

What is preventive detention?

What does the law permit, and where must the State draw the line? What safeguards does the Constitution provide against arbitrary detention? How has preventive detention evolved in India? What is the difference between preventive detention and prohibitory orders?



AISA's Neha Bora during a protest march at Connaught Place in New Delhi. - **Photo:** Shashi Shekhar Kashyap

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- Preventive detention allows authorities to detain a person to prevent anticipated threats to public order or security, but it must be distinguished from prohibitory orders and other police action against protesters

- Article 22 of the Constitution provides safeguards for detained persons, while laws such as the National Security Act set out the grounds and procedures for detention
- Courts can review state action to protect individual liberty, emphasising that restrictions on protest and preventive detention must remain within legal and constitutional limits

The story so far:

The Delhi Police detained more than 5,000 protesters as they tried to reach Jantar Mantar for the protest demanding the resignation of Chief Election Commissioner Gyanesh Kumar and a rollback of the SIR. In the lead-up to the protests in Delhi, there was a nationwide crackdown on protesters by the police force. Among those detained and brutally manhandled by the Delhi police were leaders of various political factions, former Chief Ministers, the Leader of the Opposition, lawyers, journalists, students, activists, and reportedly people who were not even part of the protest. Police detained people at representatives' residences even before the protest started, and en route to the protest site. However, the Supreme Court on October 11 directed the Centre and the Delhi Police to ensure free movement of people 'subject to law and order'.

This prompts an understanding of what preventive detention is, how it can be imposed, and how it came into practice.

What is preventive detention?

'Preventive detention' means detention of a person without a trial or conviction by a court. The primary objective of preventive detention is not to punish an individual for a past offence but to prevent him from committing an offence in the future.

Power of preventive detention can be exercised by the authorities on the grounds of public order, security of the State, and law and order.

The National Security Act, 1980 (NSA) allows for preventive detention if the government is satisfied that a person's activities are prejudicial to the defence of India, the relations of India with foreign powers, or the security of the State.

What is a prohibitory order under the BNSS?

Section 163 of the BNSS largely retains the spirit of its predecessor, Section 144 of the Code of Criminal Procedure, 1973. It empowers a District Magistrate, a Sub-Divisional Magistrate, or any other Executive Magistrate specially empowered by the State Government, to issue orders when there is sufficient ground for proceeding and immediate prevention or speedy remedy is desirable. The primary objective is to

prevent obstruction, annoyance, or injury to any person lawfully employed, or danger to human life, health, or safety, or a disturbance of the public tranquillity, or a riot, or an affray.

The provision is preventive in nature, designed to avert potential harm rather than to punish past acts. The Magistrate must be satisfied that there is an urgency that necessitates an immediate order, even without prior notice to the affected parties.

The power is extraordinary and is intended for situations where the normal course of law enforcement might be too slow to prevent immediate harm. The order must clearly state the material facts upon which it is based, ensuring transparency and providing grounds for potential challenge.

Furthermore, orders under Section 163 BNSS are subject to judicial review by the High Courts under their revisional jurisdiction. The Supreme Court, in cases like *Babulal Parate v. State of Maharashtra* (1961) and *Madhu Limaye v. Sub-Divisional Magistrate* (1971), has consistently emphasised that these powers must be exercised judiciously, proportionately, and only when there is an imminent threat to public order, and not as a routine measure.

How has preventive detention evolved?

Preventive detention in India has evolved from a colonial tool used to suppress political dissent into a legal mechanism intended to protect national security and public order. During British rule, laws such as the Rowlatt Act, 1919, and the Defence of India Act, 1939, allowed the authorities to detain individuals without trial, often targeting freedom fighters and political opponents.

After Independence, India retained preventive detention, introducing the Preventive Detention Act, 1950, which remained in force until 1969. The Maintenance of Internal Security Act (MISA), 1971, further expanded detention powers and was widely used against political opponents during the Emergency (1975–1977). It was repealed in 1978.

The National Security Act (NSA), 1980, subsequently established a continuing legal framework for preventive detention. Other laws, including the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA), 1974, also authorised preventive detention for specific purposes.

Meanwhile, amendments to the Unlawful Activities (Prevention) Act (UAPA), 1967, expanded the state's powers to address terrorism and unlawful activities.

Over time, the Supreme Court's interpretation of personal liberty has also evolved. *Maneka Gandhi v. Union of India* (1978) established that procedures restricting personal liberty must be just, fair and reasonable. However, concerns over prolonged detention without trial, inadequate judicial oversight and the potential misuse of these laws continue to raise questions about the balance between national security and fundamental rights.

What did the Supreme Court order on October 11?

With respect to the Delhi protests, the Supreme Court convened what it called an “extraordinary, exceptional” Sunday (October 11, 2026) hearing to direct the Union government and the Delhi Police to stop illegal detentions and allow free and smooth movement of people and traffic, as well as the operations of Metro and rail services, but “subject to law and public order”.

The Supreme Court directed that Delhi Metro and railway services operate normally, and that internet services remain available in accordance with the law. It said the movement of people and vehicles across Delhi must not be unnecessarily obstructed and that barricades must be reviewed based on law-and-order and traffic requirements. The court said there must be no unlawful detention and that all detentions must follow the procedure established by law. It also directed that peaceful assemblies be allowed in accordance with the law, except in areas where prohibitory orders under Section 163 of the Bharatiya Nagarik Suraksha Sanhita (BNSS) are in force. Any notice board announcing Section 163 restrictions near the Supreme Court must be removed, if still in place, to ensure access to the Supreme Court and other courts. The court also recorded the assurance that lawyers, journalists and other professionals would not be prevented from performing their duties.

The court issued notice in contempt proceedings alleging violation of its October 9 order and directed the authorities to submit a compliance report by October 13, including details of Metro restrictions and railway advisories. Habeas corpus petitions alleging mass detentions will also be heard with the main cases on October 13. The court said the State must explain the circumstances, manner and legal justification for the alleged detentions, emphasising its duty under Article 32 of the Constitution to protect and enforce fundamental rights.

What have the courts said about preventive detention?

Earlier, in *Babulal Parate v. State of Maharashtra* (1961), the Supreme Court upheld the constitutional validity of Section 144 CrPC but said it could be used only in emergencies to prevent specific threats to public order. The court held that the power was not “unlimited or untrammelled” and had to be exercised within the limits set by law.

In *Khudiram Das v. State of West Bengal* (1975) Supreme Court observed that the requirement of communication of grounds of detention acts as a check against arbitrary and capricious exercise of power. The detaining authority cannot whisk away a person and put him behind bars at its own sweet will. It must have grounds for doing so and those grounds must be communicated to the detenu, so that, not only the detenu may know what are the facts and materials before the detaining authority on the basis of which he is being deprived of his personal liberty, but he can also invoke the power of judicial review, howsoever limited and peripheral it may be. The detenu has to be afforded an opportunity of making a representation against the order of detention.

In 2012, the Supreme Court criticised the government for imposing Section 144 against a sleeping crowd at Ramlila Maidan in New Delhi during protests against the Congress-led UPA government. "Such a provision can be used only in grave circumstances for maintenance of public peace. The efficacy of the provision is to prevent some harmful occurrence immediately. Therefore, the emergency must be sudden and the consequences sufficiently grave," the court said.

In *Mazdoor Kisan Shakti Sangathan v. Union of India* (2018), the Supreme Court set aside a National Green Tribunal order banning all protests along Jantar Mantar Road. The court said a complete ban was excessive, observing that the "solution was not to ban the demonstrations altogether". It directed the authorities to create a system to regulate protests and grant permissions.

The Supreme Court in the case of *Shaik Naznen v. State of Telangana* (2022) observed that powers to be exercised under the preventive detention laws are exceptional powers which have been given to the Government for its exercise in an exceptional situation as it strikes hard on the freedom and liberty of an individual, and thus cannot be exercised in a routine manner.

According to *Ameena Begum v. State of Telangana* (2023), Supreme Court observed that to unchain the shackles of preventive detention, it is important that the safeguards enshrined in our Constitution, particularly under the "golden triangle" formed by Articles 14, 19 and 21, are diligently enforced.

Article 14 ensures equality before the law, Article 19 provides important freedoms such as freedom of speech, expression, assembly, and movement, and Article 21 guarantees the right to life and personal liberty.

What are the safeguards against preventive detention in the Constitution?

Article 22 of the Constitution provides safeguards against arbitrary preventive detention. Under Article 22(4), a person generally cannot be detained for more than three months without an Advisory Board reviewing the case, subject to the constitutional requirements and exceptions. Under Article 22(5), the authorities must communicate the grounds of detention to the detainee as soon as possible and give them an opportunity to make a representation against the order. The grounds must be communicated in a manner that allows the detainee to effectively challenge the detention.

Preventive detention orders are also subject to judicial review. Courts can examine whether the authorities followed the law, considered relevant material and complied with constitutional safeguards. Therefore, the power must be exercised carefully and cannot be used arbitrarily.