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GUARDING LIBERTY OR CHOKING DISSENT? PREVENTIVE DETENTION AND THE RIGHT TO PROTEST IN INDIA

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I. ABSTRACT

The strain between civil liberties and state security in India has become more acute in the recent years, with the special preventive detention laws becoming more and more in conflict with the basic right to dissent. This paper looks into the way in which the preventive detention system in India, which is based on Article 22 of the Constitution and laws such as the National Security Act (NSA) and Unlawful Activities (Prevention) Act (UAPA) have been applied to dissenters and whether this application is consistent with constitutional protections and international standards. [2]*The paper uses a doctrinal and comparative approach and examines Indian constitutional clauses (Arts. 19, 21, 22), major Supreme Court judgments, and recent statistics on UAPA/NSA detentions*[3]*. It also evaluates the opinions of other jurisdictions (e.g. the U.S.). First Amendment and UK Public Order/ anti-terrorism legislation) and other human rights tools. The results show, there is a trend: preventive detention has historically been insulated by the Indian courts against the normal due-process standards, despite the expansion of other rights (e.g. the due process of Maneka Gandhi)*[4]*. Recent scholarship records a dramatic increase in the number of dissent prosecutions - more than 10,000 UAPA arrests and 800+ cases of sedition in 2014-24 - frequently on flimsy evidence.* [5]*According to critics, the preventative detention system of India allows up to six months of detention without trial*

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[2] Pasham Abhinay Reddy, THE CRIMINALIZATION OF DISSENT: A Systematic Analysis of Sedition, UAPA, and Anti-Terror Laws in Democratic India (2014–2024) (Dec. 5, 2025), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5880362.

[3] Subhajit Basu & Shameek Sen, Silenced Voices: Unravelling India's Dissent Crisis Through Historical and Contemporary Analysis of Free Speech and Suppression, 33 Info. & Commc'ns Tech. L. 42 (2024), https://doi.org/10.1080/13600834.2023.2249780; accepted online Aug. 31, 2023.

[4] Swarati Sabhapandit, 75 Years On, India's Long Standing Silence on Preventive Detention Is Echoing Loudly Today, The Leaflet (Oct. 23, 2025), https://theleaflet.in/life-and-liberty/75-years-on-indias-long-standing-silence-on-preventive-detention-is-echoing-loudly-today.

[5] See Subhajit Basu & Shameek Sen, *Silenced Voices: Unravelling India's Dissent Crisis Through Historical and Contemporary Analysis of Free Speech and Suppression,* supra note 2.

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(which can be renewed at court) on vague grounds of unlawful activities and is commonly used against activists and journalists. Comparative law reveals, e.g., that the law of free speech in the United States guarantees controversial advocacy except where the advocacy tends to imminent violence[6], and that the European human rights law demands that any detention must have a high necessity and proportionality. [7]The paper concludes that preventive detention institution in India places unreasonable emphasis on a risk-averse security paradigm at the expense of dissent, and suggests reforms: improved statutory definitions, increased controls (judicial and legislative), regular review, and increased protection of Article 22 guarantees. This work places the discussion in the context of Indian and international systems, which makes it an addition to the current academic debate on the topic of national security versus the right to dissent in a constitutional democracy.

II. KEYWORDS

Right to Dissent; Preventive Detention; National Security Act (NSA); Unlawful Activities (Prevention) Act (UAPA); Civil Liberties; Article 19; Comparative Constitutional Law.

III. INTRODUCTION

The Constitution of India specifically provides the freedom of speech and expression and the right to assemble peacefully (Art. 19(1)(a), (b)) that have been interpreted to include the right to criticize the government and demand change. However, the very text of the founding document of India already entrenches a state-of- exception strategy: the Article 22 of the same document authorizes the law to use preventive detention, without trial, in the name of the order of the people or national security. The tension begs a basic question how and when should the State be permitted to suppress dissent in the name of security? On the one hand, the Indian governments and even academics describe such legislations as NSA (1980) and UAPA (1967) as a

[6] Brandenburg v. Ohio, 395 U.S. 444 (1969), available at https://supreme.justia.com/cases/federal/us/395/444/.
[7] Brandenburg v. Ohio, supra note 5.

necessary mechanism of ensuring national security and fighting terrorism[8]. Conversely, it is raising alarm that such laws are being used with ill intent to curtail peaceful dissent and curtail lawful protest.

According to Basu and Sen, all citizens are supposed to have the freedom to criticise without any fear of arbitrary repression[9]; however, a recent study reveals that between 2014 and 2024 alone over 10,000 UAPA arrests and 800+ sedition charges were made.By examining the right to dissent in India through the prism of its preventive detention regime, this paper aims to make sense of the growing application of these types of laws and how they affect the civil liberties.

The question is as follows: How far do the preventive detention laws in India comply with the constitutional and international provisions on free expression and due process? What are the Indian courts saying about the right of an individual versus the state security? How does the approach of India stand in comparison to the other democracies like the United States, the United Kingdom and the European human rights framework? The analysis will start with the description of the constitutional framework (especially Arts. 19, 21, 22) and prominent Indian jurisprudence on the fundamental rights and detention. It goes on to analyze the statutory structure of the NSA, the UAPA and other related legislation, their scope and recent changes. At the heart of the paper, the trends in government application of these laws against dissidents are analyzed - relying on both case studies and empirical data - and the major critique of scholars and activists.

The comparative section compares the model of India with foreign systems: as an example, U.S. The First Amendment principles that argue vigorously in favour of advocacy lacking an imminent threat, or the post-9/11 detention regime of the UK offset with the Human Rights Act/ECHR. Lastly, the paper provides findings and policy recommendations on how the law can be re-calibrated to include things like the tightening of statutory definitions, strengthening advisory boards and judicial review,

[8] Mohammad Khabbab Taki, Preventive Detention Laws — Balancing National Security and Civil Liberties, IJLAE (Nov.–Dec. 2024), https://ijlae.com/wp-content/uploads/2024/03/PREVENTIVE-DETENTION-LAWS-BALANCING-NATIONAL-SECURITY-AND-CIVIL-LIBERTIES.pdf.
[9] See Subhajit Basu & Shameek Sen, *Silenced Voices,* supra note 2.

and enforcing compliance with due process, so that the critical right of dissent is not excessively jeopardized by security laws.

A. Research Questions

1. To what extent do India's preventive detention laws under the National Security Act, 1980 and the Unlawful Activities (Prevention) Act, 1967 comply with the constitutional guarantees of Articles 19, 21 and 22?
2. How have Indian courts interpreted the balance between national security and the right to dissent while adjudicating preventive detention cases?
3. Whether the application of preventive detention laws in recent years reflects a shift from exceptional use to routine suppression of dissent?
4. How does India's preventive detention framework compare with the standards governing speech and detention in jurisdictions such as the United States, the United Kingdom and under the European Convention on Human Rights?
5. What legal reforms are necessary to reconcile preventive detention with constitutional due process and international human rights obligations?

B. Research Hypotheses

1. Preventive detention laws in India operate in tension with Articles 19 and 21, thereby undermining constitutional guarantees of free expression and personal liberty.
2. Judicial review of preventive detention in India has historically prioritised procedural compliance over substantive constitutional scrutiny.
3. The use of UAPA and NSA against political dissenters demonstrates a systemic shift from preventive security measures to tools for suppressing democratic protest.
4. India's preventive detention regime is substantially more restrictive of civil liberties than comparable frameworks in the United States and the United Kingdom.

5. Incorporating proportionality, strict necessity and periodic judicial oversight can significantly reduce the misuse of preventive detention laws.

C. Research Objectives

The present study is undertaken with the following objectives:

1. To examine the constitutional framework governing preventive detention in India, with particular reference to Articles 19, 21 and 22 of the Constitution of India.
2. To analyse the statutory scheme and practical operation of the National Security Act, 1980 and the Unlawful Activities (Prevention) Act, 1967 in relation to the right to dissent.
3. To evaluate judicial trends in preventive detention jurisprudence and assess whether courts have provided substantive constitutional protection to detainees.
4. To investigate empirical trends relating to the use of preventive detention laws against political dissenters, journalists and civil society actors.
5. To undertake a comparative analysis of preventive detention and free speech regimes in India, the United States, the United Kingdom and under the European Convention on Human Rights.
6. To identify doctrinal inconsistencies between preventive detention practices and international human rights standards, particularly under the ICCPR.
7. To propose legal and institutional reforms aimed at reconciling national security concerns with constitutional guarantees of liberty and the right to dissent.

D. Research Methodology

The type of study assumed in this research is doctrinal comparative. This will explore primary legal materials namely the Indian Constitution (particularly Articles 19, 21, 22), major statutes (NSA 1980, UAPA 1967 and amendments, etc.), and the landmark Supreme Court decisions. Such secondary sources like scholarly articles, current

empirical studies, and law reports exist. Since the paper has a practice orientation, empirical results (e.g. arrest statistics provided by Reddy and journalistic investigation) will be used as proof of trends.

On the comparative aspect the analysis surveys similar provisions and case law in the United States (e.g.). Jurisprudence of the First and Fourteenth amendment of the United States on speech (first and fourth amendment), the United Kingdom (e.g. Public Order Act 1986/2023, Human Rights Act 1998, and counter-terrorism legislation), and Europe (ECHR Articles 5,10,11). The strategy is to place the legal system in India in the international standards and present contradictions.

Every source utilized is referred to in the Bluebook-style form. Limitations: it is not an independent empirical survey but a literature review of empirical information and dogmatic literature. There are no data of human subjects. It is a legal scholarship, rather than a policy report, and therefore focuses on legal arguments and references to reliable academic sources and opinions.

E. Literature Review

An increasing literature has reported the way in which the security laws in India put a stress on the democracies. The preventive detention laws of India have been observed by doctrinal studies to have been formulated in such a manner that they augment the power of the executive through the methods that lead to the violation of human rights, and that the Parliament and the judiciary have frequently approved the preventive detention laws at the cost of the constraints of the constitution[10].

An example is Surabhi Chopra who contends that judicial obedience to the executive in matters concerning security legislation has been used and abused to the detriment of the constitutional rights - in particular constitutional rights - in a considerable manner. Hallie Ludson (2016) follows this back to the point of conception: the Constituent Assembly of India had to sacrifice many of the traditional fundamental rights in favour of security over liberty, and so preventive detention was guaranteed

[10] Surabhi Chopra, National Security Laws in India: The Unraveling of Constitutional Constraints (May 31, 2012), Oregon Rev. Int'l L. (forthcoming 2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441652.

by Article 22 without a general due process assurance[11]. This historical point of view highlights the risk aversion attitude which made India condone the permanent exception to liberty.

The newer legal commentary has concerned itself more with individual cases and laws. Basu and Sen (2024) describe the modern Indian crisis of dissent, in which the generalized terms (such as the ambiguous definition of unlawful activities in UAPA) have been used against journalists, activists, and students. They point out that thousands of non-violent demonstrators are reportedly charged under anti-terror regulations and sedition because they have expressed themselves non-violently. Equally, the empirical work of Pasham Reddy (2025) records a dramatic increase in the dissent prosecutions, gathering information on more than 10,000 UAPA arrests and 800 cases of sedition within the last decade. The results provide a void in the quantitative research on dissent-related arrests.

The judicial response has also been criticized by scholars. According to Gautam Bhatia (2018), the Indian courts have seen preventive detention and states of emergency as exceptional regimes and have rarely applied normal constitutional scrutiny to them. He contends that the courts have substantially succeeded in establishing a standing state of emergency by compromising the doctrines to support anti-terror laws and have thus moved out of the rule-bound nature of the Constitution[12].

On the other hand, there is a recent Bombay High Court decision (*Jyoti Chorge v. Maharashtra*), that has been praised by Jalajpura (2025) and others. This exceptionalism was rejected by Maharashtra), which reinstated strict requirements regarding

[11] Hallie Ludsin, The History of Preventive Detention in India, in Preventive Detention and the Democratic State 84–120 (Cambridge Univ. Press 2016), DOI: 10.1017/CBO9781107296923.005, online pub. Mar. 5, 2016, available at https://www.cambridge.org/core/books/abs/preventive-detention-and-the-democratic-state/history-of-preventive-detention-in-india/2E82064886E946CB1A7411D4ED3B5081.

[12] Gautam Bhatia, Speech, Association, Personal Liberty, and the State of Exception: *Jyoti Chorge v. State of Maharashtra* (Apr. 4, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156473.

[12] See Gautam Bhatia, *Speech, Association, Personal Liberty, and the State of Exception: Jyoti Chorge v. State of Maharashtra,* supra note 11.

detention[13]. Even though detainees have occasionally won, many observers (e.g. Chopra, Bhatia, Basu) decry the fact that Indian jurisprudence has been able to shield preventive detention to a great extent against the substantive protections in Articles 14, 19 and 21. Legal literature on comparative law gives background, the U.S. stone and Schauer (oxford handbook) and others have extensively studied the first amendment and have pointed out that advocacy of dissent is presumptively secure unless it can provoke imminent lawless action.

In Europe, the ECHR imposes on the UK and most Indian cases on assembly/speech a condition that any detention must be necessary in a democratic state, and reasonable. In a 2024 chapter of an oxford handbook on preventive detention, it is observed that the international norms (e.g. ICCPR article 9) warn against indefinite detention and insist on the fair trial guarantees in any detention regime. The gap in the research indicated by the scholarship, therefore, is that most have characterized the excess of Indian laws and repeated international norms, whereas few in-depth studies have linked (a) the doctrinal discrepancy between rights and emergency laws, (b) specific data on the arrests of dissidents, and (c) direct comparisons with other models. The purpose of this paper is to fill this gap through synthesizing these strands into a cohesive analysis.

IV. CONSTITUTIONAL FRAMEWORK AND RIGHT TO DISSENT

The Indian Constitution has civil liberties that are strong in nature. Article 19(1)(a) means freedom of speech and expression; the Supreme Court understands that these rights permit people to criticize the government, dissent, and call on it to change. This needs to guard against the freedom of criticism as Basu and Sen observe that in order that different views can thrive. Article 19 also provides peaceful assemblage of people (Art. 19(1)(b)) and association (Art. 19(1)(c)).

The promise of life and personal liberty outlined in Article 21 (procedure established by law has been liberalized in cases such as *Maneka Gandhi v. Union of India* to embrace due process and reasonableness. The Court in 1978 in Maneka clearly stated that a law

[13] See Gautam Bhatia, *Speech, Association, Personal Liberty, and the State of Exception: Jyoti Chorge v. State of Maharashtra,* supra note 11.

that deprives liberty must be just, fair and reasonable, which is why the Court applied this protection to preventive detention. It has also been expressly accepted by the courts that dissent is a central part of Article 19, e.g. when it is seen that the speech made about government officials is a type of protected speech. (See *Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955,* that the law of sedition could not be applied where there was no incitement to violence (inapplicability of the sedition law in the absence of incitement to violence)

More importantly, though, Article 22 of the Constitution provides an exception of preventive detention. Article 22(3) allows the lawful detention due to the reasons of public order, national security, or supplies/services maintenance. Article 22, however, offers procedural guarantees as well: a detainee should be informed of reasons (Art. 22(1)), have a chance to be heard in front of an advisory board (Art. 22(4)-(5)) and, finally, is not allowed to be detained indefinitely (the initial Constitution provided a 3-month limit, which has been extended by law).

Article 22 in theory attempts to strike a balance between liberty and security. However, according to one commentator, instead of ensuring freedom, Article 22 essentially offers a constitutional justification of arrest and imprisonment without guilt evidence[14]. Indeed, Article 22 was necessary exactly due to the fact that the framers had eliminated the language of the due process in Art. 21. Article 22 was meant to give the substance of due process and as noted by Dr. B.R. Ambedkar in the Constituent Assembly, it was designed to list the safeguards. But critics claim that Art. 22 cl. 3-5 eventually established a broad power of detention: Ambedkar had to admit that it would enable Parliament to arrest whoever the State wished to under appropriate legislation[15].

Article 22 has been applied unequally in practice. Each detention is supposed to be reviewed by the Advisory Boards within 3 months, which hardly orders release; their reports do not bind the executive. The Article 22 has been construed restrictively by

[14] V. Krishna Ananth, The Constitutional Sanction for Preventive Detention Reeks of a Fear of Freedom, Supreme Court Observer (June 26, 2025), https://www.scobserver.in/journal/the-constitutional-sanction-for-preventive-detention-reeks-of-a-fear-of-freedom/.
[15] See V. Krishna Ananth, *supra* note 13.

the courts: Art. 22(4) prohibits courts from conducting judicial review over the validity of detention orders, leaving only procedural issues to habeas corpus writs. Such laws are anti-democratic as Justice Khosla foresaw in Gopalan (1950), - "detention in such form is not known in America there is no country in the world who have made this an inseparable part of their Constitution as has been done in India"[16]. All these constitutional characteristics precondition the enactment of statutory law on preventive detention, which exploits the leash of Article 22 of the constitutional court to intervene.

V. PREVENTIVE DETENTION LAWS IN INDIA (NSA, UAPA AND OTHERS)

These are the National Security Act (NSA) 1980 and the Unlawful Activities (Prevention) Act (UAPA) 1967 (significant amendments in 2004, 2008, 2019) as principal central preventive detention acts in India. NSA was instituted to supersede a post-Emergency law (COFEPOSA) and permits up to 12 months (since extended by the courts to one year) detention without trial due to factors such as national security or order in the community. The UAPA is formally an anti-terror law, which criminalizes the illegal activity, and the belonging to the prohibited entities, but even it has its preventive elements: it permits the State to detain the suspects (up to 180 days prior to the charge) and establishes individuals as terrorists.

The criticism highlights the generalized nature of these laws. Under the UAPA, an arrested person may be detained, with no charge, and up to six months on an accusation of an act of illegal activity. That term, which is substantially equivalent to any act that is considered to support secession, both in the broadest sense, is, as one study complains, overly expansive and subject to abuse. On the same note, the reasons stated by the NSA (security of state or public order) have undefined definitions. These laws are in effect a suspension of normal criminal law protections: the detainees can be languishing without trial, without bail, awaiting the choice of the State to prosecute (never). As an illustration, Dongre notes that even though NSA has constitutional

[16] See V. Krishna Ananth, *supra* note 13.

basis on Article 22, it is contradictory with contemporary Maneka interpretations of Article 14, 19, and 21[17]. The overall impact is a parallel justice system on the so-called security cases.

The two laws have been expanded periodically. In 2004 and 2019, UAPA was expanded to include more individuals (e.g. to designate individuals rather than a group of people as a terrorist) and increased the time of detention. NSA was later revised in 2013 to allow the detention of up to 2 years on some orders relating to terrorism. Similarly, other states have their preventive legislation (e.g. Maharashtra Prevention of Anti-Social and Dangerous Activities Act) but are overshadowed by UAPA/NSA. The preventive detention regime of India is observed to be remarkably liberal. According to an NGO study, India condones indefinite trial-free detention as a course of law - in contrast to most democracies where it is something extraordinary or time-limited.

The proponents of such laws argue that they seal gaps by sluggish criminal courts and discourage terrorism. In fact, the popular will (particularly, following big attacks) tends to support the use of strong action to ensure security. UAPA and NSA have been clearly justified by politicians as necessary to prevent insurgency and terrorism. However, as writes, there is much controversy in India concerning their abuse.

According to the civil society actors, the same tools can be used on political opponents and dissenters (and, in fact, this has been done). Practice research confirms these anxieties: Tens of thousands of people have been arrested under these laws in India, and almost none convicted (improving the efficiency of these laws as a form of preventive lock-up rather than trial). These patterns and their legal implications are discussed in the following sections.

VI. JUDICIAL INTERPRETATION OF PREVENTIVE DETENTION

The Supreme Court of India has over decades wavered between the respect to security laws and the categorical protection of liberties. The initial cases established a poor

[17] Mangesh Dongre, The National Security Act of 1980 and Preventive Detention: Freedom, Safety, and the Constitutional Debate (Sept. 28, 2025), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5540378.

precedent on detention regimes. In *A.K. Gopalan v. State of Madras* (1950), Court adopted a siloed approach in State of Madras (1950) when Article 21 was equated with Article 13 of the procedure by law and the Court did not look at any substantive due process, leaving the legislature to do so on detention. The above remarks of Justice Mukherjee highlighted the constitutional sanction of preventive detention by the courts. Likewise, *Satwant Singh Sawhney v. D. Ramarathnam (1967)* was a case where Article 22 is independent of any other law, and judicial review may only be conducted on technical grounds (e.g. notice of charges).

The most terrible was the Emergency of 1975-77. In In *ADM Jabalpur v. Shiv Kant Shukla* (1976), a 5-judge bench affirmed abrogation of habeas corpus on the basis that even Fundamental Rights can be suspended at the recommendation of the President. According to one historian, Jabalpur had maintained the absolute denial of the sacrosanct right of habeas corpus, in effect giving a carte blanche to detain anybody[18]. The sole dissent of Justice Khanna is hailed as the one that defended liberty. A jurisprudential turn was observed in the post-Emergency era.

Beginning with Golaknath (1967) and forcefully in Maneka Gandhi (1978), the Court interpreted Article 21 to cover due process - just, fair and reasonable procedure - and even suggested that even pre-trial detentions had to meet Article 21 requirements. Maneka successfully defeated the hair-reading of Gopalan, which linked preventive detention to the case-law on personal liberty in general. The Court decided that legislation such as Article 22 should not fail muster by the requirements of Articles 14, 19 and 21 of reasonableness and non-arbitrariness. So, in theory, all detention orders should not be perverse or fanciful but should be supported by actual evidence.

As a matter of fact, though, Maneka has applied her guardrails unevenly. Later cases tended to regard the dictum of the Maneka case as not applicable to Article 22(4) orders. Courts had long looked at the proceedings of the advisory boards and sent cases back to board when procedure was alleged to be defective, without considering the merits of detention.

[18] See Swarati Sabhapandit, *supra* note 3.

Not so long ago it was only a few courts which have started to require just, fair and reasonable scrutiny even of the detention itself. The example is the Bombay High Court in *Jyoti Chorge v. Maharashtra* (2015) in a move that demonstrated that the UAPA detainees were not a permanent state of exception, gave bail to detainees under the UAPA, Justice Thipsay said he explicitly rejected the notion of a permanent state of exception, and that even the anti-terror laws must pass constitutional scrutiny. This, commentators praise, was a transformative judgment in which the court had opposed the orthodoxy of emergency and re-established the norms of fundamental rights. Other more recent bail determinations also suggest a pattern: some High Courts, relying on Maneka and Shreya Singhal, have bailed out activists kept in custody under UAPA stating that detention and arrest without a substantial basis violates fundamental fair-mindedness.

Although these developments have been made, the general situation is ambivalent. Indian courts continue to give deference to preventive regimes on critical matters. In *Chandra Mohan v. State of Rajasthan (1970)* the Court affirmed that Parliament can pass such laws despite the fact that they restrict personal liberty provided that the procedure under Article 22 is carried out. Substantive review is generally considered as the Advisory Board. Only in 2022, a Supreme Court bench (*in K. Vansh Lal v. State of U.P.)* proved to do so.

The court asked about the quality of evidence required to make UAPA arrests, yet that is a field where things are still developing. Accordingly, although Article 22 is not in itself a violation of the fundamental rights, civil libertarians believe that the combination of general laws and cowered judiciary review has in effect immunized executives against any substantial responsibility.

VII. TRENDS IN USE: PREVENTIVE DETENTION VS. DISSENT

There is an indication that the laws of preventive detention are being applied with greater scope in India than ever before. Empirical research records an increase in arrests under UAPA and other related legislation that is usually due to dissent or assembly. As an example, one recent large-scale study was able to find that between 2014 and 2024, UAPA has been used in more than 10,000 arrests (primarily of India-

born) and in 800+ cases under the sedition provisions (IPC 124A, now 153A of the Bharatiya Nyay Sanhita) - a dramatic increase that has grown with the post-2014 political environment.

This trend is supported by the press coverage: one of the estimates revealed that UAPA arrests had increased by 72 percent between 2015 and 2019. Most of them are non-violent activism: anti-government slogans, protests in campuses, human rights activism, or civil society affiliation. Activists and lawyers point to a lot of cases when minor violations or political speech resulted in the charges according to powerful statutes.

Rates and outcomes of detention are a cause of concern. According to one estimation, a minute portion of the UAPA cases result in conviction: the majority of the arrestees stay in prison on extended remands, begging to be released on bail. In fact, critics observe that a good number of arrests under NSA/UAPA are seen to be focused on negating dissent instead of prosecuting. Based on the Indian Law Review literature, Basu and Sen note that in reality the key aim of anti-terror provisions is to detain...the many detentions made under these provisions are evidence that there exists an underlying threat to free speech".

The moral of the story is a sorry one: even in the place where the State is supposed to fight violence, in practice wide-ranging laws of so-called security are being mined to attack those who just voice dissent. This establishes a parallel regime where individual freedoms are least safeguarded as Chopra among others have written.

This conflict is manifested in the public discourse. The government sticks to the argument that tough detention authority is essential to maintain order - an opinion that is also echoed partly by a population sensitized to the dangers of terrorism. But the civil society and rights activists have retaliated, reporting the abuses. As an example, Human Rights Watch and Press Freedom groups have criticized the application of UAPA to imprison journalists and academicians involved in critical reporting. A movement is emerging in the legal academia of India that the pendulum has swung too far, with Indian laws on preventive detention moving beyond

exception to become norm and endangering the very freedom the Constitution was meant to secure.

VIII. COMPARATIVE PERSPECTIVES

In order to see the predicament of India, it is educative to compare other democracies. The First Amendment provides as much protection as possible to dissent in the United States. Notably, in *Brandenburg v. Ohio* (1969) the U.S. Supreme Court determined that a law which criminalized the promotion of crime or violence was unconstitutional since it did not provide a distinction between advocacy and imminent incitement. The Court stated that it was speech that advocated mere abstract doctrine of force or violence that was safeguarded; speech that will induce imminent lawless action could only be prohibited.

Under this criterion, almost all the protest or criticism that is not violent is immunized. There is no preventive detention law in the U.S. that is comparable to the law in India. The federal government may impound some non-citizens on the basis of national security (i.e. suspected terrorists), but this is open to habeas examination (i.e.., *Hamdi v. Rumsfeld*, 2004) and should fulfill probable-cause requirements. Even the executive rights to detain are limited by the judiciary (such as, *Yamashita* v. Styer (1946) even in cases when there is allegedly an emergency.

Styer (1946) and Detroit during WWII. Summing up, dissent is violently guarded by the U.S. model; any law that, as the Brandenburg Court cautioned, punishes only advocacy of change, condemns, as the Court warned, the speech which our Constitution has immunized against governmental control.

The United Kingdom is in the middle ground. The European Convention (ECHR) has been integrated into the domestic law of the UK in the Human Rights Act 1998, such as Articles 10 (expression) and 11 (assembly). The UK courts should thus impose a proportionality test on any form of restriction of speech or protest. Britain had indeed had extraordinary powers to detain: in the Troubles, suspected terrorists were detained indefinitely (the 2001 Anti-Terrorism Act gave the power to detain without charge against foreigners, which was subsequently declared unconstitutional by

House of Lords in *A v. Secretary of State for the Home Department* (2004, according to ECHR Art. 5, Secretary of State for the Home Department (2004) is discriminatory.

Over the past few years, the UK has avoided preventive jailing, turning to control orders (2005-2010) and Terrorism Prevention and Investigation Measures (TPIMs, 2011-2015) to control movement of the suspects. These might involve house arrest, GPS-tagging, but not imprisonment - and only non-UK nationals had access, under judicial supervision. Parliament further restricted the law on protests through the Public Order Act 1986 and most recently through the Public Order Act 2023 which establishes new crimes (e.g. "locking-on") that are designed to deter disruptive protests[19].

These actions are condemned by civil libertarians, yet the UK regime still makes the State explain any detention or ban of protests with clear terms (e.g. Serious Organised Crime and Police Act 2005 provide the right to injunction against particular protest, though it may be disputed in judicial courts). More importantly, the speech criminality threshold is significantly greater: in the UK, the sedition law was abolished in 2009, and defamation/libel legislation is always contested (as opposed to the reinstated IPC 124A in India).

The ECHR determines the human rights standards on the European continent. The Court has decided that the detention should be restricted to strict exceptions (Article 5 ECHR does not allow arrest as a means of crime prevention, but only as a measure to prevent a crime or an imminent trial). For example, *Chahal v. UK (1996)* prohibited the use of indefinite administrative detention of foreign suspects where the risk of such could be addressed in other ways. The jurisprudence of Article 10 ECHR actively defends political speech: one cannot criticize the government without being squarely in the core of the category of the protected speech, and the restriction must be necessary in a democratic society. Similarly, the Article 11 secures the peaceful assembly. Though Europe has legislations to fight terrorism (e.g. in France state of

[19] Liberty, Public Order Act: New Protest Offences & "Serious Disruption" (information correct as of Nov. 2, 2023), Liberty (U.K.), https://www.libertyhumanrights.org.uk/advice_information/public-order-act-new-protest-offences/.

emergency laws, anti-insurrection laws in Germany) they are liable to Parliament/Parliamentary scrutiny and ECtHR oversight. According to one handbook, the Indian laws on detention can hardly be compared with anything; they have more similarity with historical war laws than regular regimes in the European or North American contexts.

To put it briefly, the experience of democracies indicates that they tend to permit only limited preventive detention (usually limited to foreigners or extremists) and lack any easy way to limit speech. The Indian model non-reviewable widespread detention and the revival of charges of sedition is an outlier. A powerful examination notes that whereas the Western constitutions were under comparable pressure of a risk-society when they were written, they preferred to put on record the restriction of state power to detain, whereas India's framers put preventive detention there to stay. This comparative outlook draws the urgency of reviewing the path of India.

IX. CONCLUSION

This research demonstrates that the constitutional promise of liberty in India is steadily eroded by the expansive and inadequately supervised regime of preventive detention. Although Articles 19 and 21 have been progressively interpreted to protect speech and personal liberty, Article 22 continues to operate as a constitutional loophole enabling the executive to detain individuals without meaningful judicial accountability.

The comparative study confirms that India stands as an outlier among constitutional democracies. Unlike the United States, which restricts detention to situations of imminent violence, or the United Kingdom, which subjects restrictions to proportionality and judicial supervision, Indian law legitimises prolonged detention based on vague standards such as “public order” and “security of the State.”

The routine invocation of UAPA and NSA against journalists, students and activists reflects a paradigm shift where preventive detention is no longer exceptional but normalized. This practice weakens democratic culture, chills dissent and places India in conflict with its international human rights commitments.

Therefore, unless preventive detention is re-conceptualised as a narrowly tailored last-resort measure, supported by strict judicial scrutiny and procedural transparency, the constitutional guarantee of the right to dissent will remain largely illusory. The preservation of democratic legitimacy in India depends upon restoring liberty to its rightful place at the core of the constitutional order.

X. FINDINGS AND SUGGESTIONS

A. Findings

This paper concludes that the current application of the preventive detention laws in India is a big limitation to the right to dissent. The State has applied UAPA, NSA and other similar laws in the name of security to arrest dozens of citizens who would not be convicted of any crime in a normal situation, speech, assembly or association. Courts have traditionally lacked judicial review: they usually handled Article 22 cases as cases of merely formal observance, which implicitly allowed a permanent state of exception.

The courts have only recently started to push back, but the number of detentions is too large to be judged in a shorter period of time. In the meantime, safeguards in the constitution have not kept up: the safeguards of article 22 have not seen changes, despite the broadening of the scope of detention orders. The academic and popular literature is in consensus with regard to the fact that India is skewed towards state power. The legislature and the judiciary, as aptly put by Chopra, have given unquestioning approvals to the expanded security powers of the executive without being fully involved in the rights connotations of such powers.

The regime of India is not up to global standards. The preventive detention here would be unchecked and would most probably be against the ECHR necessity requirement and the tight control of the U.S. on free speech. The practice of holding people without clear-cut reasons is problematic even nationally since it is a way of destroying the rich civic discourse that the Constitution is designed to preserve. In terms of the phrasing used by Ludsin, the new framework of rights in India, which has been modified, is now generating a non-liberal democracy. Overall, the growing

application of preventive detention under the guise of national security has resulted in the constriction of successful opposition in India, which requires prompt redemptive action.

B. Suggestions

To work on these issues, legal and policy changes will have to be conducted on several fronts. To start with, the legislative changes should be made to reduce the area of preventive detention laws. As an illustration, the definition of the term unlawful activity in UAPA should be narrowed down to the bone; the list of people who can be detained (particularly citizens) needs to be shortened; and the time frame of detention (with or without trial) should be minimized.

The provisions of the National Security Act might be amended to meet the due process test of Maneka (e.g. increase the burden of proof of the detention orders). Other researchers have gone the extra mile and proposed that the final solution is repealing the Article 22 itself, in order to allow all detentions to be subject to normal judicial review (which would be a radical move and would probably not pass through the political machine). Even more limited reforms - like the one that detention orders must present specific facts, or that there be no secret detentions - would help.

Second, there should be judicial reforms: The High Courts and Supreme Court need to come up with a better standard of review of preventive detention. Following Maneka, the courts should examine not only the process of detention, but also its contents - making sure that each order is supported by tangible evidence of a security threat. In order to question the substantive foundation of detention, not just rubber-stamp police claims, Advisory Boards should be empowered to do so. The courts may also demand periodic judicial review (such as habeas hearings at regular intervals) as opposed to the executive release. Notably, the judiciary must reiterate that pre-emptive detention cannot be applicable to punish ideas or even legal protest. Indian courts can become revitalized in the area of rights, at least as Jyoti Chorge points out, but only with systemic judicial commitment.

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Third, the process safeguards should be improved: Provisions of Article 22 on disclosure of grounds and legal representation need to be followed to the letter. In most of the recent situations, detainees were not provided with any clear reasons or at most, the reasons were delayed; the provision of legal assistance ought to be provided as soon as the detention. The government has also defended (e.g. in the case of Wangchuk) that it is allowed to hold grounds up to 15 days under NSA[20]; these delays must be kept to a minimum since secrecy of orders under detention prevents the adversarial process. More accountabilities should also be established in cases of misuse of the laws: independent bodies (ombudsman or human rights commissions) should visit the detention centers and recommend changes.

Fourth, comparative lessons refer to further protective measures: As an example, India might need probable cause (or reasonable suspicion) requirements in any detention, like those in the U.S. law, and not the existing requirement of satisfaction with the authority making the detention. The law may require that a detention be the minimal restrictive measure to prevent the threat in line with proportionality tests in case law of the ECHR. Moreover, the aspects of the Habeas Corpus procedure in the U.S. law could be integrated into the Indian law by enforcing the review of the detention by the judges, with the presence of civilian counsel, as soon as possible. The bar and civil society ought to be motivated to question unwarranted detentions by initiating tactical litigation to put courts on toes regarding the international human rights standards.

Lastly, there is a need to change the policy towards dissent. The state and the society should understand that healthy dissent does not oppose security, but it is part and parcel of security by voicing complaints and avoiding alienation. The regulations on detention must be seen as a last resort and not the initial reaction to protest. The unnecessary detentions can be minimized through training police and bureaucrats on the standards of rights, and in a dialogue with the activists. The media and the intellectual community also play their role: dramatic statistics of detention need to be put in the public discussion, as scholars have done.

[20] See Swarati Sabhapandit, *supra* note 3.

To conclude, the right to dissent and the right to order can coexist, though only when preventive detention is narrowly defined. The guarantees in the Constitution should not be mere rhetoric. A balanced combination of institutional, procedural and doctrinal reforms is required as suggested by Dongre to align the regime of detention in India with the constitutional values[21]. This is the call repeated by the scholars such as Chopra who calls upon legislative and judicial branches to intervene as co-guardians of liberty. Such reforms should be put in place to make sure that the democracy in India is not worn away by its security laws, and the freedom to criticise which has been an important element of the pluralistic ethos of the country.

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