

Scoping Study on Preventive Detention Laws in India

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BACKGROUND

Preventive detention (“PD”) involves detention on mere suspicion, without charge or criminal trial. PD has historically formed a core part of governance and law and order in India. Starting with the colonial rule, PD thrived as a method to control crime and dissent.¹ The Defence of India Act and the Defence of India Rules, which were enacted after the outbreak of World War II authorized 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.² The post-colonial state incorporated PD through Article 22 of the Constitution. Clauses (3) to (7) of Article 22 detail the procedural safeguards that PD laws are required to follow. They provide that no PD law shall authorize the detention of a person for a period longer than three months without the approval of an Advisory Board (“AB”). These ABs are to consist of persons who “are, or have been, or are qualified to be appointed as, judges of a high court”. 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. 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. 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. Entry 3 of List III of the 7th Schedule empowers both the Parliament and state legislatures to enact PD laws for security of a state, maintenance of public order, or the maintenance of supplies and services essential to the community.

The Preventive Detention Act, 1950 (“PDA”) was enacted a month after the adoption of the Constitution. 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. The Act was supposed to be in existence for a year, but on 19th February 1951, the Parliament extended the Act for another year.³ 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 in which 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 near identical to those of

¹ Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford University Press, 1999) at 53.

² Derek P. Jinks, *Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 Mich. J. Int'l L. 311 (2001) at 324.

³ *Supra* note 1 at 61.

PDA.⁴ With Indira Gandhi's second tryst with power in 1980, PD had become well and truly entrenched in Indian governance. Today, we have twenty-five PD laws in the country, a full list of which is given in the table below.

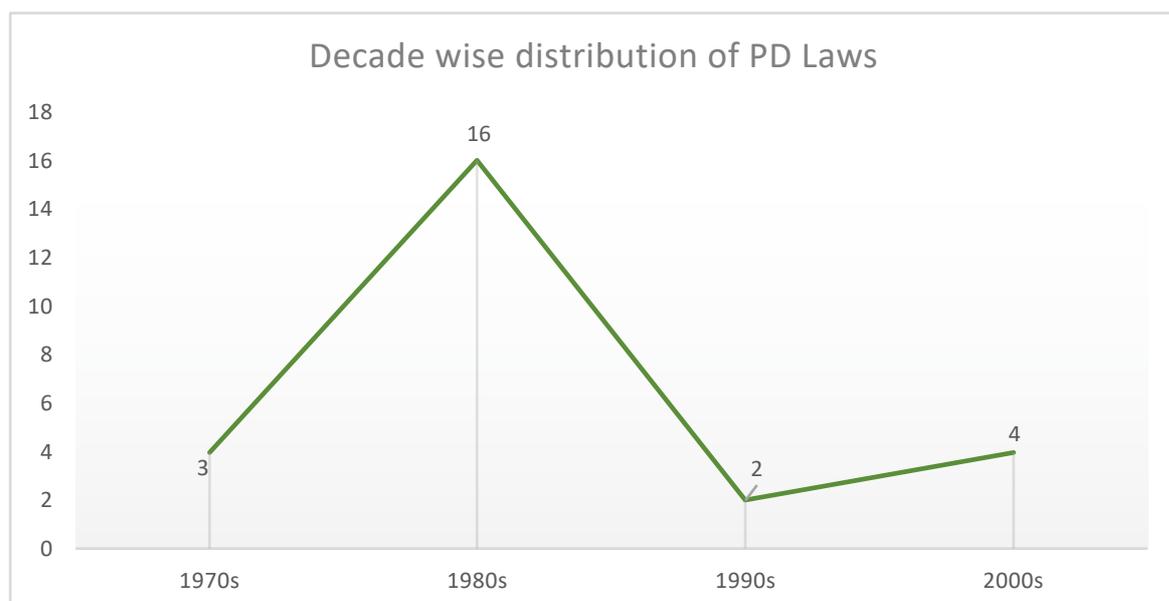
S. no.	Name of state	Name of the law
1.	Central	Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974
2.		National Security Act, 1980
3.		Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980
4.		Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988
5.	Andhra Pradesh	The Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Decoits, 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
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

⁴ Supra note 2 at 327.

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	Telangana Prevention of Dangerous Activities of Boot-Leggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers 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

ENACTMENT OF PD LAWS

Starting from 1980, the central and state governments enacted a spate of laws providing for PD during the 80s. The year 1980 itself saw the enactment of four separate preventive detention laws, the highest for any single year. The influence of central PD laws can be seen in state legislations. The Maharashtra Prevention of Communal, Anti-Social and other Dangerous Activities Act, which was enacted on 27th August 1980 explicitly acknowledges the influence of NSA in its objects and reasons. Similarly, Karnataka acknowledges Maharashtra and Tamil Nadu and their PD law. In its objects and reasons, the Act says that since it has similar problems with anti-social elements as these two states, it is imperative to make a PD legislation in public interest. There was another spike in state PD legislations in the mid 2000s, with Kerala, Rajasthan and Puducherry enacting laws to prevent “anti-social activities” and Tamil Nadu, Maharashtra and Karnataka amending their laws to include PD for video piracy.



ACTIVITIES PREVENTED BY THE LAWS

PD legislations allow detention of individuals for a wide range of offences, from broad based offences like acts threatening national security⁵, public order⁶, maintenance of supplies and services essential to the community⁷ to specific offences like bootlegging, land grabbing, gambling etc. The justification for many of these laws is that such activities have caused alarm among the public, especially in urban areas.⁸

Even though legislations allow detention of individuals to prevent acts threatening national security or public order,⁹ no law defines the range of acts considered threatening to national security.¹⁰ 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 ; (ii) in the case of a drug-offender, when he is engaged, or is making preparations for engaging, in any of his activities as a drug-offender, which affect adversely or are likely to affect adversely the maintenance of public order”¹¹ or is 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.”¹² None of the terms in this definition like ‘public health’, ‘alarm’ or ‘feeling of danger’ have been defined in the laws and thus, they remain open to interpretation.

State legislations allow detention for a wide range of offences. An exhaustive list of all the categories of offenders is provided below:

1. Acid-Attackers¹³
2. Anti-Social Elements¹⁴
3. Bootleggers¹⁵
4. Communal Offenders¹⁶

⁵ Assam PD Act, J&K PS Act, Meghalaya PD Act, NSA.

⁶ AP Communal Offenders Act, AP Bootleggers Act, Assam PD Act, Bihar COC Act, J&K PS Act, Jharkhand COC Act, Karnataka Bootleggers Act, Maharashtra Communal Offenders Act, Maharashtra Bootleggers Act, Meghalaya PD Act, NSA, Odisha Communal Offenders Act, Rajasthan ASA Act, TN Bootleggers Act, Telangana Communal Offenders Act, Telangana Bootleggers Act, WB Violent Activities Act.

⁷ Black Marketing Act, Assam PD Act, HP Preservation of Forests Act, J&K EC Act, Meghalaya PD Act, NSA.

⁸ Karnataka Bootleggers Act, AP Communal Offenders Act, AP Bootleggers Act, Maharashtra Bootleggers Act.

⁹ WB Violent Activities Act, NSA, Meghalaya PD Act, J&K EC Act, J&K PS Act, HP Preservation of Forests Act, Assam PD Act.

¹⁰ Supra note 2 at 328.

¹¹ See Karnataka Bootleggers Act, AP Communal Offenders Act, AP Bootleggers Act, Maharashtra Bootleggers Act.

¹² AP Communal Offenders Act, AP Bootleggers Act, Guj ASA Act, Odisha Communal Offenders Act, Puducherry ASA Act, Rajasthan ASA Act, TN Bootleggers Act, Telangana Communal Offenders Act.

¹³ Karnataka Bootleggers Act.

¹⁴ Bihar COC Act, Jharkhand COC Act.

¹⁵ AP Bootleggers Act, Guj ASA Act, Karnataka Bootleggers Act, Kerala ASA Act, Puducherry ASA Act, Rajasthan ASA Act, Maharashtra Bootleggers Act, TN Bootleggers Act, Telangana Bootleggers Act.

¹⁶ AP Communal Offenders Act, Odisha Communal Offenders Act, Telangana Communal Offenders Act.

5. Counterfeiters¹⁷
6. Dangerous Persons¹⁸
7. Decoits¹⁹
8. Depredators of Environment²⁰
9. Digital Data and Copyright Pirates²¹
10. Digital Offenders²²
11. Drug-Offenders²³
12. Forest Offenders²⁴
13. Gamblers²⁵
14. Goondas²⁶
15. Hired Ruffians²⁷
16. Immoral Traffic Offenders²⁸
17. Land Grabbers²⁹
18. Loan Sharks³⁰
19. Money Launderers³¹
20. Property Grabbers³²
21. Sand Offenders³³
22. Sexual Predators³⁴
23. Slumlord³⁵ and slum grabbers³⁶
24. Video or Audio Pirates³⁷

¹⁷ Kerala ASA Act.

¹⁸ Guj ASA Act, Maharashtra Bootleggers Act, Puducherry ASA Act, Rajasthan ASA Act.

¹⁹ AP Bootleggers Act, Telangana Bootleggers Act.

²⁰ Karnataka Bootleggers Act, Kerala ASA Act.

²¹ Kerala ASA Act.

²² Karnataka Bootleggers Act, Puducherry ASA Act.

²³ Telangana Bootleggers Act, AP Bootleggers Act, GJ ASA, Kerala ASA Act, Maharashtra Bootleggers Act, Rajasthan ASA Act.

²⁴ Puducherry ASA Act.

²⁵ Karnataka Bootleggers Act.

²⁶ AP Bootleggers Act, Telangana Bootleggers Act, Karnataka Bootleggers Act, Puducherry ASA Act, TN Bootleggers Act.

²⁷ Kerala ASA Act.

²⁸ Telangana Bootleggers Act, AP Bootleggers Act, Guj ASA Act, Rajasthan ASA Act, Karnataka Bootleggers Act, Kerala ASA Act, TN Bootleggers Act.

²⁹ Karnataka Bootleggers Act, Telangana Bootleggers Act, AP Bootleggers Act.

³⁰ Kerala ASA Act.

³¹ Karnataka Bootleggers Act.

³² Puducherry ASA Act, Rajasthan ASA Act, Guj ASA Act

³³ TN Bootleggers Act.

³⁴ Karnataka Bootleggers Act.

³⁵ Maharashtra Bootleggers Act.

³⁶ TN Bootleggers Act

³⁷ Kerala ASA Act.

A person can be categorized as an “anti-social element”³⁸, a “dangerous person”³⁹ or a “goonda”⁴⁰ if he, himself or as part of a gang habitually commits, attempts to commit, or abets offences against the body (Chapter XVI, IPC), offences against property (Chapter XVII, IPC) or offences relating to trafficking of women, or indecency towards women. The range of offences gives detaining authorities a virtually unlimited power of detention. Though these laws were meant to be enacted as exigency measures, they have historically been used by the police to control everyday crime. As early as 1965, PD was criticized for being used as substitution of ordinary law. It was being used against criminals against whom conviction was difficult to obtain in regular criminal courts.⁴¹ This trend seems to have continued, with some police officers admitting in informal conversations that they use PD, where habitual criminals have slipped their grasp. An example of a typical PD order is given in the table below:

The Superintendent of Police Bhind by his letter dated 31st July 2012 addressing to the District Magistrate Bhind informed that Rajkumar, 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 Section 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 Sections 294, 323, 506 read with Section 34 of I.P.C. registered in Police Station Endori, district Bhind (M.P.).

(ii) Crime No. 7/2009 for commission of offence under Section 307 read with Section 34 of I.P.C. registered in Police Station Endori, district Bhind (M.P.).

(iii) Crime No. 90/2010 for commission of offence under Sections 457 and 380 of I.P.C. registered Police Station Endori, district Bhind (M.P.).

(iv) Crime No. 33/2011 for commission of offence under Sections 336, 294, 506 read with Section 34 of I.P.C. registered in Police Station Endori, district Bhind (M.P.).

(v) Crime No. 34/2011 for commission of offence under Sections 34- A and 47-A of the M.P. Excise Act registered in Police Station Endori, district Bhind (M.P.).

(vi) Crime No. 61/2011 for commission of offence under Sections 147, 148, 149, 333, 353, 186, 332, 324, 224, 225 and 307 of I.P.C. read with sections 25 /27 of the Arms Act registered in Police Station Endori district Bhind.

(vii) Crime No. 116/2011 for commission of offence under Section 174(B) of I.P.C. registered in Police Station Endori district Bhind M.P.

³⁸ Bihar COC Act, Jharkhand COC Act.

³⁹ Guj ASA Act, Puducherry ASA Act, Rajasthan ASA Act.

⁴⁰ AP Bootleggers Act, Karnataka Bootleggers Act, TN Bootleggers Act, Telangana Bootleggers Act.

⁴¹ Supra note 1 at 66.

(viii) Crime No. 265/2010 for commission of offence under Sections 457 and 380 of I.P.C., registered in Police Station Gohad, district Bhind.

(ix) Crime No. 266/2010 for commission of offence under Sections 457 and 380 of I.P.C., registered in Police Station Gohad, district Bhind.

(x) Crime No. 5/2011 for commission of offence under Sections 457 and 380 of I.P.C., registered in Police Station Mau, district Bhind.

(xi) Crime No. 11/2009 for commission of offence under Sections 457 and 380 of I.P.C., registered in Police Station Maharajpura district Gwalior (M.P.).

(xii) Crime No. 36/2009 for commission of offence under Sections 457 and 380 of I.P.C., registered in Police Station Maharajpura district Gwalior (M.P.).

(xiii) Crime No. 37/2009 for commission of offence under Sections 457 and 460 of I.P.C. read with sections 25 /27 of the Arms Act registered in Police Station Maharajpura district Gwalior (M.P.).

(xiv) Crime No. 232/2009 for commission of offence under Sections 307, 353, 186, 336, 332, 147, 148, 149, 224 and 223 of I.P.C. registered in Police Station Maharajpura district Gwalior (M.P.).

(xv) Crime No. 386/2011 for commission of offence under sections 307 and 302 read with 34 of I.P.C. and under sections 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 Section 394 of I.P.C. read with sections 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 & Others MANU/MP/0175/2013

Additionally, prison data suggests that PD is extensively used in India - 3089 people were preventively detained across the country in 2016⁴² and 2562 people detained in 2015⁴³. Tamil Nadu has consistently topped the charts with the highest number of detainees since 2010, averaging 8.6% of its overall prison population. PD is actively deployed in Gujarat, Jammu and Kashmir and also Meghalaya, where the percentage of detainees has been as high as 34% in 2010 of its overall prison population.⁴⁴

DESCRIPTION OF DETAINING AUTHORITIES AND THEIR POWERS

Authorities empowered to make PD order

All central and state legislations empower the central government and the state governments to pass PD orders if they are satisfied that the circumstances require this.⁴⁵ In state specific laws, this power

⁴² Ministry of Home Affairs, 'Prison Statistics India 2016' (National Crime Records Bureau) <<http://ncrb.gov.in/StatPublications/PSI/Prison2016/Full/PSI-2016.pdf>>

⁴³ Ministry of Home Affairs, 'Prison Statistics India 2015' (National Crime Records Bureau) <<http://ncrb.gov.in/StatPublications/PSI/Prison2015/Full/PSI-2015-%2018-11-2016.pdf>>

⁴⁴ See Appendix A for details.

⁴⁵ AP Bootleggers Act, Assam PD Act, Bihar COC Act, J&K PS Act, J&K EC Act, Jharkhand COC Act, Karnataka Bootleggers Act, Kerala ASA Act, Maharashtra Communal Offenders Act, Maharashtra Bootleggers Act, COFEPOSA, NSA, Black Marketing Act, PIT NDPS, Odisha Communal Offenders Act, Puducherry ASA Act, TN Bootleggers Act, Telangana Communal Offenders Act, Telangana Bootleggers Act, WB Violent Activities Act.

extends throughout the state, which falls under the jurisdiction of the government. It requires no confirmation or further authorization.

Along with the power provided to the state government, these laws empower local district magistrates or commissioners of police to pass orders regarding circumstances prevailing within the local limits of their jurisdiction.⁴⁶ An exhaustive list of all delegated authorities authorized to pass PD laws is provided below:

1. Officer of Central Government no below rank of Secretary (Central legislations)
2. Officer of State Government no below rank of Secretary (State legislations)
3. District Magistrate
4. Sub-Divisional Officer
5. Commissioner of Police
6. Additional District Magistrate

PD orders passed by delegated authorities remain in operation for a limited period of time, ranging from 12-15 days, unless they are confirmed by the state government. From a quick perusal of high court decisions across different states, it appears evident that most PD orders are passed by delegated authorities (usually the District Magistrate) and subsequently confirmed by the state governments.⁴⁷

Severability of Orders

Thirteen laws⁴⁸ 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, then the order shall be construed to have been made separately on each of those grounds and not on a cumulation of the grounds. Therefore, a detention order must 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. This provision was initially added to Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (“COFEPOSA”) by way of amendment during the Emergency on 5th August 1975.⁴⁹ In June 1984, the NSA was also amended to add this provision into the law. This amendment was considered necessary to deal with the extraordinary situation in parts of the country and to deal stringently with anti-national, extremist and terrorist elements in the larger interests on India.⁵⁰ Predictably, and conveniently, this provision was subsequently introduced by states either by way of amendment to pre-existing laws or as a part of their new legislations.

⁴⁶ 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.

⁴⁷ See *Anant Singh v. The State of Bihar and Ors.* AIR 2017 SC 3250, *Jayamma v. Commissioner of Police, Bengaluru and Ors.* MANU/KA/1285/2019, *Adil Chaus v. The Commissioner of Police, Aurangabad and Ors.* 2012 Bom CR (Cri) 30, *S. Prasad Reddy v. Collector and District Magistrate and Ors.* 2005(3) ALT 487, *V. Narasamma v. State of A.P. and Ors.* 2003(5) ALD 701.

⁴⁸ Bihar COC Act, Guj ASA Act, J&K EC Act, Jharkhand COC Act, Karnataka Bootleggers Act, Maharashtra Communal Offenders Act, Maharashtra Bootleggers Act, Meghalaya PD Act, COFEPOSA, PIT NDPS, Odisha Communal Offenders Act, TN Bootleggers Act, NSA.

⁴⁹ *Supra* note 1 at 310.

⁵⁰ *Ibid* at 510.

Powers Regarding Absconding Persons

In addition to broad powers of detention, the executive has been bestowed with judicial powers in relation to detainees deemed to be absconding. This power can be traced back to an amendment to MISA,⁵¹ which allowed for attachment of the property of anyone against whom a PD order had been issued and who had absconded.⁵² Certain laws allow the detaining authority to directly exercise the powers of the competent court for issuing a proclamation for such persons and for attachment and sale of his property,⁵³ while other laws allow for proclamation and attachment of property after making a report in writing to a Magistrate.⁵⁴ All the laws require the person to be directed to be present before an officer mentioned in the order. If the person fails to do so without reason, he can be punished with imprisonment up to one year or fine. An exception to this standard is the Kerala Anti-Social Activities (Prevention) Act, 2007, which provides for punishment with imprisonment up to two years.

Length of Detention

NSA, COFEPOSA and The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (“PIT NDPS Act”) authorize the detention of persons for up to six months without obtaining the opinion of ABs. The limited protection of representation before an AB guaranteed to detainees is also denied by these laws.

The maximum period of detention permissible across various acts ranges from a minimum of 6 months to a maximum of two years. Most laws prescribe a one-year period as the maximum period of detention. Under COFEPOSA, the PIT NDPS Act, and the Jammu and Kashmir Public Safety Act, 1980, the maximum period of detention can extend up to two years from the date of detention in cases where persons have been detained for acting in any manner prejudicial to the security of the state. As with the NSA, Jammu and Kashmir Public Safety Act, 1980 empowers the state government to detain foreigners, including residents of Pakistan occupied Kashmir. Preventive detention for such persons can extend until the time where his expulsion of the state is made possible.

Further Detention after Original Order

All laws empower detaining authorities to issue fresh detention orders after the revocation or expiry of the original detention order. Usually, laws permit repeat detention in case fresh facts have arisen after the expiry of the first order. Some variations exist within this norm. Both the Jammu and Kashmir acts prescribe for another detention order to be made if the original order’s continuance is not legal or if it has been revoked due to apprehension of a challenge on technical defects. This provision gives authorities limitless power to pass repeated orders, each time resetting the maximum period possible for PD, which could potentially result in an individual staying in custody indefinitely. The Puducherry and Tamil Nadu acts also allow orders to be passed without fresh facts but such orders cannot exist

⁵¹ MISA was amended on 15th July 1975 through a Presidential Ordinance.

⁵² Supra note 1 at 310.

⁵³ AP Bootleggers Act, Guj ASA Act, Karnataka Bootleggers Act, Maharashtra Bootleggers Act, Puducherry ASA Act, Rajasthan ASA Act, TN Bootleggers Act.

⁵⁴ NSA, Black Marketing Act, PIT NDPS, Assam PD Act, Bihar COC Act, Jharkhand COC Act, Odisha Communal Offenders Act, Meghalaya PD Act, HP Preservation of Forests Act, Maharashtra Communal Offenders Act, Kerala ASA Act, J&K PS Act, J&K EC Act, WB Violent Activities Act.

for more than twelve months after the original order. This is modelled after the NSA, which amended section 14 in 1984.

ADVISORY BOARDS

Constitution of Advisory Boards

In accordance with Article 22 of the Constitution, all acts require that a reference of the detention order be made to an AB to gauge whether sufficient cause for PD existed or not.

The ABs are required to have three members. Some states like Andhra Pradesh, Maharashtra, Odisha, Tamil Nadu allow for all three members who are or have been judges of high courts, or who are qualified to be a high court judge (this could potentially include advocates who have practiced for ten years in a high court) to be members of the AB. This significantly expands the pool of eligible members of the AB for the state, and could also reduce accountability and independence of the AB.

States like Bihar, Gujarat, Himachal Pradesh, Jharkhand, Meghalaya follow the NSA model, where the Chairman has to be an acting or retired judge of the high court. Some states have put in place additional requirements, which could, at least in theory, lead to a fairer system. Both PDA legislations in Jammu and Kashmir require that all three members of the board be appointed by the Government in consultation with the Chief Justice of the high court. The Assam Preventive Detention Act and the Karnataka Prevention of Dangerous Activities Act provide that an AB can only be constituted with the recommendation of the Chief Justices of their respective high courts. The Chairman of the board is required to be a serving judge of the high court, in addition to two members who shall be or have been serving judges of the high court. These acts use language similar to the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, which constituted ABs as prescribed by the Forty-fourth Amendment to Article 22, which is yet to be notified.⁵⁵

Procedure of Advisory Boards

The procedure of the AB is largely uniform across all laws. First, the government must make a reference to the board, which includes placement of grounds for detention and other relevant information, including any representation made by the detenu before it. After the reference has been made, the detenu, if he so wishes, must be heard. The AB must consider all materials placed before it by the detenu and the detaining authority. After reviewing these materials, the AB is required to submit a report to the detaining authority within seven weeks of the date the detention order was executed. This report includes the opinion of the AB as to whether there is sufficient cause to detain the individual in question. The proceedings of the AB are closed to the public and its final report is confidential. The detaining authority must release the detainee immediately if in the opinion of the AB there is not sufficient cause to maintain the order.

⁵⁵ Forty fourth amendment of the Constitution substituted clause (4) of Article 22 to: (4) No law providing for preventive detention shall authorise the detention of a person for a longer period than two months unless an Advisory Board constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court has reported before the expiration of the said period of two months that there is in its opinion sufficient cause for such detention: Provided that an Advisory Board shall consist of a Chairman and not less than two other members, and the Chairman shall be a serving Judge of the appropriate High Court and the other members shall be serving or retired Judges of any High Court.

RIGHTS GUARANTEED TO THE DETENU

Disclosure to Detenu

Article 22(5) of the Constitution requires the detaining authority to communicate the grounds of the detention order to the detenu. Accordingly, all central and state laws require disclosure of the grounds of detention to be communicated to the detenu within, usually, 5 days.⁵⁶ This time may extend up to 10 days but with reasons recorded in writing. However, this provision usually also allows the state to not present facts which it think may harm 'public interest' if disclosed. All laws also require the detenu to be given an opportunity to make a representation against the order to the appropriate government.

Representation before the Advisory Board

All PD laws allow detainees the right to be heard by the AB in person. But, legal practitioners are expressly prohibited was representing detainees during the proceedings on the AB. The exceptions to this standard 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.

CONCLUSION

Preventive detention has historically been used as a crutch, which results not only in injustice to individuals but also atrophy in police investigatory and prosecutorial skills. Police, sometimes by their own admission, seem to consider preventive arrests to be an effective and convenient crime control tool. It is easier than the arduous, and unpredictable process of trying to convict political and economic offenders and often common criminals.⁵⁷ The enactment of PD legislations is justified to prevent a worsening law and order situation in the state, but section 151 of the Code of Criminal Procedure, 1973 empowers any police officer to arrest without a magistrate's warrant any person against whom credible information has been received, or a reasonable suspicion exists of his having been involved in any cognizable offence. Thus, regular criminal procedure already gives the executive the power to prevent crime when reasonable suspicion exists. The difference is that the police must investigate and prosecute the offender subsequently on evidence. The state does not need the power to imprison persons without trial for crime prevention, it needs the power to repress.⁵⁸

What makes these repressive laws even more egregious is that all central PD legislations have been enacted subsequent to an ordinance. Indira Gandhi and her cabinet promulgated the NSA ordinance, 1980 and the Rajiv Gandhi cabinet promulgated several amendments to the NSA. States have conveniently adopted this route as well. Twelve out of the seventeen states that provide for PD

⁵⁶ Exceptions to this rule are:

Max. 3 days- Rajasthan ASA Act

Max 7 days - Guj 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.

⁵⁷ Supra note 1 at 67

⁵⁸ AG Noorani, 'Preventive Detention in India' [1991] *Economic and Political Weekly* 2608

promulgated ordinances before the law was enacted.⁵⁹ Ordinances, once promulgated, have the effect of tying Parliament's hand. This repeated reliance on ordinances to enact PD measures can best be described as creating legislation by cheating democracy.⁶⁰

State laws have continually expanded the offences for which a person can be preventively detained, thus 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 Tamil Nadu. When the state enacted a PD law in 1982, it read as "Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Goondas, Immoral Traffic Offenders and Slum-Grabbers Act, 1982". A series of amendments through the years (forest offenders added in 1988, video pirates added in 2004, sand offenders added in 2006, cyber law offenders and sexual offender added in 2014) has given the law the unenviable title "Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Cyber Law Offenders, Drug-offenders, Forest-offenders, Goondas, Immoral Traffic Offenders, Sand-offenders, Sexual Offenders, Slum-grabbers and Video Pirates Act, 1982" today.

Information available on PD remains sketchy at best and the reporting on PD seems to erroneously suggest that it is primarily used to suppress political dissent. There is close to no information available on the constitution of ABs, how they are chosen, how often they disagree with the executive and the way in which PD is being employed by police. In their many years of existence, no review has been conducted on the application and need of such laws. A review is urgently needed to understand trends in the use of PD, the regional variations across different states to truly appreciate the scope and extent of these laws.

⁵⁹ The exceptions are: Puducherry, Odisha, Andhra Pradesh, West Bengal and Rajasthan.

⁶⁰ Shubhankar Dam, *Presidential Legislation in India: The Law and Practice of Ordinances* (Cambridge University Press, 2013) at 81-83.

ACT CODES AS USED IN FOOTNOTES

The Andhra Pradesh Prevention Of Dangerous Activities Of Communal Offenders Act, 1984	AP Communal Offenders Act
The Andhra Pradesh Prevention of Dangerous Activities of Boot-Leggers Decoits, Drug-Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986	AP Bootleggers Act
Assam Preventive Detention Act, 1980	Assam PD Act
The Bihar Control of Crimes Act, 1981	Bihar COC Act
Gujarat Prevention of Anti-social Activities Act, 1985	Guj ASA Act
Himachal Pradesh Preservation of Forests and Maintenance of Supplies of Forest-Based Essential Commodities Act, 1984	HP Preservation of Forests Act
Jammu and Kashmir Public Safety Act, 1978	J&K PS Act
J&K Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1988	J&K EC ACT
Jharkhand Control of Crimes Act, 2002	Jharkhand COC 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 Bootleggers Act
Kerala Anti-Social Activities (Prevention) Act, 2007	Kerala ASA Act
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 Bootleggers Act
Meghalaya Preventive Detention Act, 1995	Meghalaya PD Act
Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974	COFEPOSA
National Security Act, 1980	NSA

Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980	Black Marketing Act
Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988	PIT NDPS
Odisha Prevention of Dangerous Activities of Communal Offenders Act, 1993	Odisha Communal Offenders Act
The Puducherry Prevention Of Anti-Social Activities Act, 2008	Puducherry ASA Act
Rajasthan Prevention of Anti-Social Activities Act, 2006	Rajasthan ASA 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 Bootleggers Act
The Telangana Prevention Of Dangerous Activities Of Communal Offenders Act, 1984	Telangana Communal Offenders Act
Telangana Prevention of Dangerous Activities of Boot-Leggars, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986	Telangana Bootleggers Act
West Bengal (Prevention of Violent Activities) Act, 1970	WB Violent Activities Act

APPENDIX A

NUMBER OF DETENUES IN PRISON⁶¹

2016

S. no.	State	Male	Female	Total	% share of all inmates	Detenues Released	
						On Completion	Before Completion
1.	Tamil Nadu	1426	55	1481	10	276	1735
2.	Jammu & Kashmir	431	1	432	16.1	32	251
3.	Telangana	284	13	297	4.8	242	120
4.	Gujarat	201	54	255	2.1	34	885
5.	Karnataka	200	11	211	1.4	10	5
6.	Uttar Pradesh	116	0	116	0.1	71	38
7.	Maharashtra	84	0	84	0.3	71	29
8.	Madhya Pradesh	42	0	42	0.1	111	105
9.	Manipur	40	1	41	6.6	18	46
10.	Andhra Pradesh	36	0	36	0.5	4	11
11.	Nagaland	31	1	32	7.7	22	46

2015

S. no.	State	Male	Female	Total	% share of all inmates	Detenues Released	
						On Completion	Before Completion
1.	Tamil Nadu	1247	21	1268	9	481	1799
2.	Telangana	330	9	339	5.5	24	21
3.	Karnataka	220	12	232	1.7	11	6
4.	Gujarat	194	25	219	1.9	466	1329
5.	Uttar Pradesh	153	0	153	0.2	56	55
6.	Jammu & Kashmir	89	1	90	3.8	23	34
7.	Maharashtra	74	0	74	0.2	16	3
8.	Nagaland	43	0	43	8.8	23	36
9.	Madhya Pradesh	32	0	32	0.1	80	86
10.	Manipur	29	4	33	5.1	20	38

2014

S. no.	State	Male	Female	Total	% share of all inmates	Detenues Released	
						On Completion	Before Completion
1.	Tamil Nadu	1855	37	1892	11.9	134	2781
2.	Gujarat	567	27	594	5	594	1846

⁶¹ Source: Ministry of Home Affairs, 'Prison Statistics India' (National Crime Records Bureau). I have aggregated tables across different chapters from Prison Statistics India (2019-2016) and tabulated top ten states in imprisoning people under preventive detention laws.

3.	Karnataka	193	11	204	1.4	18	0
4.	Uttar Pradesh	132	0	132	0.1	49	56
5.	Madhya Pradesh	61	0	61	0.2	52	208
6.	Rajasthan	54	0	54	0.3	15	18
7.	Manipur	36	5	41	6.4	31	53
8.	Nagaland	37	0	37	8.4	30	53
9.	Jammu & Kashmir	35	0	35	1.5	42	62
10.	Maharashtra	31	1	32	0.1	13	22
11.	Meghalaya	31	0	31	3.8	5	4

2013

S. no.	State	Male	Female	Total	% share of all inmates	Detenues Released	
						On Completion	Before Completion
1.	Tamil Nadu	1733	48	1781	12.1	149	2033
2.	Gujarat	614	32	646	5.4	329	1855
3.	Karnataka	175	12	187	1.3	14	0
4.	Madhya Pradesh	124	0	124	0.4	43	258
5.	Uttar Pradesh	90	0	90	0.1	43	80
6.	Jammu & Kashmir	71	1	72	3.1	42	84
7.	Nagaland	50	0	50	10.3	7	75
8.	Manipur	40	3	43	6.5	96	56
9.	Meghalaya	33	0	33	3.9	6	1
10.	Maharashtra	27	1	28	0.1	57	6

2012

S. no.	State	Male	Female	Total	% share of all inmates	Detenues Released	
						On Completion	Before Completion
1.	Tamil Nadu	502	21	523	4	1640	1577
2.	Gujarat	468	51	519	4.5	401	2020
3.	Uttar Pradesh	197	0	197	0.2	307	652
4.	Jammu & Kashmir	144	0	144	5.7	102	130
5.	Madhya Pradesh	138	1	139	0.4	89	239
6.	Manipur	121	11	132	18.3	113	122
7.	Karnataka	94	3	97	0.7	11	6
8.	Maharashtra	42	0	42	0.2	15	10
9.	Bihar	40	0	40	0.1	40	13
10.	Meghalaya	21	0	21	3	0	1
11.	Nagaland	18	1	19	4.8	117	0

2011

S. no.	State	Male	Female	Total	% share of all inmates	Detenues Released	
						On Completion	Before Completion
1.	Tamil Nadu	962	21	983	7.1	146	797
2.	Gujarat	355	46	401	3.5	466	1651
3.	Jammu & Kashmir	234	5	239	9	12	448
4.	Uttar Pradesh	213	0	213	0.3	311	675
5.	Manipur	149	12	161	24.9	277	12
6.	Madhya Pradesh	132	0	132	0.4	26	278
7.	Nagaland	72	1	73	14.5	36	0
8.	Maharashtra	66	0	66	0.3	22	0
9.	Rajasthan	40	0	40	0.2	3	3
10.	Meghalaya	27	0	27	4.7	0	0

2010

S. no.	State	Male	Female	Total	% share of all inmates	Detenues Released	
						On Completion	Before Completion
1.	Tamil Nadu	810	23	833	6	408	31
2.	Jammu & Kashmir	394	15	409	15.9	153	1514
3.	Gujarat	210	34	244	2.1	3	192
4.	Uttar Pradesh	238	0	238	0.3	308	693
5.	Manipur	185	28	213	34.5	180	13
6.	Madhya Pradesh	86	0	86	0.3	49	229
7.	Maharashtra	75	2	77	0.3	25	0
8.	Meghalaya	43	0	43	6.9	3	0
9.	Bihar	34	0	34	0.1	17	0
10.	Nagaland	33	0	33	6.3	16	0