
SAFEGUARDING LIBERTY: A CRITICAL ANALYSIS OF PREVENTIVE DETENTION UNDER COFEPOSA

Nikita Dahiya, LL.M. (Criminal Law), Amity Institute of Advanced Legal Studies, Amity University Uttar Pradesh, Noida.¹

ABSTRACT

‘A man is the master of his liberty’ rightly quoted by William Shakespeare but in modern times state is the master which protects individual rights diligently. This process of protecting individual rights is described as a fundamental right by the virtue of part III of Indian Constitution. Essentially, Fundamental rights are the elevated version of The Magna Carta. The only fundamental right which is unique enough to draw attention is preventive detention. India is the only democracy in the world that had made preventive detention an integral part of the constitution even during peacetime. Preventive detention is a constitutional exception to personal liberty that exist under Article 22 of constitution right after Article 21 that talks about right to life and personal liberty. Preventive detention is a universal preventive measure used by majority of the states but the irony is that no one uses this in peace time. Lord Finley viewed it as a preventive measure rather than punitive one. However, philosophers like John Locke believed in the importance of individual rights and considered it arbitrary. Upendra Baxi, an Indian legal scholar argued that preventive detention is often used to suppress dissent and maintain power. Besides all this the architect of Indian Constitution said that despite being a necessary evil, it should be used sparingly and with adequate safeguards to prevent abuse of law. This constitutional exception somehow turned out to be the brainchild of many acts and one such act is COFEPOSA (Conservation of Foreign Exchange and Smuggling Activities Act), 1974. It helped in curtailing many economic offences and aided in protecting national security. The researcher aims to show the significant impacts of this exceptional constitutional power in criminal regime.

KEYWORDS: Preventive Detention, Exceptional Power, COFEPOSA, National Security, Smuggling, Foreign Exchange.

¹ LL.M. (Criminal Law), Amity Institute of Advanced Legal Studies, Amity University Uttar Pradesh, Noida.

LINTRODUCTION

The concept of preventive detention can be traced from article 22 of Indian Constitution.² It was carefully woven into the fabric of fundamental rights. India is the only democratic country which has adopted this preventive measure even in peace times. Preventive detention refers to the detention of an individual without trial or conviction before the court. The objective behind this provision was to prevent an individual from committing any offence in future. This provision turned out to be a two-edged sword and was venerably prone to misuse by corrupt authorities.

History has successfully mentioned Indira Gandhi's regime most criticized action of emergency. During the 1975-1977 Indira's government extensively misused preventive detention by the virtue of Maintenance of Internal Security Act (MISA).³ She dominantly silenced the opposition leaders and over 35,000 people were detained without trial along with suspension of their fundamental rights and judicial review was also curtailed. Many strong leaders like Jayaprakash Narayan, Morarji Desai, Atal Bihari Vajpayee were arrested under MISA act and the breakthrough was that MISA was placed in the ninth schedule to avoid all sought of legal challenges.

The very famous Habeas Corpus case was heavily criticized. In this case petitioner Shivkant Shukla challenged the detention without trial under MISA arguing that their fundamental rights were violated.⁴ This judgment was overruled in 2017, K.S. Puttaswamy case which recognized the right to privacy as a fundamental right under article 21.⁵ The Emergency regime was the downside of coin in history but the 2019 preventive detention in Jammu and Kashmir which was for the revocation of Article 370 turned out to be a silver lining in the history of preventive detention.

The 2019 revocation of Article 370 marked a profound paradigm shift in Jammu and Kashmir moving a state from special autonomy to two centrally governed Union Territories. This shift integrated the region legally, politically and administratively. Here preventive detention was an effective tool that helped government in maintaining peace and helped in neutralizing the political leaders dissenting opinion, because they could pollute the minds of general public

² Constitution of India. Art.22,21.

³ The Maintenance of Internal Security Act (MISA), 1971 (Act No. 26 of 1971).

⁴ ADM Jabalpur v. Shivkant Shukla (1976) 2 SCC 521.

⁵ K.S. Puttaswamy v. Union of India (2017) 10 SCC 1.

which would end up in riots. Apart from this the revolving-door detention⁶ was also practiced where courts ordered the release of a detainee but the administration would issue a fresh public safety act detention order.⁷

The above mentioned, incidents were the reasons when Dr. B.R. Ambedkar remarked that preventive detention is a necessary evil, it should be used sparingly and with adequate safeguards to prevent abuse of power. Article 22 was placed very diligently and parliament has the exclusive power to enact a law for preventive detention for reasons connected with Defence, Foreign affairs or security of India. In 1950, Preventive Detention came into picture which is no more in use Preventive Retention Act of 1950 was initially enacted to prevent anti national activities and it was supposed to last only for a year but its validity was extended multiple times, until it was finally lapsed in 1969. This act was later replaced by the Maintenance of Internal Security Act (MISA), 1971. This act was widely used in emergency and was repealed in 1977 by the Janta government which came into force after emergency.

II. COFEPOSA ACT EVOLUTION

Parliament has enacted many preventive detention laws and one such act is Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA), 1974 this act primarily came into existence due to some internal as well as external factors. Internal factors were that Misa Act only dealt with internal security which allowed detention without trial for threats of internal security, public order or national security. There was no other act which was particularly dealing in smuggling and conservation of foreign exchange. The external factors that amount to the enactment of this was that US PL480 aid acted as leverage which somehow pressured India on foreign policy. The PL480 was a US law 1954 which provides food aid to developing countries including India. It allowed India to buy food grains in rupees helping address food shortages. As India only paid in rupees which eased foreign exchange burden but after green revolution India reduced its dependency on PL480. India's nuclear test added enough fuel to fire which caused imposition of sanction on India.⁸ However it created an international burden on India which created economic crisis and gold smuggling was prominent at that time all these concerns lead to enactment of COFEPOSA Act in India. Both parliament and state legislature have power to enact a law for preventive detention by virtue of schedule

⁶ The Jammu and Kashmir Public Safety Act, 1978, sec.13,14,15,16,17,18.

⁷ <http://www.theindiaforum.in> last visited on 15th February, 2026.

⁸ www.business-standard.com.

7 list III entry no.3⁹ for reasons related to maintenance of public order or the supplies or services that are essential to the community.

Enacting of Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA), 1974 was itself a challenging task. This act provides for preventive detention in certain cases for the purpose for conserving and augmentation of smuggling activities. It was passed by the parliament on 13th December, 1974 after a long debate which was more than 30 hours. At that time customs officers were criticized at large scale for inability to curb smuggling and foreign exchange violations. This act provides power to executive department as well. The central government or state government or any joint secretary of central government or any secretary of state government can order the detention of a person including foreigner in cases of smuggling, abetting smuggling, transport, concealing, storing, harbouring persons involved in smuggling or dealing in smuggled goods.

Right after COFEPOSA Act enactment in *Attorney General for India v. Amratlal Prajivandas* Supreme court dealt with the Constitutionality of the Conservation of Foreign Exchange and Preventive Detention Act and Smugglers and Foreign Exchange Manipulators for Feature of Property Act. The Court upheld both Act ruling that Parliament had the competence to enact these laws the case also addressed issues relating to the preventive retention and the application of SAFEMA¹⁰ relatives and associates of detainees.¹¹

Any order by state government is to be forwarded to the central government within 10 days. Grounds of detention are to be communicated within 5 days to detenu. The delay of up to 15 days is allowed if the reason is given in writing. The detaining authority requires to satisfy the courts and also the detenu that he has acted in accordance with the laws with due consideration. High court can examine detention orders prior to execution. A detention order cannot be challenged at pre-execution stage on the grounds of delays in execution. The order can be executed anywhere in India, similar to arrest warrants under *Bharatiya Nagarik Suraksha Sanhita*, 2023.

III. HISTORIC PERSPECTIVE OF PREVENTIVE DETENTION

The concept of preventive detention is not a digital age law its instance can be traced from the Mughal Empire. Indian history shows the evidence when the Mughal Emperor Shah Jahan was

⁹ Constitution of India.

¹⁰ Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976.

¹¹ *Attorney General for India v. Amratlal Prajivandas*, 1994 SC 2179 (1994) 5 SCC 54.

detained by his own son Aurangzeb. Aurangzeb was his third son who had high political motives and wanted accede to dethrone and got an apprehension that his father Shah Jahan might not give the throne and he feared that it might slip off his hands. He then conspired and formed an alliance with his brother Murad and defeated all his brothers and later on betrayed the alliance with Murad and got him executed. Aurangzeb declared his father Shah Jahan incompetent to rule and imprisoned him in the citadel of Agra. Shah Jahan spent eight years in detention by staring at the tomb i.e. Taj Mahal that he made in the memory of his wife Mumtaj Mahal. He died under the care of his daughter Jahanara Begum and was buried in Taj Mahal next to his wife.¹²

Another instance of detention is of Mughal Emperor Bahadur Shah Zafar who was the last Mughal Emperor and ascended to the throne in 1837 after Akbar. He was on throne during the revolt of 1857. He gave full support to it and took responsibility of the all actions of the mutineers. When he became sure of the victory of the Britishers, he left his fort and refugee at Humayun's tomb. He was captured along with his sons by William Hodson on 20th September, 1857 from Humayun's tomb and was put to trial and convicted and was exiled to Rangoon where he died in 1862. With the death of Bahadur Shah Zafar an era came to an end as he was the last lineal descendant of the Mughals. After this there were countless detentions in pre-independent India.¹³

Britishers misused this preventive detention to silent the voices of Indian freedom fighters from Subhas Chandra Bose who was arrested and detained multiple times without trial under "Regulation III of 1818", Jatindra Nath Das was arrested for Lahore conspiracy case, Batukeshwar Dutt along with Bhagat Singh, Raj Guru and Sukhdev were detained in link with assembly bomb case, Lala Lajpat Rai, Ashwini Kumar Dutt and the list is never ending.

It is beyond controversy that civil liberties are essential for the development of human personality. As for the establishment of democratic polity. Therefore, civil liberties should not be suppressed for they promote the common good of society.¹⁴ John Rowle vehemently states that liberty of an individual can be curtailed only for securing the equal liberty of others, and not for any other social or economic good, he says. Liberty can be restricted only for the sake of liberty.¹⁵ For him, the basic liberties are so important that greater economic advantage can

¹² Supriya Gandhi, "The Emperor who never was: Dara Shukoh in Mughal India".

¹³ William Dalrymple, "The Last Mughal: The Fall of a Dynasty", Delhi, 1857.

¹⁴ Thomas Emerson, "Toward a general theory of 1st Amendment" Yale Law of Journal, vol.72

¹⁵ John Rawle, "A theory of Justice" p.30.

never justify their abridgement: they are first condition of economic justice and all ameliorative measures have to be subordinated to them. His thoughts were not in favor of preventive detention. However preventive detention paved its path from war times, emergency situations to a measure of preventing any crime.

There is perhaps no authoritative definition of Preventive detention. The expression traces its origin in the language used by the Lords in England while examining the nature of detention under the wartime provisions of The Defence of Realm Consolidation Act, 1914 which was enacted. During the First World War, the keyword in the expression is the adjective preventive, which is used in contradiction to punitive. Preventive detention is thus not a punitive, but a precautionary Measure which has the rather pious object of not to punish a man for having done something wrong, but to intercept him before he does it, and to prevent him from doing it.

In 1947 India got its independence and constitution came into existence and preventive detention was weaved under article 22. But the traces of law of preventive detention in India was as early a date as 1793. The east India company act, 1793, provided that “it shall and may be lawful for the governor of fort William aforesaid for the time being to issue his warrant under his hand and seal, directed to such peace officers and other persons as he shall think fit for securing and detaining in custody any person or persons suspected of carrying on mediately or immediately any illicit correspondence dangerous to the peace or safety of any of the British settlements or possessions in India with any of the princes, rajas or zamindars or any other persons or persons having authority in India or with the commanders, governors or presidents of any factories established in east Indies, by an European power or any correspondence contrary to the rules and orders of the said company or of the Governor-General in council of fort William aforesaid”.¹⁶

There is however no record of any case in which this act was called into force. Later on we come across The Bengal state prisoners regulation of 1818 (regulation III of 1818) whose preamble postulated that in the interests of public tranquility and security of the state it may be necessary to place under personal restraints individuals against whom there may not be sufficient ground to institute any judicial proceedings or that cause may not be advisable but in such cases of detained persons the grounds of such determination should from time to time come under revision and the affected persons have the right to bring to the notice of the

¹⁶ V.G. Ramachandran, Law of Preventive Detention (The Madras law journal office, 1954).

governor-general in council all matters connected with the supposed grounds or with the manner of execution of the restraint order; that during detention of the detenu will be confined according to his status with proper allowances for his wants and those of his family; that his properties shall during detention be attached and kept under the management of the revenue authorities.

This regulation applied to Bengal which included then Bihar, Orissa, Uttar Pradesh and Punjab except few scheduled districts. Madras and Bombay and similar regulations were enacted in Madras Regulation XI of 1819 and Bombay Regulation XXV of 1827. The next statute was the state prisoners act, 1859 (XXXIV of 1859 for Bengal) and 1858 (III of 1858 for madras and Bombay) which merely enabled the prisoners to be lawfully confined in fortress, goal or other place within the limits of the supreme court of judicature in the respective areas.

The first world war brought out the need for a legislation such as The Defence of India (criminal law amendment) act of 1915 to provide for special measures to secure the public safety and the Defence of British India and for speedy trial of certain offences. After this another act was the Indian criminal law amendment act (XIV of 1908), which provided for more speedy trial of certain offences and for the prohibition of associations dangerous to the public peace. The Anarchical and Revolutionary Crimes Act, 1919 (XI of 1919) came which provided the special law and procedure to supplement the ordinary law for dealing with subversive movements. After this came the Defence of India, 1939 during World War II to meet war emergencies to ensure public safety and Defence of British India.

Rule 26 of The Defence of India rules was duly framed for the purpose of “the apprehension and detention in custody of any person reasonably suspected of being hostile origin or of having acted, acting or being about to act, in a manner prejudicial to the public safety or interest and the prohibition of such person from entering or residing or remaining in any area and the compelling of such person to reside and remain in any area or to do or abstain from doing anything” but was declared ultra vires in *Keshav Talpade v. Emperor*.¹⁷

The Defence of India act was repealed after the war by the repealing and amending act II of 1948. But the disturbed condition of the country soon after partition of India into Pakistan. This was the beginning to the journey of preventive detention halt could be seen in 1950 when the Constitution of India came into force and there was no doubt a lot of discussion in the assembly

¹⁷ AIR 1943 F.C.1.

regarding preventive detention was observed and some even felt Article 22 may be omitted. Dr. Ambedkar, Chairman of the drafting committee, assured the house that the substance of the American 'due process clause' was imbedded in clause (1) and (2) of Article 22 which directed grounds of detention to be furnished to the arrested persons and production within 24 hours before a magistrate. A three months period was fixed for reference to the advisory board specially created to test the case of each detenu according to a procedure to be prescribed by law. After that it has been jolting in numerous acts like then came the Maintenance of Internal Security Act, 1971 and another such act is COFEPOSA.

IV. PREVENTIVE DETENTION COMBATING ECONOMIC OFFENCES

Smuggling is one of the conventional crimes which exists in our society and it have transformed to a great extent from conventional smuggling activities to advanced and digitalized technological upgradation. Smugglers Have shifted from traditional communication methods to the modern dark web marketplaces Unencrypted communication channels to evade the detection of the offence. Smuggling is an umbrella term which acts like a genesis of vice.

According to Directorate of Revenue Intelligence Gold smuggling in the financial Year 2021-2022 2,236 cases were reported with a total of 2,072.11 KG of gold, which increased to 4,342.85 KG in the next financial year and the highest in the decade was of year 2023 to 2024 which was 4,971.68 KG and in the financial year 2024-2025 it was 2,600.40 KG with a total of 3,005 cases.¹⁸

In the above given factual matrix the reported cases have increased frequently but there is a sign of improvement in the financial year 2024 to 2025 which directly postulates that preventive detention under COFEPOSA Act had helped the authorities to curb gold smuggling. Talking about cigarette seizures the first half of financial year 2025 there was a 19% of rise in the contraband cigarette seizures. The DRI department seized 4.4 crores of cigarettes which were originally of foreign origin and were counterfeited which was worth ₹79.67 CR in 2020.¹⁹

In the first half of financial year 2025 ₹13.8 crore of illicit country seizure was seized which surpassed the ₹12.4 crore which was seized in the financial year 2024. Drug is the only category in smuggling industry which has been penetrating deep into the society. Simultaneously in the financial year 2024 cocaine seizures were more than the double with the 9% of increase in

¹⁸ www.dri.nic.in.

¹⁹ *Id.* at 12.

cocaine smuggling and particularly northeastern states acts as the hotspot of methamphetamine seizures.²⁰

The Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act 1974, has been comprehensively used in numerous cases including some high-profile cases. One such notable case is of Actress Ranya Rao who was detained under the COFEPOSA for allegedly smuggling 14.2 kg of gold worth ₹12.56 crore. The center has issued orders for Ranya Rao, Tarun Konduru Raju and businessman Sahil Sakariya Jain. The order for detention under COFEPOSA act was issued by the Central Economic Intelligence Bureau (CEIB) of Ministry of Finance on April 22, 2025 on the request of the Directorate of Revenue Intelligence (DRI).²¹

The detention order effectively means that Ranya Rao and associates who were arrested in march 2025 for alleged gold smuggling activities will remain in prison for up to a year, even if they are granted bail by court for the customs act violation. The DRI has reported in remand application that the actress smuggled as much of 49.6 KG of gold valued over ₹40 crore from Dubai between November 2024 to February 2025. The actress is alleged to have handed over the contraband to Sahil Jain who paid for the consignments through hawala transaction to Dubai and India. The hawala Dealer Sahil Jain has a history of gold smuggling and is named in a DRI complaint in Kolkata for being part of a syndicate that smuggled over 115 KG of gold from Bangladesh in 2019.²²

In year 2022 the Kerala High Court quashed the continued preventive detention of three accused persons in the case related to gold smuggling through container freight station (CFS), Willington Island, Kochi. The Directorate of Revenue Intelligence had seized gold bars concealed in the compressor of the refrigerator bought as unaccompanied luggage. It was valued at ₹7.2 crore. The court order on the petition moved by Mohammad Ali Abdullah Assess and Bijou V Roy all accused in gold smuggling case.²³

The very famous Costao gold smuggling case of 1990's which is considered as a high -profile case of gold smuggling in Goa. Costao Fernandes, a customs officer on receiving a tip about gold smuggling operation at Fatrade beach, he alone confronted the smuggler who was closely

²⁰ *Id* at 12.

²¹ www.theindianexpress.com "Bengaluru gold smuggling case: Centre orders detention of actors Ranya Rao, Virat Konduru for a year under COFEPOSA Act, April 25, 2025.

²² www.thehindu.com "COFEPOSA Act invoked against Ranya Rao", April 25, 2025.

²³ www.thehindu.com "Kerala High court quashes preventive detention in gold-smuggling case", June 06, 2022.

related to the local politician (his brother) and the incident end up with the death of the culprit. Costao was charged with murder but later acquitted by Supreme Court and was awarded President's Medal for bravery. In this case the customs officer was discharging his duty and was also complying with the provisions of act. This case helps us in understanding how COFEPOSA Act can hinder offences like smuggling, hawala transactions, trafficking of illicit goods like gold, precious metals, exotic animals, animal product like elephant tusks, wildlife products like red sandalwood, tiger skin, leopard parts, snake venom, drugs and much more.

V. JUDICIAL APPROACH

The Constitutionality of conservation of foreign exchange and prevention of smuggling activities at 1974 was upheld by the Supreme Court of India in the landmark case of Attorney General of India v. Amratlal Prajivandas, 1994 Supreme Court affirmed that COFEPOSA is a valid piece of legislation and does not violate fundamental rights under Article 14,19 or 21 of the Constitution. The Court also ruled that due to its placement in the 9th schedule COFEPOSA is shield from challenges regarding fundamental rights violation except under basic structure doctrine. Court even distinguished COFEPOSA from punitive criminal laws calling it as a precautionary measure to prevent actions detrimental to the national economic stability.²⁴

In the case of Khudiram Das v. State of West Bengal, the Supreme Court of India set some vital standards for the examining the validity of detention order by ensuring the grounds of detention. Court said that there should be grounds of detention that must be strictly scrutinized for the procedure compliance. Court held that the principles are foundational for preventive detention under COFEPOSA Act which needs to be "subjectively satisfaction". The court further stated that the authority must be truly satisfied that detention is necessary and if the satisfaction is based on irrelevant or non-existent grounds the detention would be invalid.²⁵

In the case of Jayanarayan v. State of West Bengal pronounced four principles with respect of representation of the detained person. First the concerned authority must provide the detenu to get himself represented and make it as soon as possible. Secondly the authority's consideration of allowing the detained person of representation is not to be dependent on the advisory Board's action and deliberation of the same. Thirdly the consideration should not be delayed while not forgetting its citizens safety and lastly the Govt. should give its opinion and judgment regarding

²⁴ 1994 AIR 2179.

²⁵ (1975) 2 SCC 81.

the representation before transferring it to the Advisory board.²⁶

In *Francis Coralie Mullin v. Union Territory of Delhi*, The court stated that a detenu has the right to consult lawyer of his choice including for release from preventive detention. However, the court in *AK Roy v. Union of India* never confirmed or rejected this holding. Instead, the Supreme Court held that when the government or the retaining authority represents itself with legal aid or counsel, the detainee must also be given the same opportunity. Furthermore, the court also stated that the detainee is also entitled to be assisted by a friend who is not a legal practitioner in the proceedings before the Advisory Board, however, the board has no obligation to convey this entitlement to the detained person if it never asked for such aid or assistance.²⁷

In *Jogendra Kumar v. State of Uttar Pradesh*, The Supreme Court laid down guidelines for arrest of the person. The rights of an arrested person are embedded in Article 21 and 22(1) of the Indian Constitution and that they must be safeguarded to ensure the same. The code stated that firstly, if an arrested person held in custody requests for a relative or friend or anyone who is interested in the welfare of the arrested person to be told that where he has been detained. Secondly, the arrested person must be told about the above-mentioned right by the police officer, and lastly, there has to be an entry made in the police diary naming the person who was informed. The duty of the magistrate is to make sure that these requirements have to be followed by the police officers. The court pointed out that the guidelines are not exhaustive, though Article 22 of the Constitution was also discussed in *DK Basu v. State of West Bengal* and reiterated the importance of the rights given to arrested persons. It further observed that often the power of arresting someone and consequently detaining them is misused a lot and therefore laid a comprehensive list of directions during arrest and detention to be followed by the concerned authority and in case of torture against the arrestee would be entitled to compensation.²⁸

VI. CONCLUSION

Preventive detention is an exceptional constitutional power which aims to combat with smuggling and conserving foreign exchange in India. COFEPOSA Act is like a dark horse which is strengthening the economy by preventing economic offenses before the actual Commission and protecting economic security. Preventive Detention is always backed by the

²⁶ AIR 1973 SCC 781.

²⁷ AIR 1981 SC 608.

²⁸ AIR 1994 SC 1349.

Constitution of India in binary style. If any detention is unreasonable or unjustified it is subject to the writ of Habeas Corpus and Advisory board is always there to look at the compliance and plays a pivotal role. Apart from this preventive detention order must not be in violation of article 21 or article 19. Despite the safeguards there are higher chances to misuse this provision some whimsical minds are always found playing with fire. It would not be wrong saying that it is a potential tool, prone to abuse, but crucial for protecting the majority.