

**ANALYZING THE EFFICACY OF THE COFEPOSA ACT IN COMBATING  
SMUGGLING AND PRESERVING FOREIGN EXCHANGE: A LEGAL AND POLICY  
PERSPECTIVE**

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**ABSTRACT**

The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA), is a significant preventive detention legislation in India, aimed at curbing economic offenses like smuggling and foreign exchange violations. Though introduced with legitimate economic objectives, COFEPOSA has often faced criticism for compromising civil liberties and procedural fairness. It also undertakes a comparative analysis with international practices and suggests reforms to align national interest with human rights obligations. This article examines the legal architecture, implementation challenges, and judicial scrutiny of the Act, analyzes the legislative framework, judicial scrutiny, implementation challenges, and constitutional implications of COFEPOSA with a focus on its compatibility with constitutional safeguards and fundamental rights. The article also provides a comparative perspective and suggests reforms for aligning national security objectives with civil liberties.

**1. INTRODUCTION**

The global economy depends heavily on the regulation of cross-border movement of goods and currency. For a developing nation like India, smuggling not only impacts legal trade but also undermines economic stability by creating black markets, generating unaccounted income, and draining foreign reserves. In response to increasing illegal trade during the post-independence period, the Indian government enacted the COFEPOSA Act in 1974, supplementing the Foreign Exchange Regulation Act (FERA), 1973. India's economic security has been historically threatened by illegal trade and foreign exchange malpractices. To address this, the Parliament enacted COFEPOSA in 1974, empowering the government to detain individuals preventively to

thwart smuggling and conserve foreign exchange. Although introduced with economic stability in mind, COFEPOSA has frequently attracted criticism for bypassing due process and constitutional guarantees.

## 2. LEGISLATIVE BACKGROUND AND KEY PROVISIONS

The COFEPOSA Act was enacted under Entry 9 of the Union List (preventive detention for reasons connected with foreign affairs, defense, and the security of India). It provides for preventive detention of individuals suspected of smuggling or foreign exchange manipulations without formal charges or trial. India's economic policy during the 1970s was characterized by tight foreign exchange controls, import licensing, and a protectionist approach. The country faced acute foreign exchange shortages, and smuggling—particularly of gold, electronics, and foreign currency—was rampant. The Customs Act, 1962 and FERA proved inadequate due to their reliance on post-offense prosecution. There was thus a strong push for a preventive detention law focusing on economic threats.<sup>1</sup> Importantly, this law was brought under Article 22(3)(b) of the Constitution, which permits exceptions to safeguards against preventive detention in certain cases.

The statement of objects and reasons accompanying the COFEPOSA Bill justified the legislation on grounds of "national economic interest," asserting that smuggling posed a serious threat akin to external aggression

### Key Provisions:

Section 3(1): Empowers the Central or State Government to detain a person with a view to preventing him from smuggling goods or dealing in foreign exchange illegally<sup>2</sup>.

Section 8: Requires that the detainee be informed of the grounds of detention within 5 days (extendable to 15 days in exceptional circumstances).<sup>3</sup>

Section 11: Permits detention up to one year, extendable in certain situations.<sup>4</sup>

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<sup>1</sup> Statement of Objects and Reasons, COFEPOSA Bill, 1974

<sup>2</sup> Section 3(1), COFEPOSA Act, 1974.

<sup>3</sup> Section 8, COFEPOSA Act, 1974.

<sup>4</sup> Section 11, COFEPOSA Act, 1974.

### 3. Judicial Interpretation and Constitutional Scrutiny

The Indian judiciary has played a critical role in scrutinizing COFEPOSA's provisions vis-à-vis Article 21 (right to life and liberty) and Article 22 (protection against preventive detention) of the Constitution.

In *A.K. Roy v. Union of India*, the Supreme Court held that while preventive detention laws like COFEPOSA are constitutionally valid, they must adhere strictly to procedural safeguards to prevent misuse.<sup>5</sup>

In *Khudiram Das v. State of West Bengal*, the Court emphasized that the power of preventive detention must be exercised with utmost responsibility and fairness, stating that the "satisfaction" of the detaining authority is subject to judicial review if mala fide or based on irrelevant grounds.<sup>6</sup>

These judgments underscore the tension between state security and personal liberty under COFEPOSA..

### 4. PRACTICAL AND ADMINISTRATIVE CHALLENGES

Despite being a deterrent mechanism, COFEPOSA's implementation has been problematic:

- Abuse of Detention Powers: Reports have indicated misuse of detention powers for political or extraneous purposes.<sup>7</sup>
- Lack of Evidence: Detentions are often made on "suspicion", with little concrete evidence, leading to frequent quashing by courts.
- Delays in Advisory Board Reviews: The advisory boards, constituted under Article 22(4), often delay reviewing cases, resulting in prolonged detention without effective checks.<sup>8</sup>
- Vague Grounds of Detention: Often, the language used in detention orders is ambiguous and non-specific, leading to successful habeas corpus petitions.

<sup>5</sup> *A.K. Roy v. Union of India*, AIR 1982 SC 710.

<sup>6</sup> *Khudiram Das v. State of West Bengal*, AIR 1975 SC 550.

<sup>7</sup> Human Rights Watch Report, "India: The Use of Preventive Detention Laws", 2016

<sup>8</sup> National Human Rights Commission (NHRC) Report, 2019.

- Political Misuse: Several reports and studies have shown that COFEPOSA has sometimes been misused to settle political scores or detain dissenters under the guise of economic threat.<sup>9</sup>
- Lack of Transparency: The non-disclosure of full material documents under "public interest" weakens the detenu's defense and limits judicial review.
- Delay in Advisory Board Reviews: Delays in referring cases to advisory boards or failure to review within stipulated time frames violates Section 8 and Article 22(4) of the Constitution.

## 5. IMPACT ON FUNDAMENTAL RIGHTS

COFEPOSA significantly restricts the detenu's rights:

**No Right to Legal Representation before Advisory Board:** Unlike ordinary criminal trials, the detenu has no right to engage a lawyer during advisory board proceedings.<sup>10</sup>

**Limited Judicial Remedies:** Judicial review is limited to grounds such as mala fides, procedural violations, or total absence of material.

**Violation of Article 21:** Critics argue that COFEPOSA infringes upon the "right to life and personal liberty" without fair, just, and reasonable procedures.<sup>11</sup> A Legal Dilemma with COFEPOSA has is how it operates at the intersection of state security and individual liberty, creating tensions with the Constitution, particularly Articles 21 and 22.

Article 21 guarantees that no person shall be deprived of life or personal liberty except according to procedure established by law.

Article 22(3)(b) permits preventive detention but removes key procedural protections like production before a magistrate and access to legal counsel

## 6. Comparative Analysis

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<sup>9</sup> People's Union for Civil Liberties (PUCL) Report, "Preventive Detention Laws in India: A Critique",

<sup>10</sup> Article 22(3)(b), Constitution of India; also upheld in A.K. Roy (supra).

<sup>11</sup> Maneka Gandhi v. Union of India, AIR 1978 SC 597 – interpreted Article 21 to include substantive due process

United Kingdom: The UK's "Terrorism Prevention and Investigation Measures Act" (TPIM), 2011 allows similar preventive measures but with stronger judicial oversight and periodic reviews.<sup>12</sup>

United States: The Patriot Act provides preventive surveillance but mandates warrants, judicial review, and Congressional oversight.<sup>13</sup>

Lesson for India: While national security requires preventive frameworks, India's legal system could incorporate periodic judicial review, right to legal aid, and compensation for wrongful detention to make COFEPOSA more rights compliant.

## 7. RECOMMENDATIONS

1. Enhanced Judicial Review: Mandate stronger, time bound judicial scrutiny of detention orders.
2. Legal Representation: Allow legal representation before Advisory Boards.
3. Transparency and Reporting: Publish annual reports on COFEPOSA detentions for public accountability.
4. Strict Detention Criteria: Narrow the definition of "prejudicial activities" and require minimum evidentiary standards.
5. Compensation Mechanism: Introduce legal provisions for compensation in cases of wrongful detention.
6. Amendment to Allow Legal Representation: Detenues must be allowed to engage legal counsel before Advisory Boards.
7. Mandatory Review Mechanism: Independent judicial review must be conducted every 3 months during the detention period.
8. Compensation Provision: Statutory compensation for wrongful detention can act as a deterrent against arbitrary use.
9. Training of Officers: Enforcement officers must be sensitized to the constitutional limitations and ethical implications of preventive detention.

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<sup>12</sup> TPIM Act, 2011 (UK), Sections 6 and 9 – provide for judicial confirmation and periodic renewal.

<sup>13</sup> USA Patriot Act, 2001 – Title II, enhanced surveillance procedures; subject to judicial oversight

10. Data Transparency: Annual data on detentions under COFEPOSA should be published with anonymous details for academic and policy analysis.

## 8. CONCLUSION

The COFEPOSA Act, though enacted with legitimate economic and national interests, presents significant challenges in safeguarding individual rights. The Supreme Court's proactive interpretation has mitigated some of its harshest effects, but structural reforms are essential. A balance between state interest and constitutional freedoms is imperative for the legitimacy of preventive detention laws in a democratic society. COFEPOSA reflects the Indian state's attempt to protect its economic sovereignty and national interest through preventive legal mechanisms. However, in doing so, it must not disregard the foundational principles of justice, liberty, and due process enshrined in the Constitution. The judiciary has played an important role in checking misuse, but structural reforms and periodic legislative reviews are necessary to prevent the erosion of civil liberties. As India's economy becomes more integrated with global systems, the role of preventive detention must evolve—focusing on intelligence-led investigations, robust prosecutions, and proportionate penalties rather than indiscriminate detention.