
DEMOCRACY IN DETENTION: PREVENTIVE INCARCERATION AND THE EROSION OF CIVIL LIBERTIES IN INDIA

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ABSTRACT

Preventive detention is a legal process that can be utilized for the detention of persons whom the State believes pose a threat to national security. This has become a highly controversial subject in India, where its operationalization allows no inquiry into whether the State is overreaching or there is a public safety issue. While the Indian Constitution guarantees fundamental rights, there are laws like the National Security Act (NSA)¹ and the Unlawful Activities (Prevention) Act (UAPA)² which allows the authorities to detain individuals without trial for extended periods, adversely suspending due process of law. This paper critically examines the impact of preventive detention laws on civil liberties, focusing on the cases of Jagtar Singh Johal, a British Sikh rights activist and Dr. Kafeel Khan, whose detentions have sparked national and international debate.

This study examines how the use of preventive detention compromises democratic values, and whether the mechanism of preventive detention in India complies with international norms, taking into consideration the legal, historical, and philosophical viewpoints. A comparative analysis with the UK, the U.S. and South Africa shows how other democracies make use of such laws. Through an interactive approach, this paper aims to argue that preventive detention has been transformed lately from an exceptional security measure into a tool of political control, jeopardizing India's constitutional commitment to justice and liberty. It advocates for urgent legal reforms, judicial accountability, and stronger civil society interventions to prevent the normalization of indefinite detention without trial. Ultimately, the paper raises a crucial question: Can India claim to be the world's largest democracy while sustaining laws that contradict its foundational principles?

Keywords: UAPA, NSA, preventive detention, public order, national security

¹ Act no. 65 of 1980

² Act no. 37 of 1967

Introduction

In 2017, Jagtar Singh Johal, a British citizen of Indian origin, was in Punjab for his wedding when he was abruptly taken away by plainclothes officers. His family watched in shock as he was loaded into a car, and taken away.³ A few Months later, there were allegations emerging of torture, forced confessions, and indefinite detention under India's Unlawful Activities (Prevention) Act (UAPA).⁴ It has now been more than half a decade and Johal still remains imprisoned without a trial, caught in the web of India's sweeping counterterrorism laws.

A similar fate befell Dr. Kafeel Khan in 2020 when Khan, a pediatrician from Uttar Pradesh, found himself branded as a national threat for a speech, which was critical of the government's citizenship policies. He was detained under the National Security Act (NSA), and spent months in jail, despite the Allahabad High Court eventually ruling his detention illegal.⁵ His story became a symbol of the use of preventive detention legislation to stifle dissent.

The people who advocate for these laws contend that they are essential for preserving national security, while those in opposition claim that they are legal loopholes used to stifle dissent. The paper examines the evolution and application of preventive detention in India, focusing on the cases of Jagtar Singh Johal and Dr. Kafeel Khan, showcasing the possibility of misuse of these laws. By analyzing legal frameworks, judicial precedents, and global comparisons, it aims to assess whether these laws serve their intended purpose or pose a greater threat to civil liberties.

A Colonial Relic: How the Legal Framework Enables Indefinite Detention

The irony of India's preventive detention laws lies in the fact that they do not owe their existence to democratic principles but to the colonial-era repression. These laws were used as blunt tools by the British to quell dissent, guaranteeing that freedom fighters were imprisoned without charge or trial under the guise of upholding "public order." It could be assumed that after independence, India as a sovereign nation would discard these draconian measures but instead, it cemented them into its legal fabric, making them a permanent part of the Indian

³ <https://www.bbc.com/news/uk-scotland-67471457>

⁴ <https://www.uscirf.gov/religious-prisoners-conscience/forb-victims-database/jagtar-singh-johal>

⁵ <https://www.thehindu.com/news/national/other-states/kafeel-khan-released-from-mathura-jail/article32500347.ece/amp/>

Constitution under Article 22 acting as a constitutional loophole.

The enactment of laws like the National Security Act (NSA), 1980, and the Unlawful Activities (Prevention) Act (UAPA), 1967, both of which grant the state a dangerous level of power to detain individuals indefinitely, without trial, and often without even disclosing evidence against them have been time and again exploited by governments. These laws were ostensibly created to counter national security threats, but their real application seems to have somewhat strayed from this purpose as alongwith targeting terrorists and insurgents, they have been used to imprison activists, students, journalists, and ordinary citizens who challenge government policies.

Article 22: A Constitutional Contradiction

The Indian Constitution was drafted with the explicit goal of protecting individual freedoms, but it paradoxically contains a provision that enables the very corrosion of these rights. Article 22,⁶ which deals with protection against arbitrary arrest and detention, also contains provisions contradictory to the same. The clauses (1) and (2) guarantee fundamental protections against the arbitrary discretion of the State providing the detainees with the right to be informed of the grounds of their detention, a right to legal representation, and to be produced before a magistrate within 24 hours. On the contrary the clauses (3) to (7), provide an exceptional measure in the form of preventive detention, allowing the government to bypass the fundamental guarantees of this provision and detain individuals for months, or even years, without trial if it deems them a threat to public order or national security.

This provision was a carryover from Imperial rule, reflecting the British legal framework that empowered authorities to jail freedom fighters without considering due process of law. They were included in the Constitution as a measure to create a balance between the interests of individuals and society at large, but apart from serving that purpose it has also given future governments with a constitutional cover for suppressing dissent. Preventive detention, in principle, is meant for extraordinary circumstances like terrorism, espionage, national security threats etc. but in practice, it has become a tool for political and ideological constraint.

⁶ Art. 22 of the Constitution of India

The National Security Act (NSA): A Pretext for Arbitrary Detention?

The National Security Act (NSA) was enacted in the year 1989, and was introduced under the pretext of protecting national security and maintaining public order, but after four decades, it has become one of the most misused legislations in India.

The NSA provides that a person can be detained for up to 12 months without formal charges or trial⁷ and the detainee has no right to a lawyer during the review of the detention by the advisory board and also the government is not required to disclose the evidence justifying the detention.⁸ The impact of such unchecked power is devastating and it enables the state to incarcerate individuals based on what? Some vague and arbitrary allegations, which leaves them trapped in a bureaucratic limbo where neither the courts nor any lawyers can intervene effectively due to such stringent laws.

The case of Dr. Kafeel Khan serves as a textbook example of the NSA's misuse where he was arrested on 29th January 2020 for allegedly delivering an "inflammatory" speech against the Citizenship Amendment Act (CAA) under sections 153A, 153B, 505(2), 109 of the Indian penal Code 1860,⁹ in the Mathura District of Uttar Pradesh. A bail application was preferred by the detainee, which was accepted by the Chief Judicial Magistrate of Aligarh District and a release order was issued in his favor.

He was again booked under section 3(2) of the National Security Act, 1980, on the 13th of February in 2020, despite the fact that no direct evidence of incitement to any violence was found against him. His detention order was made by the District Magistrate of Aligarh District, Uttar Pradesh citing "public order" concerns based on the speech delivered by him at the Aligarh Muslim University on 12th of December, 2019.¹⁰ The validity of this order of his detention was challenged by the mother of the detainee, Dr. Kafeel Khan, in the Allahabad High Court, citing malfeasance on the part of the authorities in use of the powers under the National Security Act, 1980 which caused injury to his fundamental rights guaranteed under Art. 21 and Art 22 of the Constitution. The order was defended by the State of Uttar Pradesh which contended that Dr. Kafeel Khan's speech was aimed towards promoting hatred and communal

⁷ Sec 13 of the National Security Act, 1980

⁸ Sec. 8(2) of the National Security Act, 1980

⁹ Now, Bharatiya Nyaya Sanhita, 2023.

¹⁰ Nuzhat Perween vs State Of U.P. And Another, AIRONLINE 2020 ALL 1821, <https://indiankanoon.org/doc/107973750/>

violence and posed a threat to the public peace in the area. It was also contended by the State that - “the satisfaction of the detaining authority is "subjective in nature" and the Court cannot substitute its opinion over subjective satisfaction of the detaining authority, as such, no interference with an order based on subjective satisfaction of the detaining authority is desirable.”¹¹

The Allahabad High Court, upon reviewing his speech, ruled that it actually promoted unity and peace rather than inciting unrest.¹² The Court held that - “No doubt some part of the phrases used in the grounds for detention are there in the speech but apparently in different context. The speaker was certainly opposing policies of the government and while doing so certain illustrations are given by him, but that no where reflects the eventualities demanding detention. A complete reading of the speech prima facie does not disclose any effort to promote hatred or violence. ... The address gives a call for national integrity and unity among citizens.”¹³

The court’s intervention gave a little relief to the detainee, but his arrest itself sent a chilling message to the public that dissent, even if peaceful, can land you in the abyss of indefinite detention. Dr. Khan’s case is not an exception as the use of NSA has increased and is often seen targeting individuals accused of even minor offenses. There are reports from human rights organizations suggesting that many of those detained under NSA are never convicted, further reinforcing the argument that it is being used as a tool for silencing opposition rather than ensuring security.

UAPA: The Legal Black Hole That Defies Due Process

While the NSA allows for arbitrary detentions at both the state and central level, the Unlawful Activities (Prevention) Act (UAPA), 1967, is the central government’s ultimate weapon for crushing dissenting opinions. It is also meant to combat terrorism, but now it has transformed into a law that has criminalized mere suspicion.

Detention can extend up to 180 days without the filing of formal charges and bail is nearly impossible, as the law requires courts to presume the accused guilty unless proven otherwise.

¹¹ Nuzhat Perween vs State Of U.P. And Another, AIR ONLINE 2020 ALL 1821, <https://indiankanoon.org/doc/107973750/>

¹² <https://www.thehindu.com/news/national/other-states/kafeel-khan-released-from-mathura-jail/article32500347.ece/amp/>

¹³ Nuzhat Parween vs State of UP, 2020 SCC Online All 984.

Through a 2019 amendment now under the UAPA, individuals are termed as terrorists even without any trial. This amendment has also been challenged in the Supreme Court in the case of *Sajal Awasthi vs Union of India*,¹⁴ where it is alleged to give the State “discretionary, unfettered and unbound powers”.¹⁵ It gives the State the power to dub any individual as “terrorist” even before any adjudication on the matter which is a direct violation and a reversal of the standard legal principle of “innocent until proven guilty.”

The case of activist Jagtar Singh Johal shows the grave misuse of UAPA wherein he was arrested in 2017 while visiting Punjab for his wedding. He was accused of funding Sikh separatist activities and thus, was arrested under the UAPA allowing authorities to detain him indefinitely without trial, and there were reports emerging that he was tortured into signing a confession.¹⁶ More than half a decade later, he remains imprisoned despite the growing international pressure from human rights organizations and the UK government demanding his release. He was arrested in connection with various offences where total nine cases were instituted against him, ranging from promoting communal disharmony and separatist sentiments to conspiracy and murder of a right wing politician. He was recently acquitted of all charges in one of these cases but is still imprisoned facing trial for the remaining eight.¹⁷ The court also cited *NIA vs Zahoor Ahmad Shah Watali*¹⁸ to highlight the difficulty in obtaining bail under such circumstances.¹⁹

Johal's case is not an anomaly as in 2019 alone, UAPA cases saw a 72% increase, yet conviction rates remain abysmally low at just 2.2%.²⁰ These statistics underscore a disturbing reality, that most people booked under UAPA are not convicted but remain incarcerated for years, effectively serving sentences without a trial.

Judiciary's Role: A Silent Spectator or a Constitutional Guardian?

The Indian judiciary has had an inconsistent stance on preventive detention as where landmark

¹⁴ Case no. WP (C) 1076/2019, still pending.

¹⁵ <https://www.thehindu.com/news/national/hc-ought-to-have-first-shot-at-deciding-pleas-challenging-2019-amendment-to-uapa-says-supreme-court/article69181202.ece->

¹⁶ <https://www.bbc.com/news/uk-scotland-67471457>

¹⁷ <https://www.theguardian.com/world/2025/mar/04/british-sikh-activist-jagtar-singh-johal-acquitted-in-terror-trial>

¹⁸ (2019) 5 SCC 1

¹⁹ *Jagtar Singh Johal @ Jaggi vs National Investigation Agency* on 18th September, 2024
<https://indiankanoon.org/doc/27044979/>

²⁰ National Crime Records Bureau, 2020

judgments such as *Maneka Gandhi v. Union of India*²¹ reaffirmed that "procedure established by law" must be just, fair, and reasonable, courts have largely deferred to the executive in cases concerning national security laws like NSA and UAPA.

Even in cases where courts have interceded such as the *K.S. Puttaswamy v. Union of India*²² case, by rulings that established the right to privacy, still preventive detention laws remain largely untouched. It has also been contended in the case of *Sajal Awasthi vs Union of India*²³ that the new Unlawful Activities (Prevention) Amendment Act, 2019 is violating Art. 21 which has imbibed the right to reputation as an intrinsic part of the right to life with dignity. The Supreme Court's hesitation to directly take action and strike down or even impose strict safeguards on these laws will lead to individuals like Johal and Khan remaining victims of the atrocities of the State where fundamental rights are indefinitely suspended.

The foundational principle of justice is simple that "no individual should be deprived of liberty without due process of law". This is not only a legal ideal but also a fundamental component of democratic governance, however, the laws pertaining to preventive detention in India methodically undermine this idea by allowing the government to imprison people without a trial, supporting documentation, or other legal channels. In practice, preventive detention serves as a parallel justice system where the state acts as the judge, jury, and executioner, leaving the accused to suffer in prison without even being found guilty. In theory, this is justified as a national security tool. The cases of *Dr. Kafeel Khan* and *Jagatar Singh Johal* exemplify this systemic failure, showcasing how preventive detention has become an instrument of state overreach rather than a safeguard against genuine threats.

A democracy is only as strong as its judiciary and the role of the courts is to act as a counterbalance to executive overreach, ensuring that laws are applied fairly and do not trample on constitutional rights. However, in cases of preventive detention, the judiciary has numerous times chosen silence over scrutiny.

While Indian courts have historically ruled in favor of personal liberty most notably in *Maneka Gandhi v. Union of India*,²⁴ which held that due process is an integral part of Article 21, their

²¹ AIR 1978 SC 597

²² AIR 2018 SC (SUPP) 1841

²³ Case no. WP (C) 1076/2019, still pending.

²⁴ AIR 1978 SC 597

opinion on preventive detention remains deeply inconsistent. When cases involve national security laws like the NSA and UAPA, courts have frequently deferred to the government, refusing to interfere even when detentions appear politically motivated. For instance, in *A.K. Gopalan v. State of Madras*,²⁵ the Supreme Court upheld the validity of preventive detention laws, ruling that the right to life and personal liberty could be curtailed if done through “procedure established by law.” This judgment set a dangerous precedent, effectively insulating preventive detention from constitutional challenges.

The Allahabad High Court’s 2020 decision to quash Dr. Kafeel Khan’s detention under NSA was a commendable decision. In a scathing judgment, the court ruled that his speech did not incite violence but instead promoted national integrity, thereby exposing the arbitrary and politically motivated nature of his detention.²⁶ Yet, such judicial interventions remain sporadic and largely dependent on the political climate.

The judiciary is the final safeguard against government overreach, tasked with protecting constitutional rights, ensuring due process of law and acting as a check on executive power. Yet, in cases of preventive detention, the Indian judiciary has sometimes played the role of an enabler rather than a guardian of justice.

Courts frequently defer to vague counts of national security arguments instead of demanding accountability from the state, thus allowing the government to detain individuals without clear evidence or due process. This reluctance has led to what legal scholars call “the paradox of constitutional democracy”, a system where laws which are meant to protect individual freedoms are twisted to be used to curtail them. The judiciary’s response to preventive detention cases is marked by an excessive deference to the executive where instead of subjecting detention orders to strict scrutiny, courts often accept the state’s justifications.

For example, in *ADM Jabalpur v. Shivkant Shukla*,²⁷ a case that remains a blot on India’s judicial history, where the Supreme Court upheld the suspension of habeas corpus during the Emergency, ruling that a citizen had no right to approach the courts if detained by the government.²⁸ This decision was later criticized as one of the darkest judgements in the history

²⁵ AIR 1950 SC 27

²⁶ <https://www.thehindu.com/news/national/other-states/kafeel-khan-released-from-mathura-jail/article32500347.ece/amp/>

²⁷ AIR 1976 SC 1207

²⁸ H. M. Seervai, *Emergency, Future Safeguards and the Habeas Corpus Case*, 1978

of Indian judiciary which set a dangerous precedent that in times of "emergency," individual liberties could be entirely disregarded. Though the ADM Jabalpur judgment was formally overruled in Maneka Gandhi's case, its spirit still lives on in the form when in contemporary cases of preventive detention, courts continue to grant the government the right to imprison individuals in the name of national security without any scrutiny.

Instead of directly confronting the constitutional validity of arbitrary detentions, courts often rely on technicalities and procedural justifications to avoid setting strong precedents. In Jagtar Singh Johal's case, despite allegations of torture,²⁹ the Supreme Court took years to address his wrongful detention. In Dr. Kafeel Khan's case, the Allahabad High Court eventually ruled his detention under the NSA as illegal, but this came after he had already spent months in jail. In Safoora Zargar's case, the Delhi High Court after initially denying bail under UAPA, citing "national security concerns" before ultimately granting it due to public outrage over her pregnancy and health conditions.³⁰ This pattern shows that the judiciary is reluctant to confront executive excesses.

The Kafkaesque Reality of Detention Without Trial

One of the most disturbing aspects of preventive detention is that those accused have very little to no recourse to prove their innocence. Unlike in regular criminal cases where the burden of proof lies with the prosecution, under laws like the UAPA, the onus is reversed and the accused must prove that they are not terrorists or threats to national security. Preventive detention laws reinforce Rousseau's claim that "man is born free, but everywhere he is in chains"³¹ and that security concerns often come at the cost of liberty.

This legal distortion has led to years-long detentions without trial as in the case of Jagtar Singh Johal, a British national who has been imprisoned in India since 2017. Arrested in Punjab under allegations of funding Sikh separatist movements, he was detained under the UAPA and has yet to receive a fair trial. Human rights organizations, including Amnesty International and Human Rights Watch, have condemned his imprisonment, alleging that he was tortured into signing a confession.³² Still despite global outcry and diplomatic interventions, Johal remains

²⁹ <https://www.uscirf.gov/religious-prisoners-conscience/forb-victims-database/jagtar-singh-johal>

³⁰ <https://www.thehindu.com/news/cities/Delhi/delhi-violence-hc-grants-bail-to-jamia-student-safoora-zargar/article61665509.ece>

³¹ Jean Jaques Rousseau, *The Social Contract* (1762)

³² <https://www.ohchr.org/sites/default/files/2022-05/A-HRC-WGAD-2021-80-India-AEV.pdf>

incarcerated as a stark reminder of how preventive detention laws bypass the fundamental principles of justice.

Similarly, hundreds of individuals, many of whom are arrested based on vague intelligence reports or for expressing dissenting political opinions. The National Crime Records Bureau (NCRB) data shows that the number of preventive detention cases has been rising sharply, with the majority of detainees never facing trial, for example out of the 2636 persons arrested under the UAPA only 41 were actually convicted.³³ This indicates a systemic abuse of power by the government, where detention is not a means to prevent crime but a tool to silence opposition.

The Panopticon: How Preventive Detention imposes Censorship and Fear

Foucault's 'panopticon'³⁴ perfectly describes how preventive detention creates an environment of constant surveillance and self-censorship. In any democracy, the ability to speak freely, criticize the government, and organize protests³⁵ is not just a right but a fundamental pillar of governance, and the Constitution of India enshrines these freedoms under Article 19(1)(a) and (b), guaranteeing the right to free speech and peaceful assembly. However, when the state uses preventive detention laws as a tool of intimidation, these freedoms take theoretical shape in nature rather than practical application.

India has witnessed an escalation in the use of the National Security Act (NSA) and Unlawful Activities (Prevention) Act (UAPA) against activists, journalists, and even students where the mere possibility of being jailed without trial for an indefinite period has created a stifling effect, where individuals are censored and their freedoms self curtailed fearing persecution. This erosion of free expression raises a crucial question, that whether or not India as a democracy can function if its citizens are too afraid to speak?

While peaceful protest is a constitutionally guaranteed right under Article 19,³⁶ preventive detention has been used as a convenient tool to crush movements before they gain traction, and authorities have increasingly labeled dissent as "anti-national activity." This has created a State

³³ <https://www.mha.gov.in/MHA1/Par2017/pdfs/par2024-pdfs/RS04122024/1045.pdf>

³⁴ Micheal Foucault, *Discipline and Punish*, 1975

³⁵ *Ramlila Maidan vs Home Secretary, Union of India & ors.* (2012) 5 SCC 1

³⁶ *Ibid.*

of exception where preventive detention is frequently justified as a temporary measure but ends up becoming a permanent tool of control.

Another example is the case of student activists like Umar Khalid, who was arrested under UAPA in connection with the 2020 Delhi riots where the police's argument for his detention was that his speeches and activism were part of a "larger conspiracy" to incite violence. Yet, multiple independent fact-finding reports have pointed to a lack of direct evidence linking Khalid to the riots, reinforcing the suspicion that his arrest was politically motivated and he spent years in prison without trial.³⁷

This trend is not confined to one government or one political ideology, rather it is a systemic flaw that allows any ruling party to use preventive detention as a weapon against its critics. Whether it was the Emergency-era arrests under Indira Gandhi, the detentions of journalists in Kashmir under the BJP, or the crackdown on human rights activists under UAPA, this pattern of arrest and detention remains the same showing that dissent will amount to sedition, and such dissenters will be imprisoned without trial.

The State as a Night-Watchman

In a functioning democracy, protests are a means of holding the government accountable, however, in India, preventive detention laws have turned public demonstrations into potential crime scenes not because of any real criminal activities, but because authorities now arrest protestors preemptively on the suspicion that they "might" disrupt public order.

When hundreds of citizens took to the streets to peacefully oppose the Citizenship Amendment Act, the government instead of engaging in dialogue, decided to respond with mass arrests under preventive detention laws. For eg, Dr. Kafeel Khan, who also spoke at a protest was arrested under the NSA for allegedly making a "provocative speech" even though the Allahabad High Court later ruled that his speech actually promoted unity and peace.³⁸

Student activists like Safoora Zargar and Umar Khalid were booked under the UAPA for their alleged role in the Delhi riots, despite weak or circumstantial evidence³⁹ and many journalists

³⁷ <https://www.hrw.org/news/2020/09/16/india-arrests-activists-politically-motivated#>

³⁸ <https://www.thehindu.com/news/national/other-states/kafeel-khan-released-from-mathura-jail/article32500347.ece/amp/>

³⁹ <https://m.thewire.in/article/law/delhi-riots-umar-khalid-police-trideep-pais?utm=ampnext>

reporting on protests in Kashmir were detained under preventive detention laws, after being accused of spreading “anti-national” propaganda. This shows how preventive detention laws, though framed as protective measures, can serve as a ‘smokescreen’ for political repression where reporting on sensitive issues, be it corruption, government failures, or human rights violations, now carries the very real risk of being detained. For example, the case of Kashmiri journalist Aasif Sultan, who was arrested under the UAPA in 2018 for allegedly “harboring militants”, a charge that human rights organizations have described as fabricated and politically motivated.⁴⁰

This systematic targeting of journalists has led to widespread self-censorship where media organizations, fearing government retaliation, are increasingly reluctant to cover controversial topics as a result of which investigative journalism is on the decline, leaving behind a weaker democracy where only state-approved narratives dominate public discourse. It is not just journalists and activists who face the brunt of preventive detention, academics and students are now among the most vulnerable groups. Universities, traditionally spaces for free thought and debate, are being transformed into zones of surveillance and fear. In recent years, scholars studying human rights, caste dynamics, or political repression have found themselves under scrutiny, accused of spreading “anti-national” ideologies. The arrest of Hany Babu, a Delhi University professor accused of links to Maoist groups under the UAPA, is a case in point and students too, have become primary targets. The 2019 arrest of JNU student Sharjeel Imam, who was charged under UAPA for speeches on citizenship laws, exemplifies how student activism is now viewed as a criminal act rather than a legitimate political expression.

Perhaps the most insidious effect of preventive detention is its psychological impact. When individuals know that they can be imprisoned without trial, without legal recourse, and without explanation, the rational response is to self-censor, withdraw from activism, and remain silent in the face of injustice. This climate of fear does not just affect individuals, rather it erodes the very foundations of democracy and without free speech, critical journalism and fearless activism, India is risking becoming a democracy in name only.

A Convenient Tool for Political Suppression

Security is the cornerstone of any sovereign state. Preventive detention is justified by the

⁴⁰ <https://cpj.org/2022/04/kashmiri-journalist-aasif-sultan-granted-bail-then-re-arrested-under-preventative-detention-law/>

Governments as a necessary evil, in their duty to protect citizens, but when national security takes the shape of an excuse for exercising unchecked power, democracy will suffer a fatal blow. The preventive detention laws, which were originally devised to snip genuine threats in the bud, have been used to hush the voices of political dissidents.

Governments, regardless of political ideology, have historically used preventive detention as a tool for suppressing opposition. The unfortunate time of Emergency of 1975–77, declared by then-Prime Minister Mrs. Indira Gandhi, is one of the examples during which, the Maintenance of Internal Security Act (MISA), 1971 was notoriously used to detain thousands of opposition leaders, activists, and journalists without trial.⁴¹

Since then little has changed except for the legal justifications. The National Security Act (NSA) 1980, Unlawful Activities (Prevention) Act (UAPA) 1967, and Public Safety Act (PSA) 1978 have replaced MISA 1971, but their function remains the same which is detaining individuals deemed inconvenient to the ruling government. For example, the house arrest of Mehbooba Mufti, former Chief Minister of Jammu and Kashmir, who was detained under the PSA after the abrogation of Article 370 for over a year. She despite being an elected representative was confined without trial, with the government citing vague "security concerns"⁴² and her detention was not about national security but was about preventing political resistance in the region.

A Broken System: The Absence of Accountability

The lack of accountability is among the most hazardous features of preventive detention. Preventive detention functions within a legal vacuum, in contrast to conventional criminal proceedings, where the accused is entitled to a fair trial, legal defense, and judicial review. Authorities are not required to provide evidence before detaining an individual, detainees are often not informed of the exact charges against them, violating principles of natural justice and with barely adequate judicial oversight, as courts tend to shelve to the government's claims of national security.

The Supreme Court, in *A.K. Roy v. Union of India*,⁴³ upheld preventive detention laws but also

⁴¹ A.G. Noorani, *Civil Liberties - Externings Political Opponents* (1981)

⁴² <https://indianexpress.com/article/india/mehbooba-mufti-psa-detention-jammu-and-kashmir-6532746/>

⁴³ 1982 AIR 710

stated that such powers must be exercised sparingly and with extreme caution. However, this judicial restraint remains theoretical rather than practical in most cases, courts hesitate to challenge executive action, creating a culture of impunity. The absence of judicial oversight has also led to rampant abuse of human rights and numerous reports have documented cases where detainees under UAPA and NSA were subjected to torture, forced confessions, and inhumane treatment.

In the case of Jagtar Singh Johal, international human rights organizations, including Amnesty International and Human Rights Watch, have reported allegations of custodial torture to extract confessions.⁴⁴ In Dr. Kafeel Khan's case, despite his NSA detention being ruled illegal by the Allahabad High Court, the government delayed his release, highlighting the arbitrary nature of the system.⁴⁵ These cases illustrate that preventive detention does not just violate civil liberties, it also actively encourages unchecked state power which leads to human rights abuse.

The Philosophy Behind Preventive Detention: Justifying Means To An End

The justification for preventive detention resonates with the philosophy of Thomas Hobbes, who argued that in a state of nature, life would be "nasty, brutish, and short" unless individuals surrendered absolute freedom to a sovereign authority.⁴⁶ Modern governments, including India, have opted for this principle, asserting that extraordinary powers are necessary to maintain social order. But this argument is said to be based on the false assumption that society has to choose between liberty and security. John Locke opposed Hobbes' absolutism, insisting that a just government exists only to protect natural rights life, liberty, and property.⁴⁷ If the state violates these rights under the pretext of maintaining order, it ceases to be a legitimate government.

By detaining individuals indefinitely without trial, India is not preserving order, rather it is dismantling the very freedoms that give democracy meaning. A government that criminalizes dissent and criticism in the name of security risks becoming the very Leviathan that Hobbes envisioned a power beyond accountability. Preventive detention laws mirror this panoptic

⁴⁴<https://timesofindia.indiatimes.com/city/chandigarh/amnesty-hrw-urged-to-probe-johal-torture-allegations/articleshow/61671791.cms>

⁴⁵<https://indianexpress.com/article/cities/lucknow/hc-gives-final-chance-to-up-govt-to-file-reply-on-dr-kafeel-khans-plea-against-sacking-9055945/>

⁴⁶ Hobbes, *Leviathan* (1651)

⁴⁷ Locke, *Two Treatises of Civil Government* (1689)

model, creating an environment where individuals, especially activists, journalists, and minorities live under the constant threat of being detained without warning, without trial, and without recourse.

Dr. Kafeel Khan was arrested not for committing a crime, but for delivering a speech. His imprisonment sent a message that mere words could be deemed dangerous enough to justify indefinite detention. Jagatar Singh Johal's case is even more disturbing as he was abducted by security forces in Punjab, tortured, and held without trial for years, an Orwellian demonstration of state power operating beyond legal constraints. Modern states use emergencies to create a "state of exception", where normal laws are suspended in the name of national security⁴⁸ but while these exceptions are supposed to be temporary, history shows that governments rarely give up extraordinary powers once they have seized them.

Preventive detention in India operates in a bureaucratic manner as laws like the NSA and UAPA, and allows authorities to detain individuals through vaguely worded justifications like "threat to national security" or "public order" and since there is no immediate spectacle of repression, society fails to recognize the slow slide into authoritarianism. Under the NSA detention orders are issued quietly, with minimal judicial scrutiny whereas UAPA charges are applied so broadly that any person can be labeled a "terrorist". These detentions are often upheld by courts not through explicit endorsement of repression, but by choosing legal technicalities over fundamental rights. The use of legal structures to justify oppression, makes a society complicit in its own subjugation as the real danger is not always an apparent dictatorship, rather it is a gradual erosion of rights, carried out under the illusion of legality.

Comparative Analysis: Global Perspectives on Preventive Detention

Governments all around the world have used preventive detention laws as tools of power in the name of national security. This poses a fundamental question: does India represent a global trend toward greater authoritarianism, or is it an isolated exception?

To understand this, we must compare India's preventive detention framework with those of other countries, examining whether democratic principles can truly coexist with indefinite detention without trial.

⁴⁸ Agamben, *State of Exception* (2005)

- **The United Kingdom: The Illusion of National Security**

The UK has historically used preventive detention during times of crisis, particularly under the Prevention of Terrorism Acts (PTA), 2005 and the Anti-Terrorism, Crime and Security Act (2001), introduced after 9/11. These laws allowed indefinite detention of foreign nationals without charge, triggering widespread criticism.⁴⁹

However, in a landmark judgment, the House of Lords ruled such detentions unlawful, declaring that they violated human rights principles.⁵⁰ This was a groundbreaking decision after which the UK then shifted to a system of control orders, imposing strict surveillance instead of outright detention.

This shows that even in democracies, emergency laws tend to overreach and in these cases judicial oversight plays a critical role in preventing misuse of these laws. India's preventive detention laws, in contrast, remain expansive and unchecked, with no equivalent legal pushback from the courts.

- **The United States: The Guantánamo Model**

There are only few cases that illustrate the perils of preventive detention better than Guantánamo Bay where following the 9/11 attacks, the U.S. government detained hundreds of individuals, many without charge, at Guantánamo under the Authorization for Use of Military Force (AUMF, 2001). The justification for such action was that "Enemy combatants" could be held indefinitely without trial, as legal protections did not apply to them. Years later, U.S. courts ruled against indefinite detention without due process, with the Supreme Court affirming that detainees had the right to challenge their detention.⁵¹

Yet, many prisoners remain in legal limbo, highlighting how even the world's most powerful democracy has failed to fully reconcile security with civil liberties. The U.S. legal model shows that even powerful democracies struggle to contain the consequences of preventive detention. The legal ambiguity surrounding Guantánamo

⁴⁹ House of Lords, 2004

⁵⁰ A vs Secretary of State for the Home Department, 2004 UKHL 56

⁵¹ Boumediene v. Bush, 553 U.S. 723, 2008

mirrors India's UAPA and NSA, where individuals can be held for years without trial or clear legal recourse, but unlike the U.S., where courts have pushed back against executive overreach, Indian courts often defer to national security claims, enabling prolonged detentions.

- **South Africa: The Power of Constitutional Rejection**

During "apartheid"⁵² South Africa had some of the most draconian detention laws, allowing indefinite imprisonment without trial. The infamous Internal Security Act (1982) was used to suppress political dissent and keep activists like Nelson Mandela behind bars.

After the fall of apartheid, South Africa's new Constitution explicitly prohibited preventive detention, recognizing it as a tool of oppression rather than security. Today, South Africa's legal framework emphasizes on habeas corpus for protections to prevent unlawful detention and ensures strict time limits on pre-trial detention and also accountability mechanisms to ensure law enforcement does not abuse its power.

South Africa's legal system highlights how preventive detention disproportionately targets political dissidents. The abolition of preventive detention laws after apartheid demonstrates that democracy is stronger without preemptive imprisonment. India must recognize that its current framework is closer to South Africa's apartheid-era laws than to modern democratic standards.

Ultimately, the world's best democracies have recognized that security without liberty is a contradiction. If India continues to use preventive detention as a political weapon, it risks moving closer to authoritarian rule than to the democratic ideals enshrined in its Constitution.

Will India follow the path of constitutional democracies that respect individual freedoms, or will it continue down a road where fear replaces justice? The choice is urgent and the world is watching.

⁵² Institutionalised racial segregation that existed in South Africa.

Conclusion: The Perilous Path of Preventive Detention

In the grand scheme of democracy, preventive detention is an incongruity, a legal tool that evidently defends liberty but often turns into its most pernicious enemy. From the colonial-era Defense of India Act (1915) to modern-day laws like the NSA and UAPA, India has walked an uncertain path where national security has repeatedly been invoked to curtail individual liberties. Here cases like those of Jagatar Singh Johal and Dr. Kafeel Khan reveal that this pattern is not a relic of the past but still a continuing reality.

India's constitutional framework promises freedom, yet its preventive detention laws grant the state near-absolute power to silence dissent, suppress political opposition, and detain individuals without trial, without evidence, and often, without reason. This contradiction poses a fundamental question: Can a democracy thrive when fear overrides the rule of law?

India today stands in the middle, a constitutional democracy with a conflicting authoritarian legal framework. If the erosion of civil liberties continues, India risks joining the ranks of nations where the illusion of democracy masks the reality of state repression. The legal black holes created by preventive detention laws may not be as visible as prisons or military camps, but they are just as effective in silencing opposition and instilling fear.

The Path Forward: Restoring Constitutional Integrity

It is essential for India to confront the unconstitutional reality of its preventive detention laws. As much credit these laws deserve for their essence of keeping national security concerns in their heart, there is a dire need for improvement in the mechanism that swears to protect the same. Without proper check and balance of this system, which plays such a crucial role in public interest, it becomes inevitable for it to deviate, defying the purpose it aimed to serve and adversely affect the people it was created to protect in the first place.

There is a need to enhance judicial accountability in such cases. Courts must stop deferring to “national security” rhetoric and instead demand evidence-based justifications for detentions. The dubbing of individuals as culprits even before any guilt is proven must be considered in deadly earnest and courts must look after the due process of law. The judiciary is the guardian of the Constitution and is thus the protector of individuals' rights. Thus, it must make sure that the fundamental rights of its people do not fall prey to mere procedural technicalities and

arbitrariness of the State.

The Legislature must consider serious reforms in the NSA, UAPA, and PSA. They must be revised or repealed to align with constitutional protections and international human rights norms. It does not bode well for the State to appear drunk in power and abuse its people in such a grotesque manner. It needs to consider reforms to protect the people they were sworn in to serve.

One of the changes that needs to be made is that there should be strict time limits on detention. No democracy should permit indefinite detention without trial, and India, also must conform with this rule and enforce mandatory judicial review for every detention case.

There is also a need to give representation to people accused in such cases within a stipulated time period before the authorities.

The people need to be protected against political abuse. Anytime the State gets lost in power, the first political victims are activists, journalists, and opposition voices. Criticism is essential for a proper democracy, to keep the government in bounds and to stop it from becoming an instrument of class oppression. The public needs to be made aware of their rights and the legal community, media, and human rights organizations must expose and challenge unlawful detentions, ensuring that fear does not silence dissent.

India fought colonial rule, rising above all the odds as a free nation, vowing to uphold justice, liberty, and democracy. Yet, in 2025, preventive detention laws remain relics of a past that the imperialists have left behind. Every case of arbitrary detention, from Dr. Kafeel Khan to Jagtar Singh Johal proves that India's struggle for freedom from the British might be far from over but the struggle to protect its democracy as established by the forefathers of the Constitution still continues. To fulfill its constitutional promise, India must make the choice to abandon the path of legal authoritarianism and reaffirm its commitment to democracy.