



DETENTION UNDER INDIAN CRIMINAL LAW JURISPRUDENCE AND THE RIGHTS OF PERSONS

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ABSTRACT

The power of detention constitutes a significant exercise of State authority and directly engages the constitutional guarantee of personal liberty in India. This paper examines the constitutional, statutory, and judicial framework governing detention, with particular focus on Articles 21 and 22 of the Constitution. It analyses ordinary arrest and detention under the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, preventive detention, and stringent bail regimes under special legislation such as the UAPA, NDPS Act, and PMLA. The study traces the evolution of judicial safeguards through landmark decisions including Maneka Gandhi, Joginder Kumar, D.K. Basu, Arnesh Kumar, Satender Kumar Antil, and Prabir Purkayastha. It further considers constitutional remedies, including habeas corpus and compensation for custodial violations, alongside international human rights standards. The paper highlights the continuing tension between State security interests and individual liberty, particularly concerning prolonged pre-trial detention and procedural safeguards.

Keywords: Detention, Personal Liberty, Article 21, Preventive Detention, BNSS.

INTRODUCTION

The power to detain represents one of the most direct and intrusive exercises of state authority, as it can remove a person from daily life without prior proof of guilt through state machinery, including the police, executive authorities, and courts, that an individual cannot easily resist. Consequently, Indian criminal jurisprudence subjects all forms of state custody to rigorous constitutional and statutory scrutiny.¹ This domain extends far beyond routine police arrests under general procedural law; it encompasses preventive detention without trial to protect

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¹ B.B. Pande, *Criminal Law and Criminal Justice: Advanced Legal Writings* (Eastern Book Company, Lucknow, 1st edn., 2022).

public order or national security, as well as stringent custodial regimes under specialised economic and anti-terror laws.² Unifying these three categories is a constitutional guarantee that personal liberty can only be restricted through a procedure that is fair, just, and reasonable, safeguarding citizens against unchecked executive discretion.³ This principle is anchored in constitutional text, evolving judicial precedents, and the statutory framework of the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023,⁴ which formally replaced the colonial-era Code of Criminal Procedure (CrPC), 1973,⁵ on July 1, 2024.⁶

The constitutional significance of detention lies in balancing the State's power to investigate offences, maintain public order, and protect national security with the individual's fundamental right to personal liberty. Indian jurisprudence has gradually moved beyond a purely formal approach, recognising that statutory authority alone cannot justify depriving a person of liberty. Such action must satisfy the requirements of legality, fairness, reasonableness, and non-arbitrariness, with Articles 21 and 22 serving as key constitutional safeguards.⁷ This approach has shaped judicial scrutiny of arrest, custody, remand, bail, and prolonged pre-trial detention, ensuring that procedural safeguards are treated as substantive protections rather than mere formalities.⁸ However, detention operates through different legal regimes, including ordinary criminal procedure under the BNSS, preventive detention laws, and special statutes imposing stringent bail conditions, requiring a continuing balance between collective security and individual liberty.

THE CONSTITUTIONAL ARCHITECTURE: ARTICLES 21 AND 22

The foundation of detention law in India can be traced to Part III of the Constitution, particularly Articles 21 and 22, which protect the life and personal liberty of individuals.⁹ Article 21 states that no person can be deprived of life or personal liberty except according to a procedure established by law. However, during the early years of the Republic, this protection was given a relatively narrow interpretation. In *A.K. Gopalan v. State of Madras*, the Supreme Court took the view that as long as the procedure was prescribed by a valid law enacted by the

² M.P. Jain, *Indian Constitutional Law* (LexisNexis, Gurgaon, 9th edn., 2025).

³ INDIA CONST. art. 21; *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597.

⁴ The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023).

⁵ The Code of Criminal Procedure, 1973 (Act 2 of 1974).

⁶ *Supra* note 4 at s. 531.

⁷ *Maneka Gandhi v. Union of India* (1978) 1 SCC 248.

⁸ *D.K. Basu v. State of West Bengal* (1997) 1 SCC 416.

⁹ INDIA CONST. arts. 21–22.

legislature, Article 21 was satisfied. The Court did not require the procedure itself to be fair or reasonable and, on this reasoning, upheld the preventive detention law under consideration.¹⁰

This approach changed significantly with the landmark judgment in *Maneka Gandhi v. Union of India*. The Supreme Court adopted a broader understanding of personal liberty by reading Article 21 alongside Articles 14 and 19. It held that a procedure which takes away a person's liberty cannot be merely one that is legally prescribed; it must also be fair, just, and reasonable. This judgment marked a major shift in Indian constitutional law, transforming Article 21 from a largely procedural protection into a meaningful safeguard of individual liberty. Since then, the principles laid down in *Maneka Gandhi* have provided the constitutional framework for examining detention laws and ensuring that the State's power to detain does not operate in an arbitrary or unfair manner.¹¹ Building upon these protections, the first three clauses of Article 22 of the Constitution provide more specific safeguards against unlawful or arbitrary detention.¹² A person who is arrested must be informed, as soon as possible, of the reasons for the arrest and must be allowed to consult and be defended by a legal practitioner of their choice. The arrested person must also be brought before the nearest magistrate within twenty-four hours of the arrest, excluding the time required for travelling to the magistrate, and if this requirement is not complied with, continued detention becomes legally impermissible.¹³

At the same time, Article 22¹⁴ recognises that preventive detention operates on a different legal footing. Clauses (4) to (7) provide a separate constitutional framework for preventive detention and prescribe safeguards that are distinct from those applicable to an ordinary arrest. This dual structure of Article 22 is significant. On the one hand, it provides immediate and enforceable protections to persons who are ordinarily arrested; on the other, it permits Parliament and State Legislatures to enact laws providing for preventive detention, subject to a separate and comparatively limited set of constitutional safeguards. Thus, while Article 21¹⁵ establishes the broader constitutional protection of personal liberty, Article 22¹⁶ gives practical expression to

¹⁰ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.

¹¹ *Maneka Gandhi v. Union of India* (1978) 1 SCC 248.

¹² Vrinda Bhandari, "Pretrial Detention in India: An Examination of the Causes and Possible Solutions" 11 *Asian Journal of Criminology* 83 (2016).

¹³ "What Are Your Rights If You Are Arrested in India Under BNSS 2023: Complete Guide," Sansa Law Desk, available at: <https://www.sansalegal.com/post/what-are-your-rights-if-you-are-arrested-in-india-under-bnss-2023-complete-guide> (last visited on Aug. 9, 2026).

¹⁴ INDIA CONST. art. 22.

¹⁵ INDIA CONST. art. 21.

¹⁶ INDIA CONST. art. 22.

that protection by regulating the circumstances and manner in which a person may be arrested or detained.¹⁷

While the law governing ordinary arrest and continued custody is primarily concerned with detention in connection with a criminal investigation and trial, preventive detention operates on a fundamentally different basis. Under this framework, a person may be detained not because they have already committed an offence, but because the authorities consider such detention necessary to prevent a perceived future threat to public order, the security of the State, the maintenance of essential supplies and services, or matters relating to foreign affairs.¹⁸ The roots of this system can be traced to the colonial period, including measures such as Bengal Regulation III of 1818 and the Rowlatt Act of 1919.¹⁹ Its continuation after independence remains an important feature of India's constitutional history. Indeed, within months of the Constitution coming into force, the newly established Parliament enacted the Preventive Detention Act, 1950. Thus, despite the Constitution's strong emphasis on personal liberty, preventive detention was consciously retained within the constitutional framework as an exceptional mechanism of State control.

An important constitutional detail concerns the period of permissible detention without Advisory Board review. The Constitution (Forty-Fourth Amendment) Act, 1978 proposed to reduce the existing three-month period to two months. However, the relevant provision was never brought into operation through notification. Consequently, the three-month threshold continues to govern preventive detention in practice. This distinction highlights the exceptional constitutional position of preventive detention: although it permits deprivation of liberty without a prior finding of guilt, its exercise remains subject to specific constitutional limitations and procedural safeguards.²⁰ The preventive detention framework discussed above continues to operate through several central and State-level enactments. Important statutes in this area include the National Security Act, 1980,²¹ the Conservation of Foreign Exchange and

¹⁷ "A Legal Analysis on Preventive Detention Laws in India," IJLSSS, available at: <https://ijlsss.com/a-legal-analysis-on-preventive-detention-laws-in-india/> (last visited on Aug. 9, 2026).

¹⁸ Chanchal Kumar, "Security Laws: Preventive Detention And Constitutional Exceptions" 77 *JSTOR* 477 (2016).

¹⁹ Harshitha and Subeendhar, "Colonial Continuities in Indian Security Law: A Historical Study of Preventive Detention and Emergency Governance" 9 *IJLMH* 239 (2026).

²⁰ "Preventive Detention in India: Constitutional Provisions, Article 22, Landmark Cases & Personal Liberty," Legal Service India, available at: <https://www.legalserviceindia.com/Legal-Articles/preventive-detention-in-india-constitutional-provisions-article-22-landmark-cases-personal-liberty/> (last visited on Aug. 9, 2026).

²¹ The National Security Act, 1980 (Act 65 of 1980).

Prevention of Smuggling Activities Act, 1974,²² and the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988,²³ along with various State laws dealing with public safety and security. These laws reflect the constitutional recognition of preventive detention as an exceptional mechanism through which the State may act against an anticipated threat rather than punish a person for an offence already committed.²⁴

The Supreme Court has consistently maintained that preventive detention is essentially an anticipatory measure and not a form of punishment, a distinction recognised at an early stage in *Khudiram Das v. State of West Bengal*. However, describing preventive detention as preventive rather than punitive does not place it beyond constitutional scrutiny. Courts generally do not examine whether the detaining authority's subjective satisfaction was sufficient on its merits; instead, judicial review primarily focuses on whether the constitutional and statutory procedure prescribed for detention has been properly followed.²⁵ At the same time, the courts have intervened where procedural requirements have been violated. Detention orders have been set aside where the grounds of detention were found to be vague or inadequate, where the detainee's representation was not properly or promptly considered, or where there were defects in the constitution or functioning of the Advisory Board. In recent decisions, including *Jaseela Shaji v. Union of India*, the Supreme Court has reiterated that these procedural safeguards must be observed strictly. This is particularly important because a person detained preventively is placed in a fundamentally different position from an ordinary accused; the detainee does not have an absolute right to legal representation before the Advisory Board and does not have the opportunity to challenge the State's case through a conventional adversarial trial.²⁶

In this context, the constitutional remedy of habeas corpus assumes particular importance. A person subjected to preventive detention may approach the Supreme Court under Article 32²⁷ or the concerned High Court under Article 226²⁸ to challenge the legality of the detention. Through such proceedings, the constitutional courts examine whether the detention has been

²² The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Act 52 of 1974).

²³ The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (Act 46 of 1988).

²⁴ "Exploring the Detention Provisions of the National Security Act, 1980," Law Notes by TheLaw.Institute, available at: <https://thelaw.institute/challenges-to-criminal-justice-system/national-security-act-1980-detention-provisions/> (last visited on Aug. 9, 2026).

²⁵ *Khudiram Das v. State of West Bengal*, (1975) 2 SCC 81.

²⁶ *Jaseela Shaji v. Union of India*, 2024 INSC 683.

²⁷ INDIA CONST. art. 32.

²⁸ INDIA CONST. art. 226.

authorised by law and whether the mandatory procedural safeguards have been respected. Thus, although preventive detention permits the State to restrict personal liberty based on apprehended future conduct, its exercise remains subject to meaningful judicial scrutiny through constitutional remedies.²⁹

ORDINARY ARREST AND DETENTION UNDER THE BNSS, 2023

The constitutional safeguards contained in Articles 21 and 22 are further given practical effect through the statutory framework governing arrest and detention. At present, the principal provisions relating to ordinary arrest are contained in Chapter V of the Bharatiya Nagarik Suraksha Sanhita (BNSS), which largely carries forward, while in certain respects refining, the framework that existed under the erstwhile Code of Criminal Procedure (CrPC). Section 35 of the BNSS,³⁰ which corresponds broadly to Section 41 of the CrPC,³¹ empowers the police to arrest a person without a warrant in cognizable offences. The police officer must be satisfied that the arrest is necessary, for instance, to prevent the person from committing another offence, to facilitate a proper investigation, to prevent the destruction or tampering of evidence, to stop the person from influencing or threatening witnesses, or where the person's presence before the court cannot otherwise be ensured.³² Where arrest is not considered necessary, the officer is required to record the reasons for not making the arrest and issue a notice requiring the person to appear before the police instead.³³ This approach reflects the broader constitutional principle that deprivation of personal liberty should not be resorted to mechanically or without justification.

The BNSS further strengthens procedural safeguards through Sections 51 to 56, which deal with the medical examination of arrested persons.³⁴ These provisions not only permit medical examination in appropriate circumstances but also recognise the arrested person's entitlement to have their body examined for evidence of injuries or other relevant physical conditions. Finally, Section 58,³⁵ corresponding to Section 57 of the CrPC,³⁶ gives effect to the

²⁹ Sanchita Kadam, "Preventive Detention: Two Judgements, Two Contrasting Views, One Judge", Citizens for Justice And Peace (03 Mar. 2022) available at: <https://cjp.org.in/preventive-detention-two-judgements-two-contrasting-views-one-judge/> (last visited on Aug. 9, 2026).

³⁰ *The Bharatiya Nagarik Suraksha Sanhita*, 2023, No. 46 of 2023, s. 35.

³¹ *The Code of Criminal Procedure*, 1973, No. 2 of 1974, s. 41.

³² "Rewriting Criminal Procedure: A Deep Dive into the Shift from 41A CrPC to 35 BNSS," JLRJS, available at: <https://jlrjs.com/rewriting-criminal-procedure/> (last visited on Aug. 9, 2026).

³³ *Ibid.*

³⁴ *The Bharatiya Nagarik Suraksha Sanhita*, 2023, No. 46 of 2023, ss. 51–56.

³⁵ *The Bharatiya Nagarik Suraksha Sanhita*, 2023, No. 46 of 2023, s. 58.

³⁶ *The Code of Criminal Procedure*, 1973, No. 2 of 1974, s. 57.

constitutional requirement under Article 22³⁷ that a person arrested without a warrant cannot ordinarily be detained for more than twenty-four hours without being produced before a magistrate, excluding the time necessary for travelling to the magistrate. Any detention beyond this period without proper judicial authorisation is unlawful.³⁸

Taken together, these provisions seek to translate the constitutional guarantee under Article 22 into a practical set of procedural safeguards to be followed at the police station. The BNSS places clear legal limits on the exercise of police power by requiring arrest to be based on necessity and subjecting the process to accountability and judicial oversight. The Bharatiya Nyaya Sanhita, 2023³⁹ and the Bharatiya Sakshya Adhiniyam, 2023,⁴⁰ enacted alongside the BNSS as part of the broader reform of India's criminal law framework, do not substantially alter the existing architecture governing arrest and detention. Although the three new criminal codes were presented as a move away from the colonial character of the earlier legal framework, much of the basic structure of arrest law has remained intact. At the same time, certain changes in terminology and phrasing, particularly concerning custody periods and the circumstances in which extended police custody may be permitted, have raised new questions of interpretation.⁴¹

However, the statutory framework by itself has not always been sufficient to prevent the misuse of arrest powers in India. The courts have therefore played a significant role in giving practical meaning to the constitutional safeguards surrounding arrest and in ensuring that the exercise of police power remains consistent with individual liberty and dignity. In *Joginder Kumar v. State of Uttar Pradesh*,⁴² the Supreme Court dealt with the detention of a young lawyer who had been kept in police custody for several days on the ground that he was required for an inquiry. The Court made an important distinction between the mere existence of a legal power to arrest and the justification for actually exercising that power. It emphasised that arrest should not become

³⁷ INDIA CONST. art. 22(2).

³⁸ Ratanlal and Dhirajlal, *The Bharatiya Nagarik Suraksha Sanhita, 2023* (Eastern Book Company, Lucknow, 24th edn., 2025).

³⁹ The Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023).

⁴⁰ The Bharatiya Sakshya Adhiniyam, 2023 (Act 47 of 2023).

⁴¹ "What Are Your Rights If You Are Arrested in India Under BNSS 2023: Complete Guide," Sansa Law Desk, available at: <https://www.sansalegal.com/post/what-are-your-rights-if-you-are-arrested-in-india-under-bnss-2023-complete-guide> (last visited on Aug. 9, 2026).

⁴² (1994) 4 SCC 260.

routine simply because the law permits it; rather, the police must have reasonable grounds to believe that arrest is genuinely necessary.⁴³

The Court also directed that a friend or relative of the arrested person should be informed about the arrest and the place of detention, with the details properly recorded in the police diary. The magistrate before whom the arrested person is produced was also required to ensure that these safeguards had been followed. This judicial approach was strengthened a few years later in *D.K. Basu v. State of West Bengal*, a landmark case arising against the backdrop of custodial deaths and allegations of custodial abuse. The Supreme Court laid down a comprehensive set of eleven mandatory guidelines governing arrest and detention, including the preparation of an arrest memo witnessed by an independent person, informing a person chosen by the arrestee about the arrest, conducting regular medical examinations, and maintaining proper records of arrests and custody. These directions were made legally enforceable, including through the Court's contempt jurisdiction, thereby reinforcing the principle that the statutory power to arrest must operate within a framework of accountability, transparency, and protection of personal liberty.⁴⁴

The judicial development of safeguards relating to arrest did not remain confined to the manner in which an arrest is carried out. The courts also addressed the more fundamental question of whether an arrest should be made at all. In *Arnesh Kumar v. State of Bihar*, which arose from the routine arrest of husbands and their relatives in cases involving matrimonial cruelty, the Supreme Court made it clear that arrest should not automatically follow merely because an offence has been registered. In cases involving offences punishable with imprisonment of up to seven years, the police must first examine whether the statutory conditions justifying arrest are actually satisfied. The Court required these reasons to be properly recorded under Section 41 of the CrPC, a framework that now finds its corresponding provision in Section 35 of the BNSS. It also placed a duty on magistrates to independently examine whether the required safeguards had been followed before authorising further detention.⁴⁵

⁴³ "Safeguarding Personal Liberty: *Joginder Kumar v. State of Uttar Pradesh* (1994)," *Legal Service India*, available at: <https://www.legalserviceindia.com/legal/article-19162-safeguarding-personal-liberty-joginder-kumar-v-s-state-of-uttar-pradesh-1994-.html> (last visited on Aug. 9, 2026).

⁴⁴ *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416.

⁴⁵ *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.

The reasoning in *Arnesh Kumar*⁴⁶ was subsequently strengthened in *Satender Kumar Antil v. Central Bureau of Investigation*. Concerned by the high proportion of undertrial prisoners in Indian prisons, the Supreme Court laid down a structured approach to bail and reiterated that unnecessary arrests should not become a routine feature of criminal proceedings. The Court emphasised that non-compliance with the statutory requirements governing arrest can affect the legality of the detention that follows. It also reaffirmed the well-established principle that bail is the rule and jail is the exception, thereby reinforcing the idea that pre-trial detention should not be used as a substitute for punishment.⁴⁷

The importance of procedural safeguards was further emphasised in *Prabir Purkayastha v. State (NCT of Delhi)*, where the Supreme Court held that the grounds of arrest must be communicated to the arrested person in writing and in a language or manner that the person can understand. Failure to comply with this requirement may vitiate the arrest as well as any subsequent remand, reaffirming that the guarantee under Article 22(1) is not a mere technical formality but an essential condition for the lawful deprivation of personal liberty. Viewed alongside the earlier decisions, this judgment reflects the judiciary's continuing effort to transform constitutional safeguards into practical protections against arbitrary arrest and detention. The courts have increasingly gone beyond examining only what happens after an arrest and have insisted that the decision to arrest itself must be supported by lawful justification. Constitutional protection, therefore, begins from the moment a person comes into contact with the police and not merely when the person is produced before a magistrate. The police station consequently becomes the first and crucial point at which the guarantees of personal liberty under Articles 21 and 22 must be meaningfully respected and enforced.⁴⁸

Once an arrested person is brought before a magistrate, the focus of detention law moves from the legality of the initial arrest to the justification for continuing custody during the investigation. Section 187 of the BNSS,⁴⁹ which replaces Section 167 of the CrPC,⁵⁰ empowers a magistrate to authorise detention beyond the initial twenty-four-hour period when the investigation cannot be completed within that time.⁵¹ However, this power is subject to definite statutory limits: detention may extend up to ninety days where the alleged offence is punishable

⁴⁶ (2014) 8 SCC 273.

⁴⁷ *Satender Kumar Antil v. Central Bureau of Investigation*, (2022) 10 SCC 51.

⁴⁸ *Prabir Purkayastha v. State (NCT of Delhi)*, 2024 INSC 414.

⁴⁹ The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, s. 187.

⁵⁰ The Code of Criminal Procedure, 1973, No. 2 of 1974, s. 167.

⁵¹ Raghav Bansal and Gurpreet Kaur, "Bail Jurisprudence in India: 'Jail is the Exception' - Myth or Reality" 9 *International Journal of Law Management & Humanities* 4379 (2026).

with death, imprisonment for life, or imprisonment for a term of ten years or more, and up to sixty days in other cases.⁵² These time limits are significant because they place a clear boundary on the State's power to keep an accused person in custody while the investigation remains pending. If the investigating agency fails to submit its final report within the prescribed period, the accused becomes entitled to what is commonly known as default bail or statutory bail.⁵³ The Supreme Court has consistently recognised this entitlement as an important statutory right and has held that once the accused is prepared to exercise that right and satisfies the necessary conditions, it cannot ordinarily be defeated merely by the subsequent filing of a charge sheet.⁵⁴ In this manner, the provision gives concrete effect to the constitutional protection of personal liberty under Article 21 by ensuring that delays or failures in investigation do not become a justification for keeping a person in custody indefinitely.

The interpretation of the corresponding provision under the BNSS is also beginning to receive judicial attention. High Courts examining the new formulation, including the Karnataka High Court in *State of Karnataka v. Kalandar Shafi*, have so far treated the revised wording as substantially retaining the established sixty-day and ninety-day framework. This approach reflects the broader principle that where statutory provisions affecting personal liberty are capable of more than one interpretation, courts should be cautious about adopting an interpretation that unnecessarily extends the period of detention. Thus, the statutory limits under Section 187 BNSS continue to operate as an important safeguard against prolonged and unjustified pre-trial custody.⁵⁵

DETENTION UNDER SPECIAL SECURITY LEGISLATION

Closely connected with the framework of preventive detention, but legally distinct from it, is another form of restriction on personal liberty found in special criminal legislation dealing with terrorism, narcotic offences, and economic crimes. In these cases, detention does not arise from an executive preventive detention order; rather, it occurs within the ordinary criminal justice process, where the legislature has imposed stringent conditions that make the grant of bail

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Supra* note 22 at 4.

⁵⁵ *State of Karnataka v. Kalandar Shafi*, 2025 1 Cri LJ 123 (KAR).

considerably more difficult.⁵⁶ The Unlawful Activities (Prevention) Act, 1967,⁵⁷ particularly following its amendments in 2008 and 2019, provides a prominent example of this approach. Section 43D (5) requires the court to refuse bail where, upon examining the case diary or charge sheet, there are reasonable grounds for believing that the accusation is prima facie true. This significantly departs from the ordinary approach to bail and places a heavier burden on an accused seeking release during the pendency of the trial.⁵⁸

The Supreme Court's decision in *National Investigation Agency v. Zahoor Ahmad Shah Watali* further strengthened this restrictive approach. The Court held that, while considering bail under Section 43D(5), the court is not expected to undertake a detailed assessment of the evidence as it would during trial and may substantially rely upon the material presented by the prosecution for determining whether the accusation appears prima facie true. The effect of this standard has been to make bail particularly difficult in cases under the UAPA and, in some instances, has resulted in prolonged periods of pre-trial incarceration. The impact of such prolonged detention on the constitutional guarantee of personal liberty under Article 21 has, however, been recognised by the higher judiciary.⁵⁹ In decisions such as *Vernon v. State of Maharashtra*⁶⁰ and subsequent cases, including *Syed Iftikhar Andrabi v. National Investigation Agency*, the Supreme Court has reiterated that the statutory restrictions imposed by Section 43D(5) cannot completely exclude the constitutional jurisdiction of the courts. Where continued incarceration becomes disproportionate or results in an unreasonable delay in the conclusion of the trial, constitutional courts may consider granting bail to prevent the statutory restriction from operating in a manner inconsistent with the fundamental rights guaranteed under Part III of the Constitution.⁶¹

Similar, though not identical, restrictions on bail can also be found in Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985⁶² and Section 45 of the Prevention of Money Laundering Act, 2002.⁶³ These provisions reflect a legislative determination that certain

⁵⁶ "Article 21, the Grundnorm: Rigmarole of Bail Proceedings under UAPA," Bar and Bench, *available at*: <https://www.barandbench.com/view-point/article-21-the-grundnorm-rigmarole-of-bail-proceedings-under-uapa> (last visited on Aug. 9, 2026).

⁵⁷ The Unlawful Activities (Prevention) Act, 1967 (Act 37 of 1967).

⁵⁸ "Supreme Court Illuminates on Bail under Section 43D(5) of UAPA against General Rule of CrPC," SCC Online Blog, *available at*: <https://www.scconline.com/blog/post/2024/02/13/supreme-court-illuminates-bail-under-section-43d-5-of-uapa-against-crpc/> (last visited on Aug. 9, 2026).

⁵⁹ *National Investigation Agency v. Zahoor Ahmad Shah Watali*, (2019) 5 SCC 1.

⁶⁰ (2023) 15 SCC 56.

⁶¹ *Syed Iftikhar Andrabi v. National Investigation Agency*, 2026 INSC 503.

⁶² The Narcotic Drugs and Psychotropic Substances Act, 1985, No. 61 of 1985, s. 37.

⁶³ The Prevention of Money Laundering Act, 2002, No. 15 of 2003, s. 45.

offences, because of their perceived impact on national security, public health, or the financial system, require a stricter approach to pre-trial release. At the same time, the relatively low proportion of convictions in comparison with the number of persons subjected to detention under some of these stringent regimes has raised important concerns. It has consequently generated an ongoing judicial and academic debate over whether these exceptional restrictions on bail maintain a constitutionally acceptable balance between the interests of collective security and the individual's fundamental right to personal liberty.

The constitutional and statutory framework governing detention in India must also be understood in the context of international human rights standards. Although international treaties and instruments do not automatically have direct enforceability in domestic courts in the absence of implementing legislation, they have nevertheless influenced the development and interpretation of Indian detention jurisprudence. A significant source in this regard is Article 9 of the International Covenant on Civil and Political Rights (ICCPR),⁶⁴ which India ratified in 1979. It recognises the right to liberty and security of the person, prohibits arbitrary arrest and detention, and requires that a person who is arrested be informed promptly of the reasons for the arrest and be brought without undue delay before a judicial authority. Similar protections relating to personal liberty and freedom from arbitrary detention are also reflected in the Universal Declaration of Human Rights.

In the absence of such a dedicated statutory framework, Indian courts have relied significantly on constitutional remedies to address custodial abuse. The decision in *Nilabati Behera v. State of Orissa*, for instance, recognised the power of constitutional courts to award compensation for violations of fundamental rights, thereby developing the concept of constitutional tort. This judicial remedy has provided an important means of holding the State accountable for custodial excesses and reinforces the broader principle that the protection of personal liberty under Articles 21 and 22 must remain meaningful even when a person is in State custody.⁶⁵

CONCLUSION

The Indian law of detention is therefore better understood as a layered legal framework rather than as a single, unified doctrine. At its foundation lies the constitutional guarantee of personal liberty and fair procedure, which is given practical form through statutory provisions regulating

⁶⁴ International Covenant on Civil and Political Rights, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (last visited on Aug. 9, 2026).

⁶⁵ *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746.

arrest and custody. These provisions are, in turn, shaped and strengthened by judicial decisions that have repeatedly emphasised that procedural safeguards must be followed in their true substance and not merely as formal requirements. Alongside this ordinary framework, however, operate exceptional regimes such as preventive detention and special legislation dealing with terrorism, narcotics, and economic offences, under which the balance between individual liberty and the interests of the State may shift considerably towards the latter.

Despite the development of these constitutional and statutory safeguards, significant challenges remain in translating legal protections into lived reality. The continued presence of a large undertrial population, the difficulty of obtaining bail under stringent provisions such as Section 43D (5) of the UAPA⁶⁶ and the limited scope for legal representation before Advisory Boards in preventive detention matters demonstrate that the distance between constitutional guarantees and their practical implementation has not been completely overcome. These concerns become particularly important where prolonged detention continues without a final determination of guilt.

At the same time, the evolution of judicial decisions from *Maneka Gandhi* through *Joginder Kumar*, *D.K. Basu*, *Arnesh Kumar*, *Satender Kumar Antil*, and *Prabir Purkayastha* reflects a consistent judicial effort to interpret procedural safeguards in a manner that protects individual liberty. The courts have progressively insisted that arrest and detention must be justified, transparent, and subject to meaningful procedural and judicial scrutiny. The introduction of the BNSS has retained much of the existing structure of arrest and detention law, suggesting that legislative reform has largely preferred continuity and refinement rather than a fundamental departure from the earlier framework. Ultimately, the law of detention in India continues to represent a delicate balance between the State's responsibility to maintain public order and security and its constitutional obligation to protect individual liberty. The continuing interaction between legislation, constitutional principles, and judicial interpretation will therefore remain central to determining how the rights of detained persons are protected and enforced. In practice, this balance will continue to be developed not only through statutory provisions but also through the courts' examination of individual cases, where the constitutional promise of liberty is tested against the realities of State power.

⁶⁶ The Unlawful Activities (Prevention) Act, 1967 (Act 37 of 1967), s. 43D(5).