

Laws Relating to Preventive Detention in India

Dr. Suresh Kumar

Associate Professor, School of Law, MVN University, Palwal, Haryana

Abstract— Preventive detention is subject to legal challenges, particularly regarding human rights and civil liberties. Courts may review the legality of such detentions to ensure they comply with the rule of law and respect fundamental rights. While in preventive detention, individuals are often entitled to certain rights, such as access to legal counsel, periodic reviews of their detention, and humane treatment in accordance with international human rights standards. Preventive detention may be used in various contexts, including national security, immigration, and mental health. For example, individuals suspected of terrorism might be detained to prevent them from carrying out attacks, or individuals with severe mental illness might be detained to protect them from harming themselves or others.

Index Terms— Preventive Detention India

I. INTRODUCTION

Preventive detention refers to the practice of detaining individuals, typically by the government or law enforcement authorities, in order to prevent them from committing future crimes or to mitigate a perceived threat to public safety. This form of detention is used as a precautionary measure when there is a belief that the individual poses a significant risk to society, even if they have not yet been convicted of a specific crime. The legality and conditions of preventive detention vary from one country to another and may be governed by specific laws or constitutional provisions. In many democracies, the use of preventive detention is subject to strict legal safeguards to protect individual rights and prevent abuse. Preventive detention can be temporary or indefinite, depending on the legal framework and the perceived threat posed by the individual. Some jurisdictions have limits on the

maximum duration of preventive detention. Governments typically justify preventive detention on the grounds of public safety and the need to prevent potential harm to individuals or society. This practice is often controversial because it involves depriving individuals of their liberty without a formal conviction.¹

Preventive detention is a legal concept that allows authorities to detain individuals without a formal trial or conviction, typically with the aim of preventing potential threats to public order, national security, or other societal interests. In India, laws relating to preventive detention grant specific powers to the government to detain individuals for a specified period to prevent them from engaging in activities that could be deemed detrimental to the larger interests of the state. These laws are often invoked during times of political instability, social unrest, or threats to national security.²

The concept of preventive detention is a delicate balance between safeguarding individual rights and protecting the collective well-being of society. India has had a history of utilizing preventive detention laws to address various challenges, but these laws have also been criticized for their potential to be misused and abuse of power.³ Preventive detention laws in India provide the government with the authority to detain individuals without filing formal charges or conducting a trial. These laws are primarily aimed at maintaining public order, national security, and preventing individuals from engaging in activities that are perceived as harmful to society or the state. Preventive detention is seen as a tool to prevent potential threats rather than a response to crimes that have already been committed. Several laws in India

¹ A. Kapoor, "Preventive Detention Laws in India: Constitutional Challenges and Human Rights Implications," *Indian Law Review*, Volume: 30, Issue: 2 (2021).

² A. Kapoor, "Preventive Detention Laws in India: Constitutional Validity and Judicial Review," *Indian Law Journal*, Volume: 25, Issue: 2 (2021),.

³ Sudhir Nai, *Preventive Detention and Security Laws in India* 67 (LexisNexis, New Delhi, 2014).

address preventive detention, each with its own specific focus and applicability.

II. THE CONSTITUTION OF INDIA

Preventive detention laws and fundamental rights often find themselves in tension, as the former grant authorities the power to curtail certain individual rights in the interest of maintaining public order, national security, and other societal interests.

1. Right to Equality (Article 14): The right to equality can be implicated if preventive detention is used disproportionately against certain groups or if there is discrimination in the application of these laws. If it's demonstrated that certain groups are targeted more frequently, it could raise concerns about the discriminatory enforcement of the laws.⁴
2. Freedom of Speech and Expression (Article 19(1)(a)): Preventive detention can potentially infringe upon an individual's freedom of speech and expression, especially if the detention is related to political dissent or criticism of the government. If these rights are curtailed using preventive detention, it can raise concerns about the suppression of democratic discourse.⁵
3. Freedom to Assemble Peaceably and Without Arms (Article 19(1)(b)): Detention could be employed to prevent individuals from participating in protests, gatherings, or demonstrations that are perceived as threats to public order. This raises questions about the balance between the right to protest and the state's duty to maintain public order.⁶
4. Article 21 - Protection of Life and Personal Liberty: This article acts as a safeguard against arbitrary detention and emphasizes the importance of due process. Preventive detention laws directly intersect with the right to personal liberty enshrined in Article 21 of the Indian Constitution. While this right is not absolute and can be restricted under certain circumstances, preventive detention raises questions about the

balance between individual freedom and the state's authority to curtail that freedom. Detainees' rights to move freely and live with dignity can be significantly curtailed under these laws.⁷

5. Article 22 - Protection against Arrest and Detention: Article 22 provides safeguards against arbitrary arrest and detention, such as the right to be informed of the grounds of arrest and the right to legal representation. Preventive detention laws must comply with these safeguards to ensure that individuals are not detained arbitrarily and are given an opportunity to challenge their detention. Article 22 contains specific provisions related to arrest and detention, including preventive detention. The Indian Constitution does allow for preventive detention under certain circumstances.⁸
6. Article 22A - Right to be informed of the Grounds of Arrest: Article 22A was inserted into the Constitution through the 44th Amendment Act, 1978. It guarantees the right to be informed of the grounds of arrest to every person who is arrested and detained in custody.
7. Habeas Corpus: The writ of habeas corpus is a fundamental right in India under Article 32 of the Constitution. It empowers the Supreme Court to issue the writ for the enforcement of the right to personal liberty.⁹ The High Courts also have the authority to issue writs of habeas corpus under Article 226 of the Constitution.¹⁰ In cases of preventive detention, the writ of habeas corpus can be used to challenge the legality of the detention. If the court finds that the detention was not in accordance with the law or if the grounds for detention are not valid, the court can order the release of the detained individual.¹¹ The Indian Constitution does allow for preventive detention under certain circumstances, it also provides safeguards to protect the rights of individuals being detained. The writ of habeas corpus serves as an essential tool to challenge unlawful detention and ensure the protection of personal

⁴ The Constitution of India, 1950, art.14.

⁵ The Constitution of India, 1950, art.19(1)(a).

⁶ The Constitution of India, 1950, art.19(1)(b).

⁷ The Constitution of India, 1950, art.21.

⁸ The Constitution of India, 1950, art.22.

⁹ The Constitution of India, 1950, art.32.

¹⁰ The Constitution of India, 1950, art.226.

¹¹ H.M. Seervai, *Preventive Detention in Indian Constitution* 78 (N.M. Tripathi Pvt. Ltd., Mumbai, 1986).

liberty.¹² It's important to note that while the Constitution provides safeguards against arbitrary preventive detention, certain emergency provisions can temporarily suspend or restrict these rights. For instance, during a state of emergency, fundamental rights can be suspended under Article 359 of the Constitution.

III. MAINTENANCE OF INTERNAL SECURITY ACT (MISA), 1971

MISA was enacted during the period of internal emergency (1975-1977) and gave the government the power to detain individuals without trial if they were deemed to be a threat to the security of the state or the maintenance of public order.¹³

1. Detention without Trial: MISA empowered the government to detain individuals without trial if they were deemed to be a threat to the security of the state, maintenance of public order, or the sovereignty and integrity of India. The grounds for detention were often broadly defined, giving authorities wide discretion in deciding whom to detain.
2. Duration of Detention: The initial period of detention under MISA was three months, which could be extended to one year if the Advisory Board recommended such an extension. Subsequent extensions could also be made.
3. Advisory Boards: MISA required that an Advisory Board review the cases of detained individuals within six weeks from the date of detention. The board consisted of three members, including a High Court judge, who would assess the grounds of detention and the necessity of continuing detention.¹⁴
4. Rights of Detained Persons: Detained individuals had certain rights under MISA, including the right to be informed of the grounds of detention, the right to make a representation against the detention, and the right to be represented by a

legal advisor. However, these rights were limited compared to the protections available in regular criminal cases.

5. Review and Appeal: While MISA provided for review by the Advisory Board, there was no provision for a regular judicial review by the courts. Detained individuals could file habeas corpus petitions to challenge their detention, but the government could suspend this right during periods of emergency.
6. Internal Emergency: MISA was often invoked during periods of internal emergency, such as the one declared in 1975. During an emergency, fundamental rights could be suspended, and the government could take stringent measures to maintain public order and security.
7. Controversies and Criticisms: MISA was widely criticized for being a tool of political repression. It was used to detain opposition leaders, activists, and individuals critical of the government's policies. The law's broad and vague provisions gave authorities significant discretionary power, which was often abused.
8. Repeal: MISA was repealed in 1977 after the emergency was lifted. However, some of its provisions were merged into the National Security Act (NSA), which continues to be in force in India.

IV. THE CONSERVATION OF FOREIGN EXCHANGE AND PREVENTION OF SMUGGLING ACTIVITIES ACT (COFEPOSA), 1974

The Act is an Indian law that focuses on preventing smuggling activities and conserving foreign exchange. It provides authorities with the power to detain individuals suspected of being involved in smuggling or foreign exchange-related offenses.¹⁵

1. Detention: COFEPOSA empowers the central government or state government to detain a person if satisfied, based on specific information,

¹² K.N. Chandrasekharan Pillai, *Preventive Detention: Comparative and Constitutional Perspective* 67 (LexisNexis, New Delhi, 2015).

¹³ Maintenance of Internal Security Act (MISA), 1971

¹⁴ K.S. Sudarshan, *Preventive Detention: A Case Study of Indian Laws and Policies* 45 (Prashant Publishing House, Pune, 2005).

¹⁵ The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA), 1974

that the person is likely to engage in smuggling activities or foreign exchange-related offenses.

2. Grounds for Detention: The Act lists several grounds for preventive detention, including:
 - Engaging in smuggling goods, currencies, or valuables.
 - Dealing with smuggled goods, currencies, or valuables.
 - Abetting or conspiring in smuggling activities.
 - Transporting, concealing, or harbouring smuggled goods.
 - Acquiring or holding proceeds from smuggling activities.
3. Detention Order: The government issues a detention order specifying the grounds for detention. The detained person is informed of the grounds, but the Act allows the government to withhold certain facts if their disclosure is considered against public interest.
4. Detention Period: The initial detention period is up to six months. However, this can be extended up to two years in certain cases, subject to the approval of an advisory board.¹⁶
5. Non-application of Certain Laws: Certain provisions of the Code of Criminal Procedure, 1973, and the Indian Evidence Act, 1872, are not applicable to proceedings under COFEPOSA, allowing for a more streamlined process.
6. Reporting to Parliament: The central government is required to submit an annual report to Parliament on the cases in which detention orders have been issued.

V. NATIONAL SECURITY ACT (NSA), 1980

The NSA allows for the preventive detention of individuals in certain circumstances where they are considered a threat to national security or public order. The detention can be authorized by state governments or the central government. The National Security Act (NSA) is a law enacted in India in 1980 that allows for preventive detention of individuals in certain situations to ensure national security and public order.¹⁷

¹⁶S. Chandra Sekharan, *Preventive Detention: Law and Constitution* (Law Publishers, New Delhi, 2000).

¹⁷ National Security Act (NSA), 1980

1. Grounds for Detention: The NSA allows for the detention of an individual if the government is satisfied that the person's activities are prejudicial to the security of the state, maintenance of public order, or relations with foreign countries. The grounds for detention are broadly defined and can encompass various activities that are seen as threats to national security or public order.
2. Authority to Detain: The detention order can be issued by either the central government or the state government, depending on the circumstances. The order must specify the grounds for detention.¹⁸
3. Duration of Detention: Initially, the detention can be for a period of up to 12 months. However, if the government believes it is necessary to prevent the person from acting in a manner prejudicial to national security or public order, the detention can be extended beyond 12 months with the approval of the state government.
4. Rights of Detained Persons: Detained individuals have certain rights under the NSA, including the right to be informed of the grounds of detention, the right to make a representation against the detention, and the right to be represented by a lawyer during Advisory Board proceedings.
5. No Judicial Review: The NSA includes provisions that restrict the jurisdiction of courts to interfere with detention orders. This means that there is no regular judicial review of detention orders by the courts, except for the limited review conducted by the Advisory Board.

VI. ARMED FORCES (SPECIAL POWERS) ACT (AFSPA), 1958

The Armed Forces (Special Powers) Act (AFSPA) is an Indian law that was enacted in 1958 to grant special powers to the armed forces deployed in certain areas to help maintain law and order, combat insurgency, and counter terrorism. One of the main provisions of AFSPA pertains to the detention of individuals suspected of being involved in or supporting insurgent or terrorist activities. The detention provisions of

¹⁸ M.C. Gupta, *Preventive Detention: A Legal Enquiry* 89 (Indian Institute of Public Administration, New Delhi, 1969).

AFSPA are controversial and have been a subject of debate and criticism due to concerns about human rights abuses.¹⁹

1. Arrest without Warrant: Under AFSPA, members of the armed forces have the authority to arrest and detain individuals without a warrant if they have reasonable grounds to believe that the person is involved in activities that threaten the security of the area.
2. Detention Period: The law allows for the detention of suspects for a period of up to six months. However, the detained individual must be handed over to the nearest police station within 24 hours of arrest, along with a report detailing the grounds for detention.
3. Judicial Review: Detentions made under AFSPA are subject to judicial review. The detained person must be produced before a magistrate within 24 hours of arrest, and the magistrate can authorize further detention based on the evidence provided by the authorities.
4. Immunity Clause: One of the most controversial aspects of AFSPA is the provision that grants legal immunity to armed forces personnel for their actions taken under the act. This means that soldiers are protected from prosecution, unless the government grants permission to prosecute.
5. Public Safety and Order: The main objective of AFSPA is to maintain public safety and order in areas affected by insurgency or terrorism. However, the broad powers granted under the act have led to concerns about human rights abuses, including allegations of arbitrary arrests, torture, and extrajudicial killings.
6. Declaration of "Disturbed Areas": AFSPA is applicable only in areas declared as "disturbed" by the state government or the central government. Such a declaration is typically made when the authorities believe that the security situation in an area is deteriorating due to insurgency or other forms of violence.

¹⁹ Armed Forces (Special Powers) Act (AFSPA), 1958.

VII. UNLAWFUL ACTIVITIES (PREVENTION) ACT (UAPA), 1967

The Unlawful Activities (Prevention) Act (UAPA) is an Indian law enacted in 1967 to provide the legal framework for the prevention and regulation of activities deemed unlawful and potentially harmful to the sovereignty and integrity of India. The primary objective of this legislation is to combat terrorism and unlawful activities in the country.²⁰

1. Declaration of Unlawful Associations: The UAPA empowers the central government to declare an association or organization as unlawful if it believes that the group is involved in activities that threaten the sovereignty and integrity of India. Once an association is declared unlawful, its activities are banned, and its members can face legal consequences.
2. Ban on Membership: The act makes it a criminal offense to be a member of an unlawful association. Individuals found to be associated with such organizations can be arrested and prosecuted.
3. Amendment in 2019: In 2019, significant amendments were made to the UAPA, giving the government greater powers to designate individuals as terrorists and to seize their properties. This has raised concerns among civil liberties advocates, who argue that these amendments could be misused to target political activists and dissenters.
4. Designation of Individuals as Terrorists: The amended UAPA allows the government to designate individuals as "terrorists" if it has reason to believe that they are involved in terrorism-related activities. This designation allows for the freezing of their assets and detention for extended periods without formal charges.
5. Provision for Preventive Detention: The UAPA allows for the preventive detention of individuals suspected of being involved in unlawful activities, including terrorism. Detainees can be held without formal charges for up to 180 days under certain circumstances.

²⁰ Unlawful Activities (Prevention) Act (UAPA), 1967.

6. Evidence and Confessions: The UAPA contains provisions related to the admissibility of confessions made to police officers as evidence in court, which is a matter of concern as it could potentially lead to the abuse of power.
7. Punishments: The act prescribes severe penalties for various offenses under its purview, including imprisonment and fines. The severity of the punishment depends on the nature and seriousness of the offense.
8. Review and Oversight: The act allows for the review of decisions made under its provisions by an advisory board, but the government has the authority to accept or reject the recommendations of the board.
9. Banning Terrorist Organizations (Section 35 and 36): The UAPA allows the central government to declare an organization as a "terrorist organization" if it is found to be involved in terrorism. Once an organization is declared a terrorist organization, it faces severe restrictions and penalties.²¹
10. Terrorist Activities (Section 15): The UAPA defines "terrorist activity" as any act that threatens the sovereignty, integrity, or security of India. It includes activities that are intended to disturb public order, create fear, or strike terror in people.
11. Designated Courts (Section 11): The UAPA provides for the establishment of special designated courts to deal with cases related to unlawful activities, terrorist activities, and terrorist organizations. These courts are intended to expedite the trial process.

VIII. PREVENTION OF ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1988

It was enacted to fulfil India's international obligations under various international conventions on drug control. Here are the main provisions and sections of the PITA Act:²²

1. Punishment for Illicit Traffic (Section 15): This section specifies the punishment for engaging in the illicit traffic of narcotic drugs and psychotropic substances. It prescribes rigorous imprisonment for a term that may extend to twenty years and a fine that may extend to two lakh rupees.
2. Forfeiture of Property Derived from Illicit Traffic (Section 16): The act empowers the government to order the forfeiture of properties derived from illicit traffic, including any property that is believed to have been acquired from the proceeds of drug trafficking.²³
3. Powers of Search and Seizure (Section 42): The authorities have powers to search and seize premises, vehicles, vessels, and aircrafts if there are reasonable grounds to believe that any narcotic drug, psychotropic substance, or controlled substance is being carried or kept in contravention of the act.
4. Powers of Arrest (Section 52A): Certain officers, including police officers, are authorized to arrest persons who are reasonably suspected of having committed offenses under the act.
5. Enhanced Penalties in Certain Cases (Section 29): This section provides for enhanced penalties for offenses involving commercial quantity of drugs, thereby reflecting the seriousness of such offenses.
6. Presumption of Guilt in Certain Cases (Section 35): In certain cases, if a person is found in possession of a narcotic drug or psychotropic substance, the law presumes that he or she is in possession of the substance for the purpose of trafficking unless the contrary is proved.
7. Provisions Relating to Bail (Section 37-41): The act contains provisions related to bail and the conditions under which bail may be granted.
8. International Cooperation (Chapter VII): The act provides for various measures related to international cooperation in combating drug trafficking, including provisions for extradition and transfer of proceedings.

²¹ S.C. Kashyap, *Preventive Detention in India: A Constitutional and Legal Study* 56 (Oxford University Press, New Delhi, 2018).

²² Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988.

²³ S. Bhattacharya, *Preventive Detention in India: A Study of National Security Act* 45 (Universal Law Publishing, New Delhi, 2019).

IX. THE PROTECTION OF HUMAN RIGHTS
ACT, 1993

The Protection of Human Rights Act, 1993 is an important piece of legislation in India that establishes the National Human Rights Commission (NHRC) at the national level and State Human Rights Commissions (SHRCs) at the state level. The Act aims to protect and promote human rights in the country and provides for the inquiry into allegations of human rights violations. While the Act doesn't specifically focus on preventive detention, it does have provisions that are relevant to detention and human rights.²⁴

1. Functions and Powers of NHRC (Section 12): The NHRC has the power to inquire into complaints of human rights violations, including cases related to custodial deaths, police excesses, and unlawful detention.
2. Complaints to NHRC (Section 18): Any individual or a group of individuals can file complaints with the NHRC regarding allegations of human rights violations. This includes cases of wrongful detention.
3. Powers of Inquiry (Section 13): The NHRC has the power to inquire into allegations of human rights violations, summon witnesses, examine witnesses on oath, and require the production of documents.
4. Recommendations and Actions (Section 18A): After conducting an inquiry, the NHRC can recommend appropriate measures to the concerned government authorities. If the recommendations are not implemented, the NHRC can approach the Supreme Court or High Court for appropriate directions.
5. State Human Rights Commissions (Sections 21-24): Similar to the NHRC, the State Human Rights Commissions at the state level have the authority to inquire into complaints of human rights violations, including cases related to detention.²⁵

²⁴ The Protection of Human Rights Act, 1993.

²⁵ V. R. Krishna Iyer, *Preventive Detention: A Boon or Bane* 65 (Universal Law Publishing, New Delhi, 2005).

X. GOONDAS ACT, 1982

The Goondas Act, officially known as the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, Sexual Offenders, Slum Grabbers, and Video Pirates Act, is a legal framework in the Indian state of Tamil Nadu that allows for the preventive detention of individuals who are considered to be goondas or habitual offenders. The act was first enacted in 1982 and has undergone several amendments since then.

1. Preventive Detention: The Goondas Act empowers the state government to detain individuals who are deemed to be habitual offenders or "goondas" without filing formal charges against them. The detention is intended to prevent such individuals from continuing their criminal activities.
2. Definition of Goondas: The act defines "goonda" as a person who has committed, attempted to commit, or abetted the commission of certain specified offenses on two or more occasions and is likely to commit such offenses again. These specified offenses include crimes related to bootlegging, drug offenses, forest offenses, immoral trafficking, sand offenses, sexual offenses, slum grabbing, and video piracy.
3. Advisory Boards: The act establishes advisory boards to review cases of preventive detention. The board assesses whether the detention of an individual is justified and submits its recommendations to the government.
4. Detention Period: The initial detention period under the Goondas Act is typically one year, but it can be extended for additional periods if the authorities believe that the individual continues to pose a threat to society.
5. Grounds for Detention: The grounds for detention include a history of habitual criminal activities and the likelihood of the person committing such activities in the future. These grounds are assessed based on the person's criminal record and behaviour.

6. **Judicial Review:** The act allows individuals detained under its provisions to file writ petitions before the High Court challenging their detention. The court can review the detention and order release if it finds it unjustified.
7. **Stringent Punishment:** The Goondas Act aims to be a deterrent against habitual offenders and imposes strict penalties on those who are detained under its provisions.

XI. CONCLUSION

Laws relating to preventive detention in India represent a complex intersection of security concerns, individual rights, and the need to maintain public order. These laws grant authorities the power to detain individuals without trial in order to prevent potential threats to national security, public order, and other important interests. While they are intended to safeguard the larger interests of the state, these laws have often been controversial due to concerns about misuse and the potential infringement of civil liberties. The main laws governing preventive detention in India are the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA), 1974, and the National Security Act (NSA), 1980. These laws provide authorities with the ability to detain individuals suspected of engaging in activities detrimental to the economy, public order, or national security. The salient features of these laws include broad definitions that grant authorities significant discretion, a detention period that can be extended in certain cases, limited judicial review focusing on procedural aspects, and the establishment of advisory boards to review detention orders. Despite these safeguards, concerns persist about the potential misuse of preventive detention laws for political purposes and the lack of transparent accountability in the process. Balancing the need to protect society from genuine threats with the imperative of upholding individual rights is a continuous challenge. The history of these laws, including their use during periods of political turmoil, such as the Emergency in the 1970s, has highlighted the delicate nature of this balance.