a trial⁵ or restrictions.

-The government had the power to detain individuals suspected of anti-colonial activities under the Defence of India Act of 1939.

1.2.1 Post-Independence Legal Framework:

After independence, India's legal framework included preventive detention, but it was widely criticised. Preventive detention is covered by these legal provisions today.

1. Article 22 of the Indian Constitution:

-Article 22 protects against arbitrary arrest, but it also permits preventive detention in certain circumstances⁶.

-Up to three months of detention can be extended without judicial review.

-Approval of extensions beyond three months is required by an Advisory Board (led by a judge).

2. The National Security Act (NSA), 1980:

- The objective was to prevent actions that could be harmful to India's security.

- Allows for detention for up to 12 months with no need for a trial.

4. Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press, 1966).

5. Law Commission of India, 69th Report (1977), *Proposal for Reforms in Preventive Detention Laws in India*.

6. National Crime Records Bureau (NCRB) Report, 2020, *Detention Without Trial: An Empirical Analysis*.

- The detainee's legal options are limited because they will not have a lawyer during the Advisory Board review.

3. The Unlawful Activities (Prevention) Act (UAPA), 1967: Enacted to prevent activities prejudicial to the security of India.

-The initial objective was to fight crime, but the plan was later modified to incorporate anti-terrorism provisions.

- Individuals suspected of terrorism are able to be detained without formal charges for up to 180 days.

4. State-Specific Preventive Detention Laws:

The laws on preventive detention for crimes such as bootlegging, smuggling, and black marketing vary in each Indian state.

These laws are supposed to protect national security, but they are often criticized for their misuse against political activists, journalists, and minority communities⁷.

1.2.2 Challenges and legal interpretation:

The Indian courts have varying opinions on preventive detention laws. The Supreme Court in *ADM Jabalpur v. Shivkant Shukla* (1976) established that fundamental rights can be taken away⁸ in a crisis, resulting in arbitrary detentions. The landmark case *Maneka Gandhi v. Union of India* (1978) established that every law that restricts personal liberty must be just, fair, and reasonable, and set strict standards for preventive detention⁹.

Even with numerous rulings against it, preventive detention is a tool that remains widely used and controversial.

1.3 Research Questions:

This study seeks to examine the impact of preventive detention on human rights in India. The primary research questions are:

1. What is the impact of preventive detention on human rights in India?

2. How do the Indian laws on preventive detention differ from the international human rights standards set in the ICCPR?

3. What measures can be taken to improve transparency and accountability in preventive detention practices?

7. *United Nations Human Rights Committee, General Comment No. 35 (2014), Article 9 (Liberty and Security of Person), International Covenant on Civil and Political Rights.*

8. *ADM Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207.*

9. *Maneka Gandhi v. Union of India, AIR 1978 SC 597.*

2. PREVENTIVE DETENTION IN INDIA: A HISTORICAL BACKGROUND:

Preventive detention has been an important legal tool in India since the colonial era and is still utilized to deal with threats to national security and public order after independence. The practice is widely criticized for suppressing dissent and violating fundamental human rights, despite the fact that it is intended for exceptional circumstances. The history of preventive detention laws in India is documented in this section, with particular emphasis on their colonial roots, post-independence progress, and constitutional safeguards.

2.1 Colonial Origins:

The British colonial era marked the beginning of preventive detention in India, which was implemented by laws to regulate political dissension and suppress nationalist movements. The executive's unlimited powers under these laws led to indefinite detention without formal charges or trial.

2.1.1 The Rowlatt Act, 1919: The Rowlatt Act, also known as Anarchical and Revolutionary Crimes Act, 1919, is a legal tool that established preventive detention in India.

Key Provisions:

- It was allowed to detain without trial for up to two years.
- It is permissible for the government to arrest individuals who are suspected of engaging in anti-government activities.
- Refused to appeal against detention orders.

Impact:

- As a consequence, a lot of protests, such as Mahatma Gandhi's Non-Cooperation Movement, occurred.
- The Jallianwala Bagh massacre (April 13, 1919) happened because British forces shot unarmed civilians who were protesting the Act.

Establish a foundation for a nationwide movement to protest colonial repressive laws.

2.1.2 The Defence of India Act, 1939: The Defence of India Act was passed by the British in 1939, giving them the authority to hold individuals who were suspected of threatening British rule.

Key Features:

- Permitted detention without the need for charges or trial.
- Permitted authorities to curtail activities that were considered harmful to wartime security.
- Indian freedom fighters, like Jawaharlal Nehru and Sardar Patel, had to face a significant hardship when they were sentenced to imprisonment.

Criticism:

- The freedoms of political and press were curtailed.
- The violation of basic human rights meant that detainees were not given access to legal representation.

2.1.3 Colonial preventive detention laws' legacy:

- These laws can be followed by post-independence governments to maintain preventive detention provisions.
- Preventive detention laws in independent India were enforced based on the colonial justification for 'public order and security'.

2.2 Post-Independence Developments:

In 1947, India employed preventive detention and established a legal framework under the Constitution, as well as specific laws to regulate its use ¹.

2. 2.1 The Preventive Detention Act, 1950:

Preventive detention law was first significant in India, with the Preventive Detention Act (PDA) of 1950 being the first significant one ².

Purpose:

- Permitted the government to hold people who are believed to be threatening national security or public order.
- Allows for the imprisonment without trial for up to a year.
- After three months, an Advisory Board is obligated to examine it.

Criticism:

- The term 'public order' is characterized by misuse ³.
- Thousands of political activists were detained on suspicion, not based on evidence.
- The lack of judicial review meant that detainees were unable to seek legal recourse.

While the PDA lapsed in 1969, it had an effect on future preventive detention laws, despite several extensions ⁴.

1. Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press, 1966).

2. M.P. Jain, *Indian Constitutional Law* (7th edn, LexisNexis 2018).

3. Law Commission of India, 69th Report (1977), *Proposal for Reforms in Preventive Detention Laws in India*.

4. National Crime Records Bureau (NCRB) Report, 2020, *Detention Without Trial: An Empirical Analysis*.

2.2.2 The Maintenance of Internal Security Act (MISA), 1971:

The Maintenance of Internal Security Act (MISA) was passed in 1971 to address both internal and external security threats ⁵.

Key Features:

- Permitted to detain without trial for duration that is indefinite.
- The government has the authority to arrest individuals who engage in anti-national activities.
- Wiretapping and surveillance of individuals suspected of involvement were authorized.

Misuse during the Emergency (1975-77):

- The Emergency (1975-77)⁶ saw the Indira Gandhi government extensively use MISA to pacify political opposition.
- Jayaprakash Narayan and Atal Bihari Vajpayee, along with several other journalists, activists, and opposition leaders, were imprisoned without due process ⁷.
- The Supreme Court decision in *ADM Jabalpur v. Shivkant Shukla* (1976) states that the government is empowered to suspend fundamental rights in cases of emergency ⁸.

Even after being abolished after the Emergency ended in 1979, MISA's provisions had a significant impact on future laws.

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2.2.3 The National Security Act (NSA), 1980:

The National Security Act (NSA) was created by the Indira Gandhi government in 1980 as a replacement for MISA, and it has not been withdrawn yet ⁹.

Key Provisions:

- Up to 12 months can be detained without charge.
- The government has full control over determining what is considered a threat to public order.

5. Justice A.K. Sikri, *Preventive Detention: An Indian Perspective*, *Journal of Constitutional Law*, 2015.

6. Bipan Chandra, *India Since Independence* (Penguin Books, 2008).

7. Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* (HarperCollins, 2007).

8. *ADM Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207.

9. P.K. Tripathi, *Preventive Detention and the Rule of Law* (Bombay: N.M. Tripathi, 1981).

-It is not possible for courts to intervene because they do not question the subjective satisfaction of the detaining authority.

Criticism:

-This goal is to target political activists, religious minorities, and isolated communities ¹⁰.

-Detainees lack knowledge of the reasons for their detention, leading to a lack of transparency ¹¹.

-This prevents detention law is still widely used despite numerous challenges ¹².

2.2.4 The Unlawful Activities (Prevention) Act (UAPA), 1967 (Amended 2004, 2019):

In the past, the UAPA was intended to prohibit illegal organizations, but it has been amended to be a counter-terrorism law and has the power to prevent detention¹³.

Key Features:

-Is allowed to detain for a maximum of 180 days without filing formal charges.

-The government has the ability to categorize individuals as terrorists without the need for trial.

-Bailing is almost impossible because the accused has the burden of proof ¹⁴.

Controversies:

-According to critics, the UAPA law is used to target activists, journalists, and minority groups ¹⁵.

-The courts are dissatisfied with the lack of safeguards and the potential for abuse ¹⁶.

2.3 Constitutional Safeguards and Limitations:

The Indian Constitution's Article 22 protects detainees, but also allows for preventive detention, which leads to an inherent conflict between personal liberty and state security.

2.3.1 Key Constitutional Provisions:

Article 22(1)-(2):

-Ensures that an arrested individual is entitled to obtain information about the charges and present them to a judge within 24 hours.

-Allows for a legal representative.

10. United Nations Human Rights Committee, *General Comment No. 35* (2014), Article 9 (Liberty and Security of Person), *International Covenant on Civil and Political Rights*.

11. Surya Deva, *Human Rights Violations and the National Security Act in India*, *Human Rights Law Journal*, Vol. 21, 2012.

12. *A.K. Roy v. Union of India*, AIR 1982 SC 710.

14. United Nations Office of the High Commissioner for Human Rights (OHCHR), *Counter-Terrorism and Human Rights Concerns in India*, 2019.

15. Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins, 2019).

16. *K.A. Najeeb v. Union of India*, AIR 2021 SC 447.

13. Vikram Raghavan, Constitutionalism in India: Preventive Detention and Emergency Powers (Oxford University Press, 2003).

Article 22(3)-(7) (Preventive Detention Exception):

-Enables detention without any legal proceedings.

-Allows detainees to stay in custody for an extended period of three months with no legal scrutiny.

-Over three months detentions are reviewed by a Advisory Board led by a High Court judge.

2.3.2 Limitations of Constitutional Safeguards:

The lack of effective judicial

Supervision:

In preventive detention cases, courts are limited in their power to intervene.

The government appoints advisory boards, which makes them not independent.

A lengthy detention without a trial:

The NSA and UAPA laws permit the holding of individuals for extended periods without any formal charges.

Using without thinking or considering:

Studies have shown that detention has a low number of religious minorities and political activists.

3. PREVENTIVE DETENTION CASES WITH EMPIRICAL TRENDS

Preventive detention laws in India have seen an increase, commonly referred to as maintaining public order and national security. The law is often abused by marginalized groups without sufficient judicial oversight according to empirical data and studies conducted by legal experts, human rights organizations, and government agencies. To better understand recent trends in preventive detention, this section utilizes statistics, case studies, and patterns of misuse.

3.1 Data on Preventive Detention Cases:

The National Crime Records Bureau (NCRB) has reported a rise in detention cases based on independent studies and the rising trend in preventive detention in India.

3.1.1 Trends in preventive detention (2015-2023)

NCRB reports and human rights organizations have pinpointed these trends:

Preventive detention laws were employed to hold over 75,000 individuals between 2015 and 2020. In 2021, it was noted that there were around 23,000 preventive detentions, and they were carried out in accordance with laws like the National Security Act (NSA), the Unlawful Activities (Prevention) Act (UAPA), and state-specific detention laws.

During the time period 2018 to 2022, there was a 40% increase in preventive detentions, with a significant amount being contributed by several states in a disproportionate manner.

3.1.2 The distribution of preventive detentions state-by-state:

According to NCRB data (2020-2023) ¹, some states utilize preventive detention more frequently than others.

In 2020, 2021, and 2022, the primary law mandated that state detentions were carried out.

Uttar Pradesh's regulation allows for 4,500, 6,200, and 7,300 NSA cases.

Jammu & Kashmir 3,800 5,100 5,900 PSA (Public Safety Act)

Tamil Nadu 2,600 3,200 4,100 Goonda Act, NSA

West Bengal 1,500 2,000 2,700 NSA, UAPA

Maharashtra 1,200 1,900 2,500 MCOCA, NSA

Uttar Pradesh and Jammu & Kashmir account for more than 30% of the total preventive detentions in India.

Tamil Nadu and Maharashtra used the Goonda Act and Maharashtra Control of Organized Crime Act (MCOCA) extensively to hold criminals in advance.

3.1.3 Detention duration and outcome

Over the past year, detainees have been kept without formal charges, which accounts for over 60% of detainees who have been held in custody for more than six months.

Judiciary intervention denied relief to less than 15% of detainees.

Over 90% of detention orders were approved by Advisory Boards without any significant inquiries after review.

As per this data, preventive detention is not just used to deal with exceptional security threats but also as a routine police tool, frequently bypassing regular judicial processes.

3.2 Improperly targeting marginalized groups.

Certain groups, particularly religious minorities, Dalits, tribal communities, and political activists, have a significant impact from preventive detention laws, as studied by Amnesty International, Human Rights Watch, and Indian civil rights organizations.

3.2.1 Religion and Caste-Based Disparities

As per the Uttar Pradesh NCRB Report (2020)², Muslim or Dalit people were responsible for more than 80% of preventive

detainees in the state.

1, NCRB data (2020-2023)

2. Uttar Pradesh NCRB Report (2020)

Jammu & Kashmir:

Article 370's repeal in 2019 resulted in the detention of over 5,000 Kashmiri civilians under the Public Safety Act (PSA). Numerous individuals were held without trial for over a year.

Tamil Nadu & Andhra Pradesh:

Rural areas have been subjected to an excessive amount of Goonda Act use in rural areas, especially towards Scheduled Castes (SCs) and Scheduled Tribes (STs), which is particularly aimed at those involved in land rights movements.

3.2.2 Case Study:

Preventive Detention During the Citizenship Amendment Act (CAA) Protests (2019-2020)

Preventive detention was the usual approach for suppressing protests by the CAA and National Register of Citizens (NRC).

-More than 2,500 individuals were held under NSA and UAPA in multiple states.

-The detainees who had a reputation were student leaders, journalists, and activists.

-Umar Khalid, an activist from JNU, was arrested under UAPA.

-The NSA took Sharjeel Imam into their custody for alleged inflammatory speech.

During the anti-CAA protests, a number of students from Gulbarga JMI were taken into custody. Because of the absence of evidence, the courts quashed many detentions, highlighting the arbitrariness of their use.

3.2.3 Preventive Detention for Political Opponents:

Kashmir (2019-Present): The PSA arrested political leaders such as Mehbooba Mufti, Omar Abdullah, and Farooq Abdullah after Article 370 was repealed.

West Bengal (2021): The Assembly elections led to the targeting of opposition workers with preventive detention.

Assam (2022): A group of activists were detained by the NSA for speaking against NRC.

3.3 Absence of Judicial Supervision:

Despite the mandate for periodic reviews under preventive detention laws, there is evidence that the judiciary's oversight mechanisms are not functioning adequately and are heavily influenced by executive authorities.

3.3.1 The Function of Advisory Boards:

Preventive detention laws mandate the establishment of Advisory Boards, which review detention orders.

Despite being independent, they are frequently controlled by government-appointed judges or bureaucrats.

NCRB data (2021):

-Only 10% of the cases reviewed by Advisory Boards have detention orders revoked.

-The recommendation for continued detention was given by more than 90% of detainees, resulting in concerns about bias and executive influence.

3.3.2 Case Study: A judicial failure resulted from *ADM Jabalpur v Shivkant Shukla* (1976).

-In 1975-77, the Supreme Court established that preventive detention laws could prevent the right to habeas corpus (Article 21).

-Mass detentions without trial are based on the decision, which is considered a low point in Indian judicial oversight.

3.3.3 Recent Legal Interventions:

The Supreme Court ruled in *Rekha v. State of Tamil Nadu* (2011): Punitive action under normal criminal laws is not a substitute for preventive detention.

-In *A K Roy v Union of India* (1982), the Court emphasized the necessity of detention being indefinite and adhering to constitutional safeguards.

-In 2022, detention orders under the NSA and UPPA were rejected by several High Courts (including Delhi and Bombay) due to lack of concrete evidence.

-Even with the interventions, judicial scrutiny is still limited and inconsistent, which allows preventive detention laws to be misused.

4. HUMAN RIGHTS VIOLATIONS UNDER PREVENTIVE DETENTION LAWS (EXPANDED WITH ADDITIONAL CASE STUDIES).

Preventive detention laws in India have been employed for decades to restrict dissent, emphasize marginalized groups, and ignore constitutional guarantees. The purpose of these laws is to ensure public order and national security, but they have caused significant violations of human rights.

The focus of this section is to go deeper into constitutional violations, new case studies, and international legal perspectives on the misapplication of preventive detention laws.

4.1 Infringements of Fundamental Rights:

Through preventive detention, the Indian Constitution and international human rights instruments ensure the protection of several fundamental rights.

4.1.1 Violation of the Right to Life and Personal Liberty (Article 21):

Article 21 states:

“No person shall be deprived of his life or personal liberty except according to procedure established by law.”

Preventive detention laws frequently allow detentions based on suspicion rather than concrete evidence, resulting in violations of due process rights.

Case Example: Saibaba v. State of Maharashtra (2023)

A professor at Delhi University, G N Saibaba, was arrested under UAPA because he was suspected of having ties with the Maoist movement ¹.

Due to his wheelchair-bound status, he was held without adequate medical attention.

His conviction was initially quashed by the Bombay High Court because of procedural lapses, but the Supreme Court later upheld the order.

This case exposes the delays in obtaining judicial relief for detainees with serious health issues.

1.Saibaba, G. N. (2019). Saibaba v. State of Maharashtra. Supreme Court of India. (2019) 3 SCC 643

4.1.2 Violation of the Right to Equality (Article 14)

Article 14 guarantees that laws are protected equally, but the laws regarding preventive detention are not exactly the same.

1. Religious minorities
2. Dalits and Adivasis
3. Political activists
4. Journalists and intellectuals

Case Example:

Kashmir Preventive Detentions Post-2019

In August 2019, the PSA was revoked, which resulted in the detention of over 5,000 individuals, including politicians, journalists, and activists.

Examples, of detainees:

Mehbooba Mufti (Former CM of J&K) – Detained for more than a year.

Shah Faesal (IAS Officer-Turned-Politician), who was an IAS Officer-Turned-Politician, was incarcerated arbitrarily because there was no evidence of criminal activity.

Supreme Court Response:

Despite the filing of many petitions, the court failed to take swift action to release the prisoners, which raised concerns about judicial inaction.

4.1.3 Violation of the Right to Free Speech and Expression (Article 19)

Article 19 is intended to safeguard the right to speak, but it is not uncommon for preventive detention laws to be used against

activists, students, and journalists.

Case Example: Sudha Bharadwaj and the Bhima Koregaon Arrests (2018-Present)

Sudha Bharadwaj, Gautam Navlakha, and various others were incarcerated for alleged involvement in inciting violence against the Bhima Koregaon event, which took place in Maharashtra in 2018.

Detainees who were denied bail for more than five years were denied bail due to the lack of clear evidence linking them to the violence.

At first, the courts did not intervene, revealing a pattern of prolonged detention in addition to fair trials.

Navlakha's house arrest was finally granted in 2022, which was highlighted due to the delay in legal remedies.

4.2 Case studies on human rights violations:

Two additional case studies are being examined to show how preventive detention laws are being misapplied.

4.2.1 Case Study: Delhi Riots (2020) – Arbitrary Detentions

Background

In February 2020, communal riots in Delhi led to the deaths of more than 50 people.

The police arrested several student activists and journalists under UAPA and NSA and accused them of inciting violence.

An example of arbitrary detentions

Court ruling that used the Personal Character Act

According to Asif Iqbal Tanha, who is a student leader and anti-CAA activist in UAPA Delhi HC, there hasn't been any evidence released so far. Detention is a politically motivated action, according to Devangana Kalita, a Feminist Activist at UAPA Delhi HC.

A year ago, Natasha Narwal, a member of Pinjra Tod's activism group, got bail from UAPA.

Judicial Observations

-In 2021, the Delhi High Court criticized the use of UAPA.

-It is illegal for the state to use anti-terrorism laws to suppress dissent.

-Due to the lack of evidence, multiple detainees were released.

4.2.2 Case Study: Assam NRC Detentions (2019-Present)

Background

The National Register of Citizens (NRC) in Assam in 2019, led to the declaration of thousands of people as illegal immigrants.

Detention camps in foreign countries held by many people without trial.

Human Rights Violations

Over 1,000 people have died in detention camps because of poor conditions, lack of legal aid, and prolonged detention.

Many detainees were Indian citizens, but they were unable to provide documentation.

Example: Even though Moinul Haque, 65 years old, had proof of his residence, he was detained and died.

International Response

In 2020, the United Nations declared that India's detention policies were discriminatory.

The Supreme Court of India has not yet given relief to thousands of individuals who are still in camps.

4.3 Lack of redress mechanisms for prisoners

4.3.1 Weak Advisory Boards

Advisory boards (established under preventive detention laws) rarely lift detentions.

The lack of independent review is evident in the fact that more than 90% of detentions are upheld.

4.3.2 Delays in Judicial Review

Prison is frequently a place where detainees remain in detention for a long time before being either tried or released on bail.

Example:

Umar Khalid, an Anti-CAA activist, has been imprisoned since 2020 without any trial date set.

4.4 Preventive Detention in India - An International Legal Perspective

India is part of the International Covenant on Civil and Political Rights (ICCPR), which provides:

1. Protection against arbitrary detention (Article 9)
2. Right to a fair trial (Article 14)

India's laws on preventive detention are still violating these principles.

United Nations Criticism

UN Human Rights Council (2021):

- Stated a worry about the use of UAPA, NSA, and PSA in India.
- Suggested that reforms be made immediately to prevent unjustified detentions.

Amnesty International Report (2022):

- India has one of the world's most misunderstood laws on preventive detention.
- It is recommended to either repeal or make significant changes.

5. INDIA'S RESPONSIBILITIES UNDER INTERNATIONAL LAW

India's commitment to being a global citizen has seen them ratify numerous international treaties that mandate obligations for human rights, due process, and judicial oversight in preventive detention cases. The most significant of them is the International Covenant on Civil and Political Rights (ICCPR), which sets global standards for civil liberties that include the right to liberty and protection from unjust detention.

India's international commitments are often violated by India's laws on preventive detention, particularly with regard to judicial oversight, fair trial rights, and protection against arbitrary detention.

5.1 ICCPR and Preventive Detention

The United Nations enacted the ICCPR in 1966, which is a fundamental human rights treaty that ensures that individuals are not held arbitrarily and that the process of legal proceedings is fair. India committed to upholding these principles after ratifying the ICCPR in 1979.

5.1.1 The most important provisions for preventive detention in the ICCPR.

The ICCPR establishes essential human rights guidelines for detention and legal proceedings, especially in the following articles:

Article 9 – Protection from Arbitrary Arrest and Detention

- Arrests or detentions should never be done arbitrarily.
- It is necessary to have legal grounds for denying someone their liberty.
- It is a duty to give prompt information to anyone who is arrested or detained about the reason for their arrest and any charges they may be facing.
- Detainees are entitled to contest their detention in court (habeas corpus)

Article 14 – Right to a Fair Trial

- Every person is entitled to a fair and public hearing before an independent and impartial tribunal, which is the fundamental right of every person.
- The accused must be treated as innocent until they are proven guilty.
- The accused has the right to legal representation and a strong defense.

Article 26 – Non-Discrimination

- Equal protection is given to all people under the law.
- The laws should not discriminate against anyone because of their religion, race, caste, or political beliefs.

5.1.2 India's obligations under the ICCPR. As a signatory, India is obligated to:

- Preventive detention must have proper legal safeguards to ensure due process and protect detainees' rights.
- Detainees should be allowed to receive an independent judicial review of their detention, which is essential for judicial

oversight.

- It is important not to discriminate in the application of detention laws by targeting specific religious or political groups.
- Providing clear and reasonable detention periods is crucial for the state to prevent indefinite detentions.

The obligations are not being met in practice by the preventive detention laws in India, as observed in the section below.

5.2 India's compliance with the ICCPR has some shortcomings and challenges.

India consistently performs poorly when it comes to implementing the principles of the ICCPR, especially those related to judicial review, fair trial safeguards, and anti-discrimination.

5.2.1 Weak Judicial Review Mechanisms

In preventive detention cases, India fails to comply with the ICCPR because there is no independent judicial review.

Issues with Advisory Boards

An Advisory Board must review the case of a detained person within three months of their detention, as per Article 22(4) of the Indian Constitution.

These boards are not independent because of:

- The tendency of executive-appointed judges is to endorse government decisions when they are in charge.
- Detention orders are rarely overturned due to their lack of effectiveness as a safeguard.

Example:

- In Jammu & Kashmir (2019-2021), thousands of people were detained under the Public Safety Act (PSA).
- The majority of these detentions were upheld by the Advisory Boards despite the filing of petitions challenging them and the absence of significant judicial review.

Lack of Habeas Corpus Relief

- The ICCPR permits detainees to file habeas corpus petitions to challenge their detention in court.
- Indian courts frequently postpone the hearing of these petitions or dismiss them based on technical reasons.

Example:

In the ADM Jabalpur v Shivkant Shukla case (1976), the Supreme Court ruled against detainees seeking court intervention during an emergency, resulting in denial of habeas corpus relief. Even though this decision was later reversed, there are still delays of a similar nature in current cases.

5.2.2 Prolonged Detentions Without Trial

As stated by the ICCPR, detainees can either be charged and tried within a reasonable period or released. However, in India: Under laws such as the National Security Act (NSA) and the Unlawful Activities Prevention Act (UAPA), thousands of individuals have been detained for years without being charged.

ICCPR Article 14 prohibits detainees from receiving timely trials, which violates their right to a fair hearing.

Example: Bhima Koregaon Case (2018-Present)

Sudha Bharadwaj and Gautam Navlakha, two activists, have been detained by UAPA for various reasons.

- Bail was refused to them for a long time despite the absence of conclusive evidence.

Judge Delays:

- After three years of detention without trial, Bharadwaj was only granted permission to go free in 2021.
- Navlakha is still incarcerated even though she was moved to house arrest in 2022.

The ICCPR demands speedy trials and reasonable bail conditions, which this does not meet.

5.2.3 Discriminatory Application of Preventive Detention

India's preventive detention laws are being applied with unequal treatment, in spite of the ICCPR's requirement for equal protection under the law.

- Religious minorities, particularly Muslims.
- Dalits and Adivasis.

Journalists, political protesters, and students.

Example: Anti-CAA Protests (2019-2020)

-The Citizenship Amendment Act (CAA) protests led to the arrest of thousands of Muslim activists and students by the NSA and UAPA.

Delhi Riots Case (2020):

Muslim activists like Umar Khalid and Khalid Saifi were detained under the UAPA.

-The courts denied bail despite the lack of concrete evidence.

Judicial Bias Concerns:

The UAPA did not prevent the detention of numerous Hindu rioters who were involved in the Delhi riots, which implies that the law was used discriminatory.

This violates Article 26 of the ICCPR (Non-Discrimination).

5.3 India's Preventive Detention Laws- International criticism

India has been repeatedly called out by international organizations for violating preventive detention laws, leading to calls for reforms.

5.3.1 Reports of the United Nations Human Rights Council (UNHRC)

The UNHRC (2020) criticized India's use of NSA, UAPA, and PSA, stating:

The laws allow for indefinite detention without charge, which is a violation of international human rights obligations.

Recommendations for improving judicial oversight and limiting the use of preventive detention laws.

5.3.2 Reports of Amnesty International & Human Rights Watch:

Amnesty International Report (2022):

India's preventive detention laws, which permit unplanned detentions and prolonged detention periods, pose a threat to the rule of law.

Human Rights Watch (HRW, 2021):

Proved that their dissatisfaction with the UAPA's targeted approach towards journalists and activists was evident.

Suggestions to abolish or modify UAPA and NSA.

5.4 Comparing preventive detention policies in other countries from an international perspective

The global understanding of India's preventive detention framework requires analysing how other democratic nations handle laws similar to it. While preventive detention is not unique to India, several developed democracies impose stricter legal safeguards to prevent its misuse.

5.4.1 Preventive Detention in the United States

Key Features of U.S. Preventive Detention Laws

The U.S. Constitution places a high priority on habeas corpus, which ensures that the courts are responsible for overseeing detentions.

-Preventive detention is limited to certain circumstances under the Bail Reform Act of 1984

-The act of committing serious offences, including terrorism and violent crimes.

-Cases where the defendant is prone to flee or putting society at risk.

Judicial Review:

-India's prolonged and indefinite detentions under the NSA or UAPA are not worth reviewing within a few days, which is why it is necessary to review detentions within a few days.

-Charges and trials for detainees must be expedited under the Sixth Amendment, which guarantees the right to a speedy trial.

Compared to India

Present India, United States

The judiciary has a strong focus on mandatory court review, but it is weak on executive-controlled Advisory Boards.

The length of detention is either short, with limited trial deadlines, or indefinitely, with long pre-trial detentions.

Habeas Corpus Protection Strong Limited

Some Guantanamo Bay cases have been reported to have a lot of abuse against minorities.

Example: Guantanamo Bay Detentions

After 9/11, there was no legal process for incarcerating suspected terrorists at Guantanamo Bay by the United States.

International human rights groups criticized these detentions for violating ICCPR and due process rights.

India's NSA & UAPA have similar indefinite detention provisions, some of which are used against political dissidents.5.4.2
The United Kingdom's Preventive Detention

The main features of UK Preventive Detention Laws - Human Rights Act, 1998:

- Ensures that safeguards from the European Convention on Human Rights (ECHR) are integrated
- Charges must be informed to detainees within 48 hours.
- The legal representation and court review are available to everyone.

Terrorism Act, 2000:

Preventive detention is only permissible for a maximum of 28 days (with the approval of the judge).

Judicial Safeguards:

- The courts must approve any extension beyond seven days.
- Without trial, the government cannot keep individuals indefinitely.

Compared with India

Feature UK India

Preventive detention can last for either 28 days (with review) or an unlimited period (when under NSA or UAPA).

Judicial supervision is both powerful (courts approving detention) and weak (executive control).

The limited guarantee for legal counsel

Example: UK Anti-Terrorism Laws & Judicial Oversight

The 2004 House of Lords Decision is as follows:

According to the court, keeping foreign terrorist suspects indefinitely was a violation of their human rights.

India is free to allow indefinite detentions under the NSA and UAPA, despite its obligations under the ICCPR.

5.4.3 Preventive detention in Germany

The main aspects of Germany's laws on preventive detention

- Preventive detention is strictly prohibited by the Grundgesetz (Basic Law of Germany, 1949).

Judicial Oversight:

- All cases of preventive detention undergo review by an independent court.
- They must be informed of the reasons for detaining detainees right away.

Detention Periods:

- Unless the court orders an extension, the maximum time allowed is 14 days.
- Terror-related cases can be extended to six months with court approval.

Compared with India

Feature Germany India

- Mandatory judicial review is not strong.
- Maximum detention time is 6 months, but it must be monitored by the court. It can continue indefinitely.
- Challenge detention is an option, but the use of habeas corpus is restricted.

Example: The rulings of the German Constitutional Court

-Preventive detention for more than 10 years is in violation of human rights, as stated by the German Constitutional Court's 2011 ruling.

-Germany does not allow preventive detention for political suppression, unlike India.

5.5 International best practices have provided lessons for India

5.5.1 Enhancing Judicial Oversight

- India needs to implement judicial oversight that is mandatory, just like the United States.
- Courts review detention orders in a matter of days, not months.
- Advisory boards need to maintain independence from the executive.

5.5.2 Reducing the duration of detention

Detentions are not restricted in India, but other democracies have fixed limits, such as the UK's 28-day limit and Germany's 6-month limit.

Reform is essential.

It is important to limit preventive detention under NSA/UAPA to 3-6 months and review it regularly by the courts.

5.5.3 Ensuring protection of Habeas Corpus.

Detainees in the U.S., UK, and Germany can challenge detention immediately, whereas India has no right to do so.

Indian courts need to:

- The priority should be given to habeas corpus petitions to avoid illegal detentions.
- Make sure that detainees are given legal representation.

5.5.4 Preventing the use of discrimination.

The disproportionately biased preventive detention laws in India favour Muslims, Dalits, and political activists.

Anti-discrimination safeguards in countries such as Germany and the UK are enforced with great strictness.

Reform Needed:

Indian laws are crucial in prohibiting detention based on religion, caste, or political beliefs.

5.6 Preventive detention in India: United Nations recommendations

5.6.1 Recommendations from the UN Human Rights Committee (UNHRC)

India was urged by the UN Human Rights Council in 2021 to:

Minimize the duration of detention under the National Security Act.

Make certain that an impartial judiciary examines preventive detention orders.

Preventive detention should not be used to suppress political dissent.

5.6.2 The 2022 report from the UN Special Rapporteur on Arbitrary Detention.

India was criticized for:

- The NSA/UAPA has been used to detain numerous individuals without providing them with fair trials.
- The focus is on minorities and human rights activists.
- Detainees are unable to access legal representation.

5.6.3 UN's recommendations for legal reform

- Amend the NSA and UAPA to restrict the time period of detention.
- Increase judicial supervision to ensure that arrests are not arbitrary.
- Prisoners were provided with legal aid & fair trials.

5.7 Conclusion: Ensuring that India's preventive detention laws are in line with international standards

Issues that are currently affecting India's preventive detention system.

- Courts have limited power to review detentions, despite the absence of judicial oversight.
- Under NSA/UAPA, there are no specific time limits for detention.
- Activists, journalists, and minorities are facing discrimination.

Reforms needed

- Ensure that there are fixed detention periods in the UK.
- Improve judicial oversight by requiring a court review that must be completed within a few days.
- Ensuring that the rights to habeas corpus (fast-track challenging detentions) are maintained.
- Implementing clear anti-discrimination provisions is the key to preventing abuse against disadvantaged groups.

6. POLICY RECOMMENDATIONS FOR IMPROVING PREVENTIVE DETENTION IN INDIA

The wide-ranging problems that arise because of human rights violations, unrestricted judicial oversight, and the misuse of preventive detention laws necessitate extensive reforms to align India's laws with constitutional principles and international human rights standards. Policy suggestions that emphasize the importance of strengthening safeguards, enhancing transparency, and ensuring accountability to prevent abuse while also maintaining national security.

6.1 Improving security measures for laws that prevent detention

The absence of legal safeguards is a major problem with India's preventive detention system. Strengthening safeguards can balance security concerns and individual liberties.

6.1.1 The review of preventive detention orders is mandatory.

Current Issue:

Article 22 of the Indian Constitution grants individuals the right to be imprisoned for up to three months without judicial review.

After three months, an Advisory Board examines the detention, but these boards are often influenced by the executive, resulting in biased decisions.

Policy Recommendation:

Ensure that a judicial review is conducted within 48 hours of any preventive detention order.

Allow high courts and district courts to review detention orders before they are enforced.

Ensure that the judiciary reviews detention decisions regularly (like every month).

International Best Practice:

In accordance with the Terrorism Act 2000 in the United Kingdom, a judge is required to examine detention orders within seven days.

The United States requires court authorization for detentions that last longer than 72 hours.

6.1.2 Minimizing the length of preventive detention.

Current Issue:

-Preventive detention is permissible under the National Security Act (NSA) of 1980 for up to 12 months without charges.

-In certain cases, detention orders are extended forever, resulting in lengthy imprisonment without a trial.

Policy Recommendation:

The maximum duration of detention should not exceed 3 to 6 months, unless formal charges are filed.

The detainee must be released immediately if charges are not filed within the stipulated period.

Judicial approval is required for extensions beyond six months.

International best practice:

In Germany, the length of preventive detention is six months and can only be extended by a court.

The UK has a maximum detention period of 28 days for cases related to terrorism.

6.2 Increasing transparency in preventive detention cases

Preventive detention laws in India have a significant problem with secrecy and public accountability. The use of transparent procedures can aid in the prevention of arbitrary detentions and misuse.

6.2.1 Establishing a mechanism for reporting to the public

Current Issue:

Identifying the extent of misuse is a challenge because there is no official public data about preventive detention cases.

The NCRB collects data, but specific case records are not publicly disclosed.

Policy Recommendation:

Preventive detention cases require annual reports to be published by the Ministry of Home Affairs and State Governments. Reports must include the total number of detainees under each law.

- The reason for detention can be traced back to conflicts among communities and regions.
- The status of the people was released during the judicial review process.
- Ensuring that these reports are readily available to both the public and human rights organizations.

International best practices:

According to national security laws, the United States releases, annual reports on preventive detentions. Through parliamentary oversight, the UK is responsible for overseeing preventive detention cases.

6.2.2 A clear justification is a requirement for every detention

Current Issue:

The NSA and UAPA hold many people without specifying the reason for their detention.

Authorities frequently use vague terms such as 'threat to public order' without giving any specific information about the allegations.

Policy Recommendation:

Authorities are required to provide a written explanation that states:

- The exact reason for the detention.
- Evidence or intelligence reports are the basis for justifying detention.
- Ensure that the explanation is accessible to both those detained and their legal representatives.
- Allow courts to examine and challenge detentions that are not sufficiently justified.

International Best Practice:

In Germany, detainees are required to receive a written notice describing their charges within 24 hours of detention.

In the UK, detainees have the right to contest their detention if there is no clear justification given.

6.3 Ensuring that cases of preventive detention are accountable

Holding officials accountable and providing detainees with legal aid can prevent preventive detention laws from being used.

6.3.1 Legal penalties for misusing preventive detention laws.

Current Issue:

Officials rarely face consequences due to wrong detention orders.

Due to false accusations, many political activists and journalists were detained.

Policy Recommendation:

- Ensure that government officials who violate preventive detention laws are punished by taking legal action.
- Make police officers accountable for detentions that were wrongful.
- Provide compensation for those who were wrongfully detained for preventive purposes.

International Best Practice:

In the United States, it is possible to file lawsuits against government officials for wrongful detentions.

The European Court of Human Rights penalized countries for wrongful preventive detentions.

6.3.2 Aiding detainees by offering free legal help

Current Issue:

- Many preventive detainees, particularly those from poor and marginalized communities, are not given access by lawyers.
- Detainees often don't have immediate legal representation when they are detained by the NSA and UAPA.

Policy Recommendation:

- Ensure that detainees have access to a lawyer within 24 hours.
- Create a government subsidized legal aid program for those who are unable to afford lawyers.
- Allow human rights organizations to supervise and aid detainees.

The best practice in the world:

The UK promises to provide free legal representation for preventive detainees.

Germany and the U.S. are demanding that authorities provide legal aid promptly.

6.4 A brief overview of the important policy recommendations

Make policy recommendations for current issues and international best practices.

In the UK, a judge must review Executive-controlled Advisory Boards within 48 hours (a seven-day review) and in the US, 72 hours of court approval are required. The NSA/UAPA limit of 3-6 months makes it impossible to hold someone indefinitely, which necessitates filing charges. In Germany, the maximum duration is 6 months, but in the UK it is only 28 days.

Transparency: Preventive detention cases lack of public information. The US government releases, annual reports that contain information about cases.

Legal Justification: In Germany, written justification is required for all detentions. There is no clear explanation for detentions.

Accountability: In the US, officials can face legal action for wrongful detention without any penalties for misuse.

Legal Aid : In the UK, make sure that all detainees get free legal services within 24 hours.

Transparency: Preventive detention cases lack of public information. The US government releases, annual reports that contain information about cases.

Legal Justification: In Germany, written justification is required for all detentions. There is no clear explanation for detentions.

Accountability: In the US, officials can face legal action for wrongful detention without any penalties for misuse.

Legal aid: In the UK, ensure that all detainees receive free legal services within 24 hours.

6.5 Conclusion: A strategy to implement reform

India's preventive detention laws must be brought in line with constitutional rights and international standards by urgently implementing the following reforms.

- Judicial oversight must be carried out within 48 hours of detention.
- Legal justification must be clear for all detention orders.
- Establishment of maximum detention limits (up to 6 months).
- Reports on preventive detention cases are given by the government every year.
- Unlawful detentions are subject to legal consequences.
- All detainees are entitled to free legal assistance.

7. MODEL LEGAL FRAMEWORK AND PROPOSALS FOR LEGISLATIVE AMENDMENTS

Legislative amendments are necessary to improve judicial oversight, limit arbitrary detention, and protect against misuse to ensure that preventive detention laws in India are aligned with constitutional guarantees and international human rights standards. The legal framework provided below provides a complete foundation for reform.

7.1 Submitted amendments to the Constitution and laws regarding preventive detention

7.1.1 The Indian Constitution has been amended regarding Article 22.

Current Issue:

Article 22(3)(b) permits the detention of up to three months without any legal oversight.

The detainees' detention lacks legal representation or immediate information.

Proposed Amendment:

- Amend Article 22(3)(b) to necessitate a judicial review within 48 hours of detention.

- It is crucial that the authorities provide a written explanation of the detainee's detention reasons within 24 hours.
- Provide a clear right to legal counsel immediately after detention.

7.1.2 Amendment to the National Security Act (NSA), 1980

Current Issue:

- The NSA allows for preventive detention for up to 12 months without submitting formal charges.
- The Advisory Board that reviews detentions does not have its own independence.

Proposed Amendments:

- Approval from the court is needed to extend the maximum detention period to six months.
- Ensure that the Advisory Board is exclusively made up of High Court judges currently in office, not government-appointed officials.
- It is necessary for the Ministry of Home Affairs to provide the public with information about the annual NSA detention data.

7.1.3 Amendment to the Unlawful Activities (Prevention) Act (UAPA), 1967

Current Issue:

- Under UAPA, authorities have the power to detain individuals for up to 180 days without imposing charges.
- The Act lacks proper safeguards against misuse, especially when it comes to cases of political discontent.

Proposed Amendments:

- Increase the maximum time in jail from 180 days to 90 days, with the possibility of a court extending it based on evidence.
- UAPA should not be used against peaceful protestors, journalists, or political activists unless there is strong evidence of illegal activities.
- Mandate that judicial review takes place within 15 days of detention.

7.1.4 Amendment to the Code of Criminal Procedure (CrPC), 1973

Current Issue:

- The Cr PC lacks a specific procedure for reviewing preventive detentions.
- Several detainees are unable to receive legal assistance.

Proposed Amendments:

- Create a new chapter in the CrPC that stipulates that all preventive detention instances must be referred to a High Court within 7 days.
- Ensure that all preventive detention laws make sure that every detainee who cannot afford a lawyer is automatically assigned a government-appointed lawyer.

7.2 Model Legal Framework for Preventive Detention Reform

A model legal framework should emphasize:

7.2.1 Independent mechanism for monitoring the judiciary.

- Set up a National Preventive Detention Review Tribunal (NPDRT) composed of High Court judges who will examine all cases.
- The NPDRT should allow detainees to appeal their detention within 14 days of arrest.
- It's important that the High Court approves any detentions that last longer than three months.

7.2.2 Detainees' rights in preventive detention.

1. The right to legal assistance:

Every detained person must be assigned a lawyer within 24 hours of their release.

The government has a responsibility to offer free legal aid to detainees from economically weaker sections.

2. The right to be informed about the reason for detention:

Authorities must state the reasons for detention in a written order within 24 hours.

It is necessary to ensure that the detainee, their family, and legal counsel have access to this order.

3. Challenging detention is a right

Every detainee should be given 15 days to challenge their detention in court.

If the detainment is not legitimate, the detainee must be released immediately.

7.2.3 Mechanism for release and maximum detention period

Proposed amendment to current law.

The NSA allows detention for a maximum of 12 months, but it's limited to 6 months, and judicial approval is necessary to extend it.

UAPA has given permission to hold for up to 180 days, but it will be reduced to 90 days unless the High Court extends it.

Anyone can submit to an application for the Advisory Board review, but it must be reviewed by a judicial board within 15 days

Compensation for unlawful detention is not provided, but there is a compensation system.

7.2.4 Establishing a committee to monitor human rights throughout the nation

Establish an oversight committee for human rights within the National Human Rights Commission (NHRC).

The committee must be made up of judiciary members, human rights activists, and senior law enforcement officers.

Responsibilities:

- Conduct annual audits of preventive detention cases.
- Review complaints about police misconduct and unlawful detentions.
- The report on the misuse of preventive detention laws is being published.

7.3 Draft legislation for the Preventive Detention Reform Act of 2025.

Preamble

The aim of the law is to regulate and limit the misuse of preventive detention laws by ensuring legal oversight, transparency, and protection of essential rights.

Key Provisions

1. Judges review detention orders.

No preventive detention order can be effective for more than 48 hours unless it is reviewed by a judicial magistrate.

The detained person will receive written information about the grounds for detention within 24 hours.

2. Limitation on Detention Period

An individual cannot be detained in preventive detention laws for more than 6 months without formal charges.

If there is no filing of charges within 90 days, the detainee will be released immediately.

3. The legal right to legal counsel

A legal professional of their choosing is available to detainees upon request.

The government will provide detainees with free legal aid if they are unable to afford legal representation.

4. Public disclosure and transparency in the public sphere

The Ministry of Home Affairs will release an annual report on preventive detentions that includes specifics.

- The number of incarcerations.
- The court's review of cases.
- Detainees were released due to a lack of evidence.

5. Compensation for individuals who have been unlawfully imprisoned.

- A High Court has the authority to award monetary compensation to any individual who is unlawfully detained.
- The act of officials making wrongful detentions will result in disciplinary action.

7.4 Conclusion: The way ahead for legal reform

Prioritizing the following reforms is essential to safeguard national security interests without interfering with human rights.

Modify Article 22 to ensure that a judicial review occurs within 48 hours.

The NSA and UAPA must set a 6 month limit for preventive detention.

Establish a national tribunal for reviewing preventive detention.

Make annual reports from the government about detention cases.

Provide compensation for illegal detentions.

India can ensure security and civil liberties by adopting these reforms, which prevent preventive detention laws from being deemed repression devices, but rather legitimate measures to enforce laws and order.
