

# PREVENTIVE DETENTION LAWS IN INDIA

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*The thorny issue of preventive detention emerges in public discourse every time detentions under the infamous National Security Act are reported. Preventive arrests for dissent—protesting against controversial laws, or criticising government officials and policies—have now become routine. This paper attempts to look at the extent and reach of preventive detention in India and argues that it is far more rampant and ubiquitous than one might believe.*

*The need to include preventive detention within the ambit of the Constitution was hotly debated at the time of its drafting. But the savage violence that accompanied Partition convinced the Constituent Assembly that preventive detention was required to maintain peace and public order in an India torn apart in more ways than one. This paper argues that with draconian measures like preventive detention, comes the inherent risk that they will keep expanding in practice.*

*The paper begins by giving a brief history of preventive detention in India, followed by a look at the process of enactment of these legislations. It argues that the very enactment of all preventive detention laws has been opaque. It then looks at the text of preventive detention legislations and argues that the Centre, as well as the States, have continually expanded the scope of these laws, to such an extent that today most offences under ordinary criminal law expressly fall within the scope of preventive detention laws in the country. Finally, the paper looks at the application of these laws and concludes that preventive detention has predictably been misused, overused, and has come to displace democratic rules and procedure, even in non-critical times.*

## I. BACKGROUND OF PREVENTIVE DETENTION

Preventive detention ('PD') involves detention on mere suspicion, without charge or criminal trial. PD has openly been practised in India since 1818,

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under the Bengal State Prisoners Regulation III.<sup>1</sup> The Defence of India Act 1939, which was enacted after the outbreak of World War II authorised the government to detain any person seen as a threat to public order, national security, or the maintenance of supplies and services essential to the community.<sup>2</sup> The post-colonial state incorporated PD through Article 22 of the Constitution. The draft Constitution had excised the phrase “due process of law”, and instead provided that life and personal liberty could be taken away by “procedure established by law”. This phrasing ensured that “procedure established by law” could only be interpreted as law enacted by the legislature and not as natural law.<sup>3</sup> The members of the Constituent Assembly believed that substantive interpretation of due process might interfere with legislation for social and welfare purposes.<sup>4</sup> To mitigate the harm caused by the exclusion of a due process clause, Ambedkar introduced Draft Article 15-A, which finally became Article 22.<sup>5</sup>

Though many members of the Constituent Assembly had themselves been at the receiving end of detention orders, they were convinced that PD provided the surest weapon against communal violence that had shaken the country during partition.<sup>6</sup> In a tug-of-war between individual liberty and public security, the unsettled conditions of the country tipped the scales in favour of restraints on personal liberty for the good of the people.<sup>7</sup>

Clauses (3) to (7) of Article 22 delineate the procedural safeguards that PD laws are required to follow. They provide that no PD law shall authorise the detention of a person for a period longer than three months without the approval of an Advisory Board (‘AB’). These ABs consist of persons who “are, or have been, or are qualified to be appointed as, judges of a high court.”<sup>8</sup> The Parliament can prescribe the circumstances and classes of cases under which a person might be detained for longer than three months without obtaining the opinion of an AB.<sup>9</sup> The detaining authority is required to communicate the grounds of detention to the detenu and to afford him the earliest opportunity to make a representation against the order unless disclosing the facts would be against public interest.<sup>10</sup> Entry 9 of List I of the 7th Schedule of the Constitution empowers the Parliament to enact PD laws for defence, foreign affairs or the security of India.

<sup>1</sup> Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP 1972) 129.

<sup>2</sup> Derek P. Jinks, ‘Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India’ (2001) 22 MJIL311, 324.

<sup>3</sup> Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP 1972)132.

<sup>4</sup> Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP 1972) 129.

<sup>5</sup> Abhinav Sekhri, ‘Article 22- Calling Time on Preventive Detention’ (2020) 9 Indian Journal of Constitutional Law 176.

<sup>6</sup> Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP 1972) 136.

<sup>7</sup> Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP 1966) 133.

<sup>8</sup> The Constitution of India 1950, Art. 22(4).

<sup>9</sup> The Constitution of India 1950, Art. 22(7).

<sup>10</sup> The Constitution of India 1950, Art. 22(6).

Entry 3 of List III of the 7th Schedule empowers both the Parliament and state legislatures to enact PD laws for the security of a state, maintenance of public order, or the maintenance of supplies and services essential to the community.

## II. THE FIRST POST-INDEPENDENCE PREVENTIVE DETENTION LAW AND SUBSEQUENT LEGISLATIONS

The Constituent Assembly had pinned their trust upon the good faith of the legislature and the character of their leaders.<sup>11</sup> This faith was first put to the test in February 1950, one month after the adoption of the Constitution, when the Parliament passed the Preventive Detention Act, 1950 ('PDA'). It provided for detention of persons acting prejudicially towards the defence and security of India, relations with foreign powers, and the maintenance of public order and essential supplies and services. §14 of the Act gave the State sweeping powers - the courts were expressly forbidden from questioning the necessity for any order issued by the government; the subjective satisfaction of the authorities was considered sufficient to determine the validity of the order.

The PDA was challenged in *AK Gopalan v. State of Madras*<sup>12</sup>, where the Supreme Court upheld the legality of the Act by a majority opinion, but held § 14 unconstitutional for violating Article 22(5). The Court acknowledged the power of PD given to the Parliament by the Constitution and also expressed hope in the legislature's ability to make laws in good faith. This decision set a particularly bad precedent, which allowed the legislature to continue enacting preventive detention legislations largely unchecked.

The Act was supposed to exist only for a year, but on 19th February 1951, the Parliament extended it for another year.<sup>13</sup> The PDA was repeatedly extended, until it lapsed on December 3, 1969. The Parliament, under Indira Gandhi's leadership, enacted the Maintenance of Internal Security Act, 1971 ('MISA') two years later. Following the Emergency of the mid-1970s, where PD was notoriously used as a political weapon, MISA was also allowed to expire in 1978 under the Janata Government. Two years later, upon Indira Gandhi's return to power, a new PD law was enacted - the National Security Act, 1980 ('NSA'), the terms of which were almost identical to those of PDA.<sup>14</sup> The NSA was challenged in *AK Roy v. Union of India*<sup>15</sup>, where the Supreme Court upheld the validity of the law and stressed on the wisdom of the Constituent Assembly in including PD in

<sup>11</sup> Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP, 1966) 141.

<sup>12</sup> *AK Gopalan v. State of Madras* (1950) SCR 88.

<sup>13</sup> Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (OUP 1999) 61.

<sup>14</sup> Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (OUP 1999) 508-509.

<sup>15</sup> *AK Roy v. Union of India* AIR (1982) SC 710.

the Constitution. With Indira Gandhi's second tryst with power in 1980, PD had become well and truly entrenched as a permanent measure in Indian governance. Today, we have twenty-five PD laws in the country, a full list of which is given in Annexure A.

Courts blindly continue to set store by the notion of a 'benign' State, one that only resorts to oppressive measures when left with little else. In the coming sections, I shall demonstrate how the Indian State has been anything but benign. The enactment of these legislations, central or state, has been shrouded in secrecy and opacity. Ruling dispensations have never demonstrated the need for such legislations and the very letter of the law is vague and overly expansive. Predictably, such poorly written laws lead to handing overarching powers to the police and local administration, which subsequently leads to the violation of both individual rights and the larger criminal justice system. Be it the enactment of PD laws, the letter and spirit of the very text of these laws or their implementation—the Indian State has left little room for us to cling to the optimism that dominated the thinking of the Constituent Assembly.

### III. ENACTMENT OF PD LAWS LEGISLATION BY ORDINANCE

Of most concern is the lack of transparency in the enactment of these legislations, by the Centre and the states. All central PD legislations and their ensuing amendments have been enacted subsequent to an ordinance. An ordinance is used by the President to pass laws when the Parliament is not in session.<sup>16</sup> The power to issue an ordinance is conferred upon the President to enable him to act in unusual and exceptional circumstances, requiring immediate enactment of laws.<sup>17</sup>

States have resorted to this opaque practice of promulgating ordinances as a precursor to enacting PD laws as well. Twelve out of the seventeen states that provide for PD issued ordinances before the law was enacted.<sup>18</sup> States have also passed many amendments to their legislations pursuant to ordinances.

This begs the question - why have states and the centre chosen to go down the 'extraordinary' ordinance route, instead of following normal and 'ordinary' legislative processes? The Maharashtra assembly argued that circumstances regarding anti-social and extremist elements rendered immediate action necessary, and ordinances were one way to address this.<sup>19</sup> However, while the necessity of an

<sup>16</sup> The President has been given legislative powers to promulgate ordinances under Article 123 of the Constitution. Similar powers have been given to Governors under Article 213 of the Constitution.

<sup>17</sup> *R.C. Cooper v. Union of India* (1970) 3 SCR 530.

<sup>18</sup> The exceptions are: Andhra Pradesh, Odisha, Puducherry, Rajasthan and West Bengal.

<sup>19</sup> See for example, the Objects and Reasons of the NSA; Maharashtra Prevention of Communal, Anti-Social and other Dangerous Activities Act 1980 ('**Maharashtra Communal Offenders Act**'); Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders, Dangerous Persons and Video Pirates Act 1981 ('**Maharashtra Goondas Act**').

ordinance has always been claimed, unusual and exceptional circumstances have never been shown to have existed. For example, Maharashtra and Tamil Nadu both amended their PD laws to allow their state governments to preventively detain people who distribute or attempt to distribute pirated copies of music and movies through ordinances.<sup>20</sup> The Governor of Maharashtra, in the statement of objects and reasons of the ordinance, claimed that video piracy was causing a public order problem; and that the film industry was in severe crisis because of large volumes of video piracy, which made issuing an ordinance necessary. While the legislative process can be time-consuming and there might exist emergent situations, which need immediate action, it seems highly improbable that an ordinance was required to protect these states from the threat of public order disruption caused by video pirates.

Legislation by ordinance is meant to meet extraordinary situations and not perverted to serve parochial political ends. It is the onus of the Executive to show that exceptional circumstances existed which made the issuance of an ordinance imperative. Ordinances, once promulgated, limit people's elected representatives from passing or rejecting a Bill after a free and open discussion. To governments opposed to basic measures of transparency or scrutiny, ordinances offer a comfortable alternative: they require no debate or vote.<sup>21</sup> In effect, ordinances tie the Parliament's hand and create legislations by cheating the democratic process.<sup>22</sup>

This cheat becomes all the more grievous when it concerns detaining people without charge or investigation. A law that gives states unbridled power over its people needs to be enacted with utmost transparency, where the need for such harsh measures are clearly laid out and consent of its elected representatives sought after a detailed and considered deliberation. While the enactment of these laws leaves much to be desired, it is useful to look at what the text of these laws actually contains.

#### IV. TEXT OF LAWS

##### A. SCOPE OF ACTIVITIES PREVENTED BY THE LAWS – VAGUE AND EVER EXPANDING

The terms of the NSA heralded years of new repressive legislation. Detentions under NSA were authorised to prevent an individual from acting in a manner prejudicial to the defence or security of India, to relations with foreign powers, to the maintenance of public order or to protect the maintenance

<sup>20</sup> Tamil Nadu introduced video pirates to their PD Act in 2004 and Maharashtra in 2009.

<sup>21</sup> Shubhankar Dam, *Presidential Legislation In India: The Law And Practice Of Ordinances* (CUP 2013) 117.

<sup>22</sup> Shubhankar Dam, *Presidential Legislation In India: The Law And Practice Of Ordinances* (CUP 2013) 81-83.

of essential supplies and services.<sup>23</sup> Meanwhile, various state legislatures passed their own PD laws mimicking the Centre's<sup>24</sup> or enacted particularistic PD laws for the broad control of crime,<sup>25</sup> against communal activities,<sup>26</sup> against anti-social activities<sup>27</sup> and against dangerous activities of bootleggers, drug offenders and goondas.<sup>28</sup>

All these legislations have deliberately included vague and ever-expanding definitions of offences. Terms like “acts threatening state or national security”<sup>29</sup>, “public order”<sup>30</sup> prevention of activities of “anti-social elements”<sup>31</sup>, “goondas”<sup>32</sup> or “dangerous persons”<sup>33</sup> have not been specifically defined, and governments are given a free hand to interpret these terms in any manner they deem fit.<sup>34</sup>

<sup>23</sup> NSA, § 3.

<sup>24</sup> Assam Preventive Detention Act 1980 (**Assam PD Act**); Jammu and Kashmir Public Safety Act 1978 (**J&K PS Act**); Meghalaya Preventive Detention Act 1995 (**Meghalaya PD Act**).

<sup>25</sup> The Bihar Control of Crimes Act 1981 (**Bihar COC Act**); Jharkhand Control of Crimes Act 2002 (**Jharkhand COC Act**); West Bengal (Prevention of Violent Activities) Act 1970 (**WB Violent Activities Act**).

<sup>26</sup> The Andhra Pradesh Prevention of Dangerous Activities of Communal Offenders Act 1984 (**AP Communal Offenders Act**); Odisha Prevention of Dangerous Activities of Communal Offenders Act 1993 (**Odisha Communal Offenders Act**); Maharashtra Communal Offenders Act; The Telangana Prevention of Dangerous Activities of Communal Offenders Act 1984 (**Telangana Communal Offenders Act**).

<sup>27</sup> Gujarat Prevention of Anti-Social Activities Act 1985 (**Guj ASA Act**); Kerala Anti-Social Activities (Prevention) Act 2007 (**Kerala ASA Act**); Rajasthan Prevention of Anti-Social Activities Act 2006 (**Rajasthan ASA Act**); The Puducherry Prevention of Anti-Social Activities Act 2008 (**Puducherry ASA Act**).

<sup>28</sup> The Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act 1986 (**AP Goondas Act**); Karnataka Prevention of Dangerous Activities of Acid Attackers, Bootleggers, Depredator of Environment, Digital Offenders, Drug Offenders, Gamblers, Goondas, Immoral Traffic Offenders, Land Grabbers, Money Launderers, Sexual Predators and Video or Audio pirates Act 1985 (**Karnataka Goondas Act**); Telangana Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act 1986 (**Telangana Goondas Act**); 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 1982 (**TN Goondas Act**).

<sup>29</sup> Assam PD Act; J&K PS Act; Meghalaya PD Act; NSA.

<sup>30</sup> AP Communal Offenders Act; AP Goondas Act; Assam PD Act; Bihar COC Act; J&K PS Act; Jharkhand COC Act; Karnataka Goondas Act; Maharashtra Communal Offenders Act; Maharashtra Goondas Act; Meghalaya PD Act; NSA; Odisha Communal Offenders Act; Rajasthan ASA Act; TN Goondas Act; Telangana Communal Offenders Act; Telangana Goondas Act; WB Violent Activities Act.

<sup>31</sup> Bihar COC Act; Jharkhand COC Act.

<sup>32</sup> AP Goondas Act; Telangana Goondas Act; Karnataka Goondas Act; Puducherry ASA Act; TN Goondas Act.

<sup>33</sup> Guj ASA Act; Maharashtra Goondas Act; Puducherry ASA Act; Rajasthan ASA Act.

<sup>34</sup> The vagueness of some of these expressions was challenged in *AK Roy v. Union of India* AIR (1982) SC 710. It was contended that the vagueness conferred uncontrolled discretion on the detaining authority to expand the horizon of their power, to the detriment of the liberty of the subject. The court dismissed this argument on the ground that even though the expression might

Wherever acts adversely affecting public order are defined, they are either tautologically described, for example, “acting in any manner prejudicial to the maintenance of public order means,-(i) in the case of a bootlegger, when he is engaged, or is making preparations for engaging, in any of his activities as a bootlegger, which affect adversely, or are likely to affect adversely, the maintenance of public order”<sup>35</sup> or are loosely defined as follows: “Public order shall be deemed to have been affected, or deemed likely to be affected if activities of persons are causing, or are likely to cause harm, danger or alarm, a feeling of insecurity to the public, or actual danger to life, property or public health.”<sup>36</sup> The justification for many of these laws is that such activities have caused alarm among the public, especially in urban areas.<sup>37</sup>

A person can be called an “anti-social element”, a “dangerous person” or a “goonda” if he, himself or as part of a gang habitually commits, attempts to commit, or abets offences against the body (Chapter XVI, Indian Penal Code, 1860), offences against property (Chapter XVII, Indian Penal Code, 1860) or offences relating to trafficking of women, or indecency towards women. Chapters XVI and XVII of the IPC cover over one hundred and sixty offences; many of which are simple offences that are bailable and carry a punishment of imprisonment for as little as a month. The range of offences gives detaining authorities a virtually unlimited power of detention.

States have increasingly expanded the scope of their PD laws and included regular crimes within their ambit, thus further expanding the number of people who can be arrested without the bother of investigation and gathering of evidence. The most glaring example of this is Telangana, which amended its PD Act in 2018 to include offences related to spurious seed offenders, insecticide offenders, fertiliser offenders, food adulteration offenders, fake document offenders, scheduled commodities offenders, forest offenders, gaming offenders, sexual offenders, explosive substances offenders, arms offenders, cybercrime offenders and white-collar or financial offenders. This recent amendment has given Telangana’s PD law this unenviable title: The Telangana Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders Land-Grabbers, Spurious Seed Offenders, Insecticide Offenders, Fertiliser Offenders, Food Adulteration Offenders, Fake Document Offenders, Scheduled Commodities Offenders, Forest Offenders, Gaming Offenders, Sexual Offenders, Explosive

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appear to be vague and uncertain on paper, it may not be difficult to apply said expression to life’s practical realities.

<sup>35</sup> See Karnataka Goondas Act; AP Communal Offenders Act; AP Goondas Act; Maharashtra Goondas Act.

<sup>36</sup> AP Communal Offenders Act; AP Goondas Act; Guj ASA Act; Odisha Communal Offenders Act; Puducherry ASA Act; Rajasthan ASA Act; TN Goondas Act; Telangana Communal Offenders Act.

<sup>37</sup> Karnataka Goondas Act; AP Communal Offenders Act; AP Goondas Act; Maharashtra Goondas Act.

Substances Offenders, Arms Offenders, Cyber Crime Offenders and White Collar or Financial Offenders Act, 1986.

## B. EXPANSIVE DETENTION POWER OF THE AUTHORITIES

These laws, in addition to the sheer number of people they could potentially include, also give virtually limitless power to delegated authorities to pass detention orders. This power has been delegated to district magistrates, sub-divisional officers, commissioners of police, amongst others.<sup>38</sup> The only safeguard against the excesses of the local officers is that the state governments have to be notified of detentions ordered by their own subordinate officers within 12 days of the date of detention, or the order stands vitiated.<sup>39</sup> The maximum period of detention permissible across various acts ranges from a minimum of 6 months to a maximum of two years.

Thirteen central and state laws<sup>40</sup> provide for severability of the grounds on which PD was made. This is a broad power given to detaining authorities. Severability means that if an order was made on more than one ground, the order should be construed to be made separately on each of those grounds and not based on a cumulative of those grounds. Therefore, a detention order can be sustained so long as one valid ground is specified. All of these laws provide that a detention order is not void if one or some of the grounds of detention are: vague, non-existent, non-relevant, not connected or not proximately connected with such person, or invalid for any other reason whatsoever.

## C. DENIAL OF SAFEGUARDS TO DETENUS

The most draconian aspect of PD is that it expressly denies rights to detenus that are normally available to persons at the time of their arrest: the right to be represented by legal counsel, the right to be heard by an independent and impartial third body as soon as may be, and the right to not be held for a period over 24 hours except upon the express order of a magistrate.<sup>41</sup> Detenus are allowed limited rights - grounds of detention must be communicated to detenus

<sup>38</sup> An exception is the Himachal Pradesh Preservation of Forest and Maintenance of Supplies of Forest-Based Essential Commodities Act 1984 which only empowers the State Government to pass orders.

<sup>39</sup> This is usually mentioned in § 3 of most legislations, which provides for “power to make orders detaining certain persons”.

<sup>40</sup> Bihar COC Act; Guj ASA Act; J&K EC Act; Jharkhand COC Act; Karnataka Goondas Act; Maharashtra Communal Offenders Act; Maharashtra Goondas Act; Meghalaya PD Act; Odisha Communal Offenders Act; TN Goondas Act; NSA; Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 (**‘COFEPOSA’**); Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988 (**‘PIT NDPS’**).

<sup>41</sup> Constitution of India 1950, Article 22(3).



within, usually, 5 days.<sup>42</sup> This may extend up to 10 days,<sup>43</sup> but with reasons recorded in writing. However, this provision usually also allows states to conceal facts that may harm 'public interest' if disclosed. Detenus have the right to make a representation against the order to the appropriate government and the right to be heard by Advisory Boards in person. But, legal practitioners are expressly prohibited from representing detenus during the proceedings of the ABs.<sup>44</sup>

The Constituent Assembly seems to have feared that allowing these safeguards into the preventive detention framework would invite delays that plagued the ordinary criminal justice system, undermining the efficiency that made preventive detention attractive in the first place.<sup>45</sup> The denial of safeguards at the altar of efficiency has led to an unsurprising, inevitable, arbitrary and over-use of these laws on the ground. The next section briefly explores the application of these laws in the country.

## V. APPLICATION OF PD LAWS ON THE GROUND

PD laws have been justified as necessary exigency measures; designed for the maintenance of public safety and not for punishment.<sup>46</sup> But in practice, they have historically been used by the police to control everyday crime. As early as 1960, PD was criticised for being used as a substitute for ordinary criminal law, employed primarily against common criminals.<sup>47</sup> This dependence on PD seems to have worsened, with some police officers admitting in informal conversations that they often use this tool, where habitual criminals have slipped their grasp. An example of a typical PD order is given below:

The Superintendent of Police Bhind by his letter dated 31st July 2012 addressing to the District Magistrate Bhind informed that Rajkumar,

<sup>42</sup> Exceptions to this rule are the:

Max. 3 days- Rajasthan ASA Act.

Max 7 days - Gujarat ASA Act, Puducherry ASA Act.

Max 5 days - Kerala ASA Act, Maharashtra Communal Offenders Act, Maharashtra Bootleggers Act, Odisha Communal Offenders Act, TN Bootleggers Act, WB Violent Activities Act.

<sup>43</sup> Except for COFEPOSA and Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act 1980, which allow for detention up to 15 days without informing the detenu the grounds of detention.

<sup>44</sup> The exceptions are: the Andhra Pradesh Communal Offenders Act, and the Telangana Communal Offenders Act which permit a person to be heard through his legal advisor. Kerala allows for legal representation before the AB, if the Board thinks it is needed to do so.

<sup>45</sup> Abhinav Sekhri, 'Article 22(3): A Constitutional Paradox' (*Indian ConLaw& Phil*, 16 November 2018) <<https://indconlawphil.wordpress.com/category/preventive-detention/>> accessed 9 January 2021.

<sup>46</sup> Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (OUP, 1999) 66.

<sup>47</sup> David H. Bayley, 'The Indian Experience with Preventive Detention' (1962) 35(2) *Pacific Affairs* 110-111.

son of Radheshyam Gurjar, a resident of village Bhure Ka Pura, Police Station Endori, district Bhind was involved in criminal activities and leading criminal life. It was mentioned in the letter that he was involved in cases of murder, attempt to murder, robbery, house breaking with theft including illegal transactions of firearms, illegal liquor trade and several other crimes. Near about 16 crimes are said to be registered against the petitioner in various Police Stations. It is stated that involvement of the petitioner in the crimes has extended to such limit that every attempt to check his criminal activities became ineffective. Ultimately, he was arrested in connection with the crime registered in Police Station Amayan and confined in jail. It is further informed that the activities of the petitioner has adversely affect the community at large. Therefore, it was proposed to pass the preventive detention order under § 3(2) of the Act against the petitioner. The criminal antecedent of petitioner are as follows:-

- (i) Crime No. 36/2006 for commission of offence under §294, 323, 506 read with § 34 of I.P.C. registered in Police Station Endori, district Bhind (M.P.).
- (ii) Crime No. 7/2009 for commission of offence under § 307 read with § 34 of I.P.C. registered in Police Station Endori, district Bhind (M.P.).
- (iii) Crime No. 90/2010 for commission of offence under §§ 457 and 380 of I.P.C. registered Police Station Endori, district Bhind (M.P.)...
- (xv) Crime No. 386/2011 for commission of offence under §§ 307 and 302 read with 34 of I.P.C. and under §§ 25 /27 of the Arms Act registered in Police Station Maharajpura district Gwalior (M.P.), and
- (xvi) Crime No. 498/2010 for commission of offence under § 394 of I.P.C. read with §§ 11/13 of the MPDVPK Act registered in Police Station Gole Ka Mandir district Gwalior (M.P.).

Source: *Rajkumar Singh v. State of Madhya Pradesh* MANU/MP/0175/2013

Most detention orders are passed by delegated authorities, often in anticipation of bail being granted by regular criminal courts. The threat to public order from their release is considered to be sufficiently serious as to justify a detention order pre-empting this eventuality.<sup>48</sup> Additionally, data suggests that PD is

<sup>48</sup> In the case of *Masood Alam v. Union of India* AIR (1973) SC 897, the Supreme Court held that there was no legal bar on serving a detention order on a person who is likely to be released on bail and the detaining authority is satisfied that if free, the person is likely to indulge in activities prejudicial to the security of the State or maintenance of public order. High courts often confirm such detention orders. See *Maya Ajit Satam v. The State of Maharashtra* (2012) 114 BOM LR 2969;

extensively used in India – 98768 people were detained across central and state laws in 2018<sup>49</sup> and 106612 in 2019.<sup>50</sup>

PD is an obvious, and worrying tool that can be invoked at any time to suppress dissent, but it becomes all the more alarming when used in times of peace in substitution or addition to the ordinary criminal law of the land. Considering the way in which these laws have been employed, both as to types of persons detained and total numbers, it seems evident that central and state governments are attempting to fulfil the goals of substantive law even before a person can be tried and convicted. Such detentions subvert the rules of natural justice, which precludes the realisation of punitive goals prior to a trial and verdict.

## VI. CONCLUDING REMARKS

In practice, preventive detention is a far cry from being a last resort to deal with grave threats to public order and is instead used to detain persons on suspicions of cow smuggling,<sup>51</sup> burglary,<sup>52</sup> food adulteration<sup>53</sup> etc. These laws are used as a crutch, resulting not only in injustice to individuals, but also atrophy of investigative and prosecutorial skills. Police, sometimes by their own admission, have come to rely on preventive arrests as a convenient crime control tool. It is easier than the arduous and unpredictable process of trying to convict offenders, be they petty thieves or political and economic offenders. Preventive detention has repeatedly been justified as being needed to deal stringently with anti-national elements in the larger interests of India. But it is evident that the State does not need the power to detain persons without trial to preserve public order or the security of the state; it needs the power to repress and conceal its incompetence.

Information available on PD remains sketchy at best. The reporting on PD erroneously suggests that it is primarily used to suppress political dissent. There is

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*Adil Chaus v. The Commissioner of Police, Aurangabad* (2012) Bom CR (Cri) 30; *Rajkumar Singh v. State of Madhya Pradesh* MANU/MP/0175/2013.

<sup>49</sup> National Crime Record Bureau, *Preventive Detentions (Crimehead-wise) – 2018* <[https://ncrb.gov.in/sites/default/files/crime\\_in\\_india\\_table\\_additional\\_table\\_chapter\\_reports/Table%2019A.11.pdf](https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%2019A.11.pdf)> accessed January 9, 2021.

<sup>50</sup> National Crime Record Bureau, *Preventive Detentions (Crimehead-wise) – 2019* <[https://ncrb.gov.in/sites/default/files/crime\\_in\\_india\\_table\\_additional\\_table\\_chapter\\_reports/Table%2019A.11\\_o.pdf](https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%2019A.11_o.pdf)> accessed January 9, 2021.

<sup>51</sup> '3 booked for cow smuggling under National Security Act in Congress-ruled MP' (*India Today*, 6 February 2019) <<https://www.indiatoday.in/india/story/nsa-against-3-men-accused-of-cow-slaughter-in-congress-ruled-madhya-pradesh-1449193-2019-02-06>> accessed January 9, 2021.

<sup>52</sup> 'Three jewellery shop burglars of Bihar detained under PD Act' (*United News of India*, 17 November 2019) <<http://www.uniindia.com/three-jewellery-shop-burglars-of-bihar-detained-under-pd-act/south/news/1792825.html>> accessed January 9, 2021.

<sup>53</sup> 'In 3 verdicts, Madhya Pradesh HC terms NSA in food adulteration cases illegal' (*Times of India*, 18 November 2019) <<https://timesofindia.indiatimes.com/city/bhopal/in-3-verdicts-hc-terms-nsa-in-food-adulteration-cases-illegal/articleshow/72100390.cms>> accessed January 9, 2021.

close to no information available on the constitution of ABs, how they are chosen, how often they disagree with the executive and the manner in which police employ PD. In their many years of existence, no review has been conducted on the need and application of such laws. An exhaustive review is likely to find widespread abuse of preventive detention across legislations. It is not sufficient to justify preventive detention simply because the Constitution provides for it; in fact, it might be time to delete sub-clauses (3) to (7) of Article 22 altogether.

### ANNEXURE A

#### LIST OF PREVENTIVE DETENTION LAWS IN INDIA

S. no.	Name of state	Name of the law
1.	Central	Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974
2.		National Security Act, 1980
3.		Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980
4.		Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988
5.	Andhra Pradesh	The Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986
6.		The Andhra Pradesh Prevention Of Dangerous Activities Of Communal Offenders Act, 1984
7.	Assam	Assam Preventive Detention Act, 1980
8.	Bihar	The Bihar Control of Crimes Act, 1981
9.	Gujarat	Gujarat Prevention of Anti-Social Activities Act, 1985
10.	Himachal Pradesh	Himachal Pradesh Preservation of Forests and Maintenance of Supplies of Forest-Based Essential Commodities Act, 1984
11.	Jammu and Kashmir	Jammu and Kashmir Public Safety Act, 1978
12.		Jammu and Kashmir Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1988
13.	Jharkhand	Jharkhand Control of Crimes Act, 2002

S. no.	Name of state	Name of the law
14.	Karnataka	Karnataka Prevention of Dangerous Activities of Acid Attackers, Bootleggers, Depredator of Environment, Digital Offenders, Drug-Offenders, Gamblers, Goondas, Immoral Traffic Offenders, Land Grabbers, Money Launderers, Sexual Predators and Video or Audio pirates Act, 1985
15.	Kerala	Kerala Anti-Social Activities (Prevention) Act, 2007
16.	Maharashtra	Maharashtra Prevention of Communal, Anti-Social and other Dangerous Activities Act, 1980
17.		Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-Offenders, Dangerous Persons and Video Pirates Act, 1981
18.	Meghalaya	Meghalaya Preventive Detention Act, 1995
19.	Odisha	Odisha Prevention of Dangerous Activities of Communal Offenders Act, 1993
20.	Puducherry	The Puducherry Prevention of Anti-Social Activities Act, 2008
21.	Rajasthan	Rajasthan Prevention of Anti-Social Activities Act, 2006
22.	Tamil Nadu	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, 1982
23.	Telangana	The Telangana Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders, Land-Grabbers, Spurious Seed Offenders, Insecticide Offenders, Fertiliser Offenders, Food Adulteration Offenders, Fake Document Offenders, Scheduled Commodities Offenders, Forest Offenders, Gaming Offenders, Sexual Offenders, Explosive Substances Offenders, Arms Offenders, Cyber Crime Offenders and White Collar or Financial Offenders Act, 1986.
24.		The Telangana Prevention Of Dangerous Activities Of Communal Offenders Act, 1984
25.	West Bengal	West Bengal (Prevention of Violent Activities) Act, 1970