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PREVENTIVE DETENTION AND CONSTITUTIONAL LIBERTIES IN INDIA: A CRITICAL CONSTITUTIONAL ANALYSIS

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Abstract

The relationship between individual liberty and the coercive apparatus of the security State has occupied a recurring, and often uneasy, place in Indian constitutional jurisprudence. From the textual literalism of *A.K. Gopalan v. State of Madras*, which read Article 21 as a bare procedural guarantee, to the substantive due-process turn inaugurated in *Maneka Gandhi v. Union of India* and consolidated in *Justice K.S. Puttaswamy v. Union of India*, the Supreme Court has progressively widened the constitutional net available to test the legality of preventive detention, surveillance and anti-terror legislation. Yet the statutory architecture of national security law — running from the colonial-era preventive-detention regulations through the Preventive Detention Act, 1950, the Maintenance of Internal Security Act, the Terrorist and Disruptive Activities (Prevention) Act, the Prevention of Terrorism Act and the amended Unlawful Activities (Prevention) Act, 1967 — has retained a strikingly consistent structure of executive discretion, truncated procedural safeguards, and deferential judicial review. This paper undertakes a doctrinal and comparative examination of that structure. It argues that while the Court's post-Maneka Gandhi jurisprudence has formally embedded a proportionality standard into Article 21 adjudication, the practical operation of preventive detention and anti-terror bail law continues to privilege executive assessment of threat over individualised judicial scrutiny. Drawing on comparative material from the United Kingdom, the United States, Canada and Germany, the paper contends that Indian law lags behind institutionalised oversight mechanisms — independent reviewing authorities, sunset clauses and parliamentary reauthorisation — that other constitutional democracies have used to discipline emergency power. The paper concludes with constitutionally grounded reform proposals directed at the Article 22 advisory-board mechanism and the restrictive bail regime under Section 43D(5) of the Unlawful Activities (Prevention) Act.

Keywords: Preventive Detention; Personal Liberty; Article 21; Procedural Due Process; National Security Legislation; Judicial Review; Proportionality; UAPA; Habeas Corpus.

I. Introduction

Liberty, in the constitutional imagination, is rarely absolute. It is instead a relational concept, defined as much by the limits a polity is prepared to place upon it as by the freedoms it promises. The Indian Constitution embodies this relational understanding with unusual candour: Part III guarantees fundamental rights in the same textual breath that it authorises their restriction — through reasonable restrictions on speech and movement under Article 19(2)-(6), through the ordinary criminal process under Article 21, and, most starkly, through preventive detention without trial under Article 22(3)(b). Few constitutional democracies textually entrench preventive detention as an ordinary, peacetime instrument of governance; India does so, a legacy traceable to the colonial administration's reliance on regulations authorising detention without judicial trial to suppress political dissent.

The concept of national security has itself evolved considerably since 1950. What was once confined largely to external aggression and organised insurgency has expanded, in contemporary policy and legislative practice, to encompass communal violence, narco-terrorism, cyber-enabled radicalisation and disinformation. Each expansion of the security predicate has been accompanied by a corresponding expansion of executive power — the Preventive Detention Act, 1950; the Maintenance of Internal Security Act, 1971; the Terrorist and Disruptive Activities (Prevention) Act, 1985 and 1987; the Prevention of Terrorism Act, 2002; and the substantially amended Unlawful Activities (Prevention) Act, 1967 form a continuous legislative lineage rather than a series of unrelated statutes. The constitutional question this raises is not whether the State may act to protect security — that authority is not seriously disputed — but whether the procedural architecture surrounding such action honours the constitutional commitment to liberty, equality and due process embodied in Articles 14, 19, 20, 21 and 22.

Research Problem. Despite six decades of doctrinal development culminating in the recognition of privacy as a fundamental right in *Justice K.S. Puttaswamy v. Union of India*,¹ preventive detention and anti-terror legislation continue to operate largely outside the

¹Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.

disciplining influence of ordinary due process. This paper examines whether the constitutional and judicial safeguards surrounding preventive detention and national security legislation in India meet the standard of proportionality that the Supreme Court has itself articulated as the touchstone of Article 21 adjudication.

Scope. The paper confines itself to the constitutional and statutory framework governing preventive detention, anti-terror legislation and State surveillance. It does not undertake a general survey of criminal procedure, nor does it address the substantive law of specific offences created under these statutes.

Objectives. (i) to trace the constitutional and legislative evolution of national security law in India; (ii) to critically evaluate the judicial standard of review applied to preventive detention and anti-terror legislation; (iii) to situate the Indian position within a comparative constitutional frame; and (iv) to propose doctrinally grounded reforms.

Research Questions. First, has the substantive due-process standard articulated in *Maneka Gandhi* meaningfully altered the practical operation of preventive detention law? Second, does the bail jurisprudence developed under the Unlawful Activities (Prevention) Act satisfy the proportionality standard the Court has itself endorsed? Third, what institutional mechanisms used in comparable jurisdictions might strengthen procedural safeguards without unduly compromising legitimate security objectives?

Hypothesis. The paper proceeds on the hypothesis that Indian constitutional doctrine has expanded the substantive content of Article 21 considerably further than it has reformed the institutional mechanisms — the advisory board under Article 22, and statutory bail restrictions such as Section 43D(5) of the UAPA — through which preventive detention and anti-terror prosecutions are actually administered, producing a persistent gap between doctrinal promise and administrative practice.

Methodology. The paper adopts a doctrinal method, analysing constitutional text, statutory provisions and case law, supplemented by a comparative examination of anti-terrorism frameworks in the United Kingdom, the United States, Canada and Germany. The analysis is qualitative and critical rather than empirical.

II. Constitutional Framework of Liberty and its Limits

The Preamble's promise of liberty of thought, expression, belief, faith and worship is not an isolated aspiration but the interpretive lens through which Part III must be read. Article 14 guarantees equality before the law and equal protection of the laws; Article 19(1) guarantees the several freedoms of speech, assembly, association and movement, subject to the reasonable restrictions enumerated in clauses (2) to (6); Article 20 protects against ex post facto punishment, double jeopardy and self-incrimination; Article 21 guarantees that no person shall be deprived of life or personal liberty except according to procedure established by law; and Article 22 supplies the specific procedural guarantees — the right to be informed of grounds of arrest, the right to consult a legal practitioner, and production before a magistrate within twenty-four hours — while carving out, in clauses (3) to (7), a distinct and considerably weaker set of guarantees applicable to persons held under preventive detention laws.

For much of the Constitution's first three decades, Article 21's guarantee of a 'procedure established by law' was read narrowly. In ², a majority of the Supreme Court held that Article 21 required only that some procedure be prescribed by validly enacted law; it did not require that the procedure be fair, just or reasonable, nor did it require the courts to read Articles 19 and 21 as mutually reinforcing guarantees. The practical effect was to insulate preventive detention law, so long as it complied with the bare procedural requirements of Article 22, from substantive scrutiny under Articles 14, 19 or 21.

This literalism was decisively abandoned in ³, where the Court held that the 'procedure established by law' under Article 21 must itself be fair, just and reasonable, and that Articles 14, 19 and 21 are not mutually exclusive silos but form an interconnected 'golden triangle' against which executive and legislative action must be tested. Any law depriving a person of liberty must therefore withstand three cumulative tests: it must prescribe a procedure, the procedure must satisfy the requirements of Article 21, and the procedure must also be fair and reasonable within the meaning of Article 14. The doctrinal shift is properly described as India's substantive due-process moment, even though the Court has been careful to avoid explicitly importing the American due-process vocabulary.

The proportionality doctrine that has since developed as the operative standard for testing

²A.K. Gopalan v. State of Madras, AIR 1950 SC 27.

³Maneka Gandhi v. Union of India, AIR 1978 SC 597.

restrictions on fundamental rights requires that a restriction pursue a legitimate State aim, bear a rational connection to that aim, be the least restrictive means available, and strike a fair balance between the right infringed and the aim pursued. The nine-judge bench in ⁴ entrenched this structured proportionality analysis as the applicable standard whenever the State seeks to restrict privacy, and by extension personal liberty, in the name of a compelling State interest such as national security. The doctrine of the rule of law and separation of powers reinforces this constitutional design: preventive detention, being an executive act unaccompanied by trial, sits in permanent tension with the judiciary's constitutional role as the guardian of individual liberty, which is precisely why Article 22(4) mandates review of any detention exceeding three months by an Advisory Board composed of persons qualified to be High Court judges.

III. Evolution of National Security Legislation in India

The statutory lineage of Indian preventive detention law begins in the colonial period, when regulations and ordinances permitting detention without trial were used to suppress the independence movement. The framers of the Constitution, aware of this history but also anxious about post-Partition unrest and communist insurgency, chose not to abolish preventive detention but to constitutionalise it, subject to the limited safeguards of Article 22. Parliament's very first exercise of this power was the Preventive Detention Act, 1950, enacted within months of the Constitution's commencement and upheld, save for one provision, in *Gopalan*. The Act was allowed to lapse in 1969 amid growing disquiet over its use against political opponents.

The Maintenance of Internal Security Act, 1971 (MISA) revived and expanded the preventive detention framework, and became infamous for its use during the Emergency of 1975–77 to detain political dissenters, journalists and opposition leaders without trial. MISA was repealed in 1978 following the electoral defeat of the government that had imposed the Emergency, and the Forty-Fourth Constitutional Amendment subsequently narrowed the scope for suspending fundamental rights during emergencies. The National Security Act, 1980, enacted soon after, remains in force today and continues to be the principal general preventive detention statute, invoked with considerable frequency at the level of State administration.

The 1980s witnessed a second wave of security legislation directed specifically at organised terrorism, prompted by insurgency in Punjab and the north-east. The Terrorist Affected Areas (Special Courts) Act, 1984 and the Terrorist and Disruptive Activities (Prevention) Act, 1985

⁴Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.

and 1987 (collectively TADA) introduced special courts, relaxed evidentiary standards — including the admissibility of confessions made to police officers, a marked departure from ordinary criminal procedure — and a restrictive bail regime. TADA's constitutionality was upheld, though not without serious reservation, in ⁵, and the statute was allowed to lapse in 1995 amid documented evidence of misuse.

The Prevention of Terrorism Act, 2002 (POTA), enacted in the aftermath of the December 2001 Parliament attack, revived several TADA-era features and was itself repealed in 2004 following widespread criticism of its use against political and religious minorities. Rather than allow anti-terror legislation to lapse a third time, Parliament instead redirected its energies into progressively amending the Unlawful Activities (Prevention) Act, 1967 (UAPA), originally a comparatively narrow statute directed at unlawful associations. Amendments in 2004, 2008, 2012 and 2019 have transformed the UAPA into India's principal anti-terror statute, incorporating TADA- and POTA-style features such as extended police custody, a restrictive bail provision in Section 43D(5), and, since 2019, the power to designate individuals — as opposed to only organisations — as terrorists by executive notification. The National Investigation Agency Act, 2008, enacted after the Mumbai terror attacks, created a specialised central investigative and prosecutorial agency for scheduled offences, further centralising control over terrorism prosecutions. Alongside this criminal-law architecture, the Information Technology Act, 2000 and its associated rules furnish the executive with a parallel surveillance and content-blocking apparatus, discussed further in Part VII below.

IV. The Conflict between Liberty and Security

The tension between liberty and security is most visible at the point of arrest. Article 22(1) and (2) guarantee every arrested person the right to be informed of the grounds of arrest, to consult a legal practitioner of choice, and to be produced before a magistrate within twenty-four hours. In ⁶, the Supreme Court supplemented these textual guarantees with a detailed code of procedural safeguards — memoranda of arrest attested by a witness, medical examination at the time of arrest and thereafter, and information to a relative or friend of the arrestee — designed to curb custodial abuse. Yet Article 22(3)(b) expressly excludes persons detained under preventive detention laws from clauses (1) and (2), substituting instead the considerably weaker safeguards of Article 22(4)–(7): a maximum initial detention of three months without

⁵Kartar Singh v. State of Punjab, (1994) 3 SCC 569.

⁶D.K. Basu v. State of West Bengal, (1997) 1 SCC 416.

Advisory Board review, disclosure of grounds 'as soon as may be' subject to an exception for facts the detaining authority considers against the public interest to disclose, and no guaranteed right to legal representation before the Advisory Board.

Surveillance presents a second axis of conflict. Section 5(2) of the Indian Telegraph Act, 1885 permits interception of messages during a public emergency or in the interest of public safety on grounds including the sovereignty and integrity of India, the security of the State, and public order. In ⁷, the Supreme Court held that telephone conversations fall within the right to privacy protected by Article 21, and that interception without procedural safeguards violates Articles 19 and 21; the Court accordingly read procedural safeguards into the statute pending legislative reform. Two decades later, *Justice K.S. Puttaswamy* constitutionalised privacy as an independent fundamental right and required that any State interference with it satisfy the fourfold proportionality test, a standard that surveillance under the unreformed Telegraph Act and the Information Technology Act arguably still struggles to meet given the absence of independent, judicial pre-authorisation.

Restrictions on speech and internet access illustrate a third dimension of the conflict. Following the abrogation of the special status of Jammu and Kashmir in August 2019, the Union Territory administration imposed an indefinite suspension of internet and mobile services. In ⁸, the Supreme Court held that freedom of speech and expression, and the freedom to carry on trade or business, through the medium of the internet enjoy constitutional protection under Article 19(1)(a) and (g), and that any restriction — including a suspension order under the Temporary Suspension of Telecom Services Rules, 2017 — must be temporary, subject to periodic review, proportionate, and open to judicial scrutiny. The judgment has, however, been criticised for the gap between its procedural mandate and its practical enforcement, since it declined to restore services immediately and did not rule on the constitutionality of the underlying restrictions in that instance.

The bail jurisprudence developed under the UAPA sharpens the conflict further. Section 43D(5) of the Act bars a court from granting bail if, on a perusal of the case diary or the final report, it is satisfied that there are reasonable grounds for believing the accusation is prima

⁷People's Union for Civil Liberties v. Union of India, (1997) 1 SCC 301.

⁸Anuradha Bhasin v. Union of India, (2020) 3 SCC 637.

facie true — a standard the Supreme Court, in ⁹, read as precluding any detailed evaluation of the evidence at the bail stage, effectively converting the prima facie standard into a very low threshold for continued incarceration. Two years later, in ¹⁰, the Court held that the statutory bar under Section 43D(5) does not extinguish the constitutional courts' power to grant bail where prolonged incarceration without trial itself violates the right to a speedy trial under Article 21, thereby carving out a constitutional exception to a statutory restriction. The tension between *Watali's* evidentiary deference and *Najeeb's* constitutional corrective captures, in microcosm, the larger unresolved conflict this paper examines.

V. Judicial Response: From Gopalan to Puttaswamy

Indian judicial engagement with national security legislation can usefully be periodised into three phases. The first, running from *Gopalan* (1950) to the Emergency, was marked by textual deference: courts largely confined themselves to verifying compliance with the bare procedural requirements of Article 22, leaving the substantive wisdom of detention to executive judgment. The nadir of this phase was reached in ¹¹, where a majority of the Supreme Court held that during the Emergency proclaimed in 1975, the right to move any court for enforcement of the right to personal liberty under Article 21 stood suspended, so that even patently illegal detention could not be judicially questioned. Justice H.R. Khanna's lone dissent — that the right to life and liberty pre-exists the Constitution and cannot be extinguished even during an Emergency — was vindicated only decades later, when the nine-judge bench in *Justice K.S. Puttaswamy* expressly disapproved of the majority view in ¹².

The second phase, inaugurated by ¹³ in 1978, embedded a substantive due-process reading of Article 21 and, through subsequent decisions, extended it into the specific domain of preventive detention. The Court progressively required that grounds of detention be precise, relevant and communicated without unreasonable delay, that the detaining authority apply its mind independently to the material before it rather than mechanically reproduce a police report, and that any unexplained delay in considering a detenu's representation vitiate the detention order. ¹⁴ exemplifies the qualified character of this scrutiny: the Court upheld the constitutionality of

⁹National Investigation Agency v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1.

¹⁰Union of India v. K.A. Najeeb, (2021) 3 SCC 713.

¹¹Additional District Magistrate, Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207.

¹²Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1, disapproving the majority view in Additional District Magistrate, Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207.

¹³Maneka Gandhi v. Union of India, AIR 1978 SC 597.

¹⁴Kartar Singh v. State of Punjab, (1994) 3 SCC 569.

TADA's special-court and confession provisions while simultaneously issuing detailed guidelines to prevent their misuse — an approach the dissenting opinions in that very case suggested was insufficiently protective, given TADA's subsequent documented record of abuse.

The third phase, associated with *Justice K.S. Puttaswamy* and its progeny, formally constitutionalises proportionality as the applicable standard whenever the State restricts liberty or privacy in the name of security, and does so by expressly repudiating the Emergency-era deference of *ADM Jabalpur*. The Court's decisions in ¹⁵ and ¹⁶ extend this proportionality logic to internet shutdowns and to bail under a statute expressly designed to restrict it. Yet the persistence of a markedly more deferential evidentiary standard in ¹⁷ suggests that this third phase has not displaced executive-facing deference so much as layered a formally more rigorous doctrinal vocabulary over a practice of review that, in bail matters at least, remains cautious. The three phases are therefore best understood not as a linear progression from deference to scrutiny, but as a persistent doctrinal oscillation, with the pull of security-driven deference reasserting itself precisely in those matters — UAPA bail applications being the clearest instance — where the political salience of the underlying accusation is highest.

VI. Comparative Constitutional Analysis

A comparative perspective clarifies both the distinctiveness and the deficits of the Indian framework. The United Kingdom's post-2000 anti-terrorism architecture — principally the Terrorism Act 2000, the Anti-terrorism, Crime and Security Act 2001, and the control-order and subsequent Terrorism Prevention and Investigation Measures regimes — has consistently paired executive detention or restriction powers with defined statutory time limits, mandatory periodic renewal by Parliament, and oversight by an Independent Reviewer of Terrorism Legislation who reports publicly on the operation of the powers. The House of Lords' rejection, on human-rights grounds, of indefinite detention of foreign terrorism suspects without trial illustrates a judicial willingness to strike down security measures that lack a workable end-point — a form of scrutiny considerably sharper than the advisory-board mechanism that remains the principal check on Indian preventive detention.

¹⁵Anuradha Bhasin v. Union of India, (2020) 3 SCC 637.

¹⁶Union of India v. K.A. Najeeb, (2021) 3 SCC 713.

¹⁷National Investigation Agency v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1.

The United States' post-9/11 framework, anchored in the USA PATRIOT Act of 2001 and its successor legislation, expanded surveillance and material-support offences considerably, but detention of citizens continues to be tested against the ordinary due-process and habeas corpus guarantees of the Fifth Amendment and Article I of the Constitution, with the Supreme Court affirming, even in the context of enemy-combatant detention, that citizens held by their own government retain a constitutional right to contest the factual basis for their detention before a neutral decision-maker. The comparative lesson is less about the substantive breadth of security powers, which is considerable in the American context as well, than about the existence of an accessible, judicially enforceable habeas remedy untouched by the kind of Emergency-era suspension India experienced in 1975–77.

Canada's Anti-terrorism Act, 2001 similarly created broad preventive arrest and recognizance powers, but subjected them to sunset clauses requiring parliamentary reauthorisation and, following the 2015 amendments, mandatory judicial authorisation for many surveillance and disruption powers, together with periodic independent review by parliamentary committees with statutory access to classified material. Germany's constitutional framework offers a further point of contrast: Article 10 of the Basic Law guarantees the privacy of correspondence and telecommunications, restrictions upon which are permitted only by law and are subject to a specialised parliamentary oversight body created under the G-10 Act, supplementing ordinary judicial review with a standing legislative-oversight mechanism dedicated specifically to intelligence and surveillance activity.

Read together, these comparative frameworks share three institutional features that Indian law lacks in comparable strength: first, statutory sunset clauses compelling periodic legislative reconsideration of extraordinary powers, rather than indefinite continuation as under the National Security Act and the UAPA; second, a standing, resourced oversight body — whether a reviewer of legislation, a parliamentary committee with security clearance, or a specialised court — distinct from the ordinary advisory-board mechanism; and third, a judicially enforceable habeas corpus guarantee that has not, at any point since these frameworks were enacted, been treated as suspendable by executive proclamation. The absence of the first two features, in particular, is a significant and readily rectifiable gap in the Indian scheme, discussed further in Part IX.

VII. Contemporary Challenges: Surveillance and Digital Constitutionalism

The proliferation of digital infrastructure has introduced forms of State capability that the drafters of the Telegraph Act, 1885 and even the framers of the Constitution could not have anticipated. Facial-recognition systems now deployed by several State police forces for crowd and suspect identification raise questions of mass, suspicionless surveillance that sit uneasily with the individualised, warrant-based model of interception contemplated by ¹⁸. The revelations, from 2021 onward, that NSO Group's Pegasus spyware may have been used against journalists, opposition politicians and civil-society actors in India prompted a writ petition before the Supreme Court; in ¹⁹, the Court constituted an independent technical committee to examine the allegations, observing that unauthorised State surveillance of journalists and activists implicates both the freedom of the press and the right to privacy, and that mere invocation of national security does not, without more, foreclose judicial scrutiny of the factual basis for such invocation.

Data-governance legislation, principally the Digital Personal Data Protection Act, 2023, exempts processing by the State for reasons including sovereignty, integrity and security of India from several of the Act's core obligations, an exemption structurally similar to the public-emergency exception under the Telegraph Act. Whether such exemptions can be reconciled with the proportionality standard of *Justice K.S. Puttaswamy* remains, at the time of writing, substantially untested in litigation, but the structural resemblance to the surveillance exceptions this paper has already examined suggests that digital-era legislation is reproducing, rather than resolving, the older tension between security-driven executive discretion and judicially enforceable safeguards.

Internet shutdowns, addressed doctrinally in ²⁰, illustrate a related and continuing difficulty: compliance with the procedural requirements the Court articulated — publication of orders, periodic review, and proportionality — has been documented to remain inconsistent at the level of State and district administration, indicating that the gap between constitutional doctrine and administrative practice, a recurring theme of this paper, is if anything more pronounced in the digital domain than in the physical domain of arrest and detention, where at least the Article 22 textual guarantees furnish a floor of protection.

¹⁸People's Union for Civil Liberties v. Union of India, (1997) 1 SCC 301.

¹⁹Manohar Lal Sharma v. Union of India, order dated 27 October 2021 (Supreme Court of India).

²⁰Anuradha Bhasin v. Union of India, (2020) 3 SCC 637.

VIII. Critical Evaluation

Three structural features of Indian national security law warrant sustained critical scrutiny. The first is over-criminalisation: the definition of 'unlawful activity' and 'terrorist act' under the UAPA is drawn broadly enough to capture conduct — membership of an organisation, provision of undefined 'support', or acts intended to threaten the 'economic security' of India — that extends well beyond the paradigmatic case of organised violence the statute was originally designed to address. Overbreadth of this kind creates a structural risk of misapplication against political dissent, journalism and civil-society advocacy, a risk that is not merely theoretical given the documented historical record of MISA's use during the Emergency and TADA's acknowledged pattern of misuse prior to its lapse.

The second is executive discretion insufficiently checked by institutional counterweights. The Advisory Board under Article 22(4), composed of persons qualified to be appointed High Court judges, reviews the sufficiency of cause for detention, but its proceedings are not adversarial in the manner of a trial, the detenu has no guaranteed right to legal representation before it, and its opinion, while formally advisory, is in practice rarely displaced by the detaining authority. The 2019 amendment to the UAPA permitting the executive to designate individuals as terrorists without a prior judicial finding compounds this concern, since it locates a determination with serious reputational and liberty-affecting consequences entirely within the executive branch, subject only to a subsequent, and comparatively weak, review mechanism.

The third is the weak procedural safeguard represented by the bail regime under Section 43D(5), as construed in ²¹. A *prima facie* standard that precludes any meaningful evaluation of the reliability of the evidence functions, in practice, as a near-categorical bar on bail, particularly given the documented delay in the conclusion of UAPA trials. ²² offers a constitutional corrective grounded in the right to a speedy trial, but it operates as an exception invoked only after years of incarceration rather than as a structural safeguard built into the statute itself, leaving the ordinary operation of Section 43D(5) substantially unaltered.

These three features are properly understood as instances of a single underlying failure: the persistent privileging of executive assessment of threat over individualised judicial or quasi-judicial determination, at precisely the moments — arrest, designation, and bail — where the

²¹National Investigation Agency v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1.

²²Union of India v. K.A. Najeeb, (2021) 3 SCC 713.

consequences for individual liberty and dignity are most acute. Constitutional morality, understood as fidelity to the values of the Constitution rather than to its bare text, would require that procedural safeguards be strongest exactly where executive discretion is broadest; Indian national security law has, across each of its successive legislative incarnations, tended toward the opposite arrangement, a pattern this paper regards as the central democratic-accountability deficit in the field.

IX. Suggestions and Reform

Four reforms follow directly from the preceding analysis. First, the Advisory Board mechanism under Article 22(4) should be strengthened by statute to guarantee the detenu a right to legal representation before the Board, to require reasoned, written opinions disclosing the material relied upon subject only to a narrowly construed public-interest exception, and to subject the Board's opinion to appellate review by a High Court on a defined, expedited timeline, rather than treating it as functionally final.

Second, anti-terror legislation should incorporate statutory sunset clauses of the kind found in the Canadian and, historically, the British frameworks, requiring Parliament to reauthorise the more exceptional provisions of the UAPA — including extended police custody and the Section 43D(5) bail restriction — at fixed intervals, on the basis of a published record of the provisions' operation, rather than allowing them to remain in force indefinitely absent an affirmative repeal.

Third, the bail standard under Section 43D(5) should be legislatively amended, or judicially reconsidered, to require a genuine, if summary, evaluation of the reliability rather than the bare existence of the prosecution's material, and to build the *Najeeb* speedy-trial exception into the statute itself as a mandatory bail-review trigger after a defined period of pre-trial custody, rather than leaving it to case-by-case constitutional litigation.

Fourth, surveillance under the Telegraph Act, the Information Technology Act, and any future data-protection framework should be brought within a unified statutory scheme requiring independent, preferably judicial, pre-authorisation for interception and access requests, together with a standing parliamentary oversight committee possessing security clearance and the power to review classified operational material, on the German and Canadian models discussed in Part VI. Each of these reforms is consistent with, rather than a departure from, the

proportionality standard the Supreme Court has already endorsed in ²³; what is required is institutional implementation of a standard the Court has articulated but which existing statutes do not yet operationalise.

X. Conclusion

This paper set out to examine whether the constitutional and judicial safeguards surrounding preventive detention and national security legislation in India meet the proportionality standard the Supreme Court has itself articulated. The doctrinal trajectory from *Gopalan* through *Maneka Gandhi* to *Justice K.S. Puttaswamy* demonstrates a genuine and consequential expansion in the substantive content of Article 21, one that has repudiated the Emergency-era deference of *ADM Jabalpur* and extended proportionality analysis into surveillance, internet shutdowns and, more unevenly, bail. Yet the institutional architecture through which preventive detention and anti-terror prosecution are actually administered — the Article 22 advisory-board mechanism, the Section 43D(5) bail standard as construed in *Watali*, and the absence of sunset clauses or standing oversight bodies comparable to those in the United Kingdom, Canada and Germany — has not kept pace with this doctrinal expansion.

The hypothesis with which this paper began is accordingly borne out: Indian constitutional law has done more to expand the substantive guarantee of liberty than to reform the institutional mechanisms through which that guarantee is tested in practice. A balanced constitutional resolution of the tension between individual freedom and national security does not require India to abandon preventive detention or anti-terror legislation altogether — the constitutional text itself contemplates their existence — but it does require that the procedural safeguards surrounding their exercise be strengthened to match the substantive rights they are meant to protect. The reforms proposed in Part IX, each grounded in the Court's own proportionality jurisprudence and in comparative institutional practice, offer one route toward that resolution.

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Secondary Sources

This paper draws on the reported text of the judgments cited above and on the constitutional and statutory provisions listed. Given the fast-moving and partly sub-judice character of several contemporary matters discussed in Parts VII and VIII, in particular the technical-committee proceedings in the Pegasus litigation and the operation of the Digital Personal Data Protection Act, 2023, readers are directed to the official law reports and to the Supreme Court's and Parliament's own published records for the most current position.

