III. PERSONAL LIBERTY AGAINST PREVENTIVE DETENTION
CHAPTER III
PERSONAL LIBERTY AGAINST PREVENTIVE DETENTION

3.1 Our Constitution has adopted preventive detention as a subject matter of peace-time legislation as distinct from emergency legislation and Courts cannot question the sufficiency of reasons for depriving a person of his liberty. The framers of our Constitution thought that preventive detention is indispensable, they also provided certain safeguards to mitigate its harshness under Article 22 of our Constitution.

3.2 Preventive detention means detention of a person without trial and conviction by the Court, only on suspicion in the mind of the executive authority. A person is detained only on subjective satisfaction of the executive and it is only preventive in nature, that is, preventive detention is not to punish an individual for any wrong done by him but to curtail his liberty with a view to prevent him from indulging in any unlawful activity in future.

3.3 In the Draft Constitution of India the Drafting Committee had introduced Article 15 A corresponding to the present Article 22 putting some curbs upon the power of preventive detention which has been introduced in the Legislative Lists like Entry 9 in List I and Entry 3 in List III which are as under:

"Entry 9, List I:

"Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subjected to such detention."

"Entry 3, List III:

"Preventive detention for reasons connected with
the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention".

3.4 The Draft Article was subjected to fierce criticism by some progressive members of the Constituent Assembly(1) led by Late Shri Jaspat Roy Kapoor and Late Shri Mahavir Tyagi and which is as follows:

Shri Mahavir Tyagi (U.P. General):

"Sir, Dr. Ambedkar will please pardon me when I express my fond wish that he and other members of the Drafting Committee had the experience of detention in jail before they became members of the Drafting Committee".

The Hon'ble Dr. B.R. Ambedkar:

"I shall try hereafter to acquire that experience".

Shri Mahavir Tyagi:

"I may assure Dr. Ambedkar that although the British Government did not give him this privilege, the Constitution he is making with his own hands will give him that privilege in his life-time. There will come a day when they will be detailed under the provisions of the very same clauses which they are making ( Interruption ). Then they will realise their mistake. It is all safe as long as the House is sitting and the Members are sitting on these Benches. But then let us not make provisions which will be applied against us very soon. There might come a time when these very clauses which we are now considering will be used freely by a Government against its political opponents".

"Sir, in this article we are required to grant rights and privileges to the people, but along with them I am surprised to find that it has occurred to the Drafting Committee and their friends and advisers
to provide herein penal clauses also. This is a charter of freedom that we are considering. But is this a proper place for providing for the curtailment of that very freedom and liberty? When freedom is being guaranteed, why does the Drafting Committee think it fit to introduce provisions for detaining people and curbing their freedom? This is an article which will enable the future Government to detain people and deprive them of their liberty rather than guarantee it......"

"Sir, life, liberty and pursuit of happiness are the three chief fundamental rights of every individual ..... These rights are inherent and inalienable. Even if one chooses to alienate these rights, I submit, he cannot do so because they are inherent in him and they are inalienable. But the individual voluntarily transfers from his inherent rights and pools them to the cumulative store of social rights known as the State."

Shri Mahavir Tyagi:

"In Urdu, there is a couplet which says : "Kas rahe hain apni Minaquaron se halqa jalka".

"That is what really we are doing. We are making it easy and convenient and legal for the future Government to detain us. That is the meaning. Sir, I do not wish to say more on this point. I only wanted to warn the House if we pass this article as it is we will simply be making a provision, which will be used against us."

3.5 According to an eminent jurist, preventive detention is, by its very nature repugnant to the democratic ideas and no such law exists in U.S.A. or in England even in time of peace. Even Acting Chief Justice Shelat in Sambhu Nath Sarkar's case has described about the provision of preventive
detention in our Constitution in the following words.

"....the constitution makers accepted preventive
detention as a necessary evil, to be tolerated in
a constitutional scheme which, otherwise, guaranteed
personal liberty in its well accepted form"(5)

3.6 Our Constitution undoubtedly guarantees various freedoms and personal liberty to all persons in our Republic. But the constitutional guarantee of such freedoms and liberty is not meant to be abused and misused so as to endanger and threaten the very foundation of the pattern of our free society in which the guaranteed democratic freedom and personal liberty is designed to grow and flourish. The larger interests of our multi-religious nation as a whole and the cause of preserving and securing to every person the guaranteed freedom preposterously demand reasonable restrictions on the prejudicial activities of individuals which undoubtedly jeopardise the rightful freedoms of the rest of the society. Main object of Preventive Detention is the security of a State, maintenance of public order and of supplies and services essential to the community demand, effective safeguards in the larger interest of sustenance of peaceful democratic way of life.

3.7 Article 22 of the Constitution must be construed in its plain language consistently with the basic requirements of preventing anti-social subversive elements from imperilling the security of the State or the maintenance of public order or of essential supplies and services therein. Power to detain is primarily intended to be exercised in those rare cases where the larger interest of the State demand that restrictions shall be placed upon the liberty of the citizen during his future activities. The restrictions so placed must, consistently with the effectiveness of detention should be minimal.
3.8 Article 22 provides a limitation upon the power of the Legislature conferred by Article 21 to make any law as to deprivation of personal liberty. Any law must not contravene the conditions or limits imposed by Article 22. In case of preventive detention, the procedure prescribed by law under which the detention is made, must be strictly followed and if this is not done, the person detained is entitled to be released by the Court.

3.9 Preventive detention is a serious invasion of personal liberty and the safeguards which are provided for in Article 22, clauses (4) to (7) are too meagre and the executive may improperly make use of this power and for which the individuals may look towards the Judiciary who are considered to be the guardians of the people. Safeguards provided in clauses (4) to (7) are as under:

1. That no law can provide for detention for a period of more than 3 months unless the sufficiency for the cause of detention is investigated by an Advisory Board within the said period of three months.

2. That a State law cannot authorise detention beyond the maximum period prescribed by Parliament under the powers given to it under clause (7).

3. That Parliament also cannot make a law authorising detention beyond 3 months without the intervention of an Advisory Board unless the law conforms to the conditions laid down in clause (7).

4. Provision has been also made to enable Parliament to prescribe the procedure to be followed by Advisory Board as a safeguard against any arbitrary procedure.

5. Apart from these enabling and disabling provisions certain procedural rights have been expressly safeguarded by clause (5) of Article 22. A person detained under a law of preventive detention has a right to obtain
information as to the grounds of his detention and has also the right to make representation protesting against an order of preventive detention. This right has been guaranteed independently of the duration of the period of detention.

3.10 In 1971 Parliament passed the Maintenance of Internal Security Act (MISA) under cover of the war with Pakistan, continued it after the war and used it largely to stifle the voice of dissent. In Emergency, the Act was used against the leaders of the opposition. Even Shri Jayprakash Narayan was detained under MISA. The Maintenance of Internal Security Act under which people were preventively detained, was put beyond the reach of fundamental rights by being included in Schedule 9 by the 39th Amendment Act.

3.11 By the Constitution 44th Amendment Act, 1978 the provisions of Article 22 have been further amended, to make it less rigorous and more equitable and they are as under:

(1) Article 22(4) was amended so as to reduce the period upto which a person could be preventively detained without consulting an Advisory Board from 3 to 2 months.

(2) The composition of the Advisory Board (Article 22 (4) (a) was altered to make it really independent of the Executive Government. Article 22 (4) (a) as originally enacted, provided that the Board must consist of persons who were or had been or were qualified to be appointed Judges of the High Courts. Since under Article 217 (b) an Advocate of ten years standing is qualified to be a Judge of a High Court, this provision would enable Government to pack the Board with its own men. The 44th Amendment requires that the Board must be appointed in accordance
with the recommendations of the Chief Justice of the appropriate High Court and the Board must consist of a Chairman and not less than two members. The Chairman must be a serving Judge of appropriate High Court and the remaining members may be either serving or retired Judges of any High Court.

(3) Article 22 (7) (a) which permitted persons to be detained for a longer period than 3 months without obtaining the opinion of the Advisory Board, if the prescribed conditions of that Article were fulfilled was deleted. This deletion removed from the Constitution the greatest blot which was there on preventive detention in India. That provision which was a part of a fundamental right, denied to a citizen of India in times of peace what was not denied to a subject, or even an alien in England in times of wars, namely, a right of the detained person to have his case considered by an independent Board.

3.12 In the year 1980 Mrs. Gandhi came back to power and she promptly brought back the law of preventive detention on the statute book, namely, the National Security Act. This Act did not contain the provisions made by Janata Government. The National Security Act was amended in 1984 more than once.

3.13 Under the original Act the detaining authority detains a person on its subjective satisfaction. The Courts do not investigate the question of adequacy or inadequacy of this subjective satisfaction. There is normally more than one ground for the detention of a person, all the grounds cumulatively leading to the subjective satisfaction of the detaining authority. If any of the grounds is non-existent, stale, irrelevant or vague, the Courts can strike down the order of detention, but the amendments have changed this.
Now even if one of the ground is relevant, the order of detention will be valid. This has made it almost impossible for a Court to strike down an order of preventive detention. Originally if an order of detention expired, or was revoked, the detaining authority could not make another order on the same grounds. But the amendments enable the detaining authority to detain a person again and again on the same grounds.\(^{(6)}\)

3.14 The topic of Preventive Detention is very wide and numerous cases have been decided under each of the safeguards provided in Article 22, clauses (4) to (7). In fact, a whole thesis can be written on this topic. Even where the plea was taken on the ground of liberty, Article 21 which is the key theme of the thesis was not touched and, therefore, only a few selected case laws which deals specifically with the concept of liberty vis-a-vis Article 22 are discussed underneath.

3.15 After our Constitution came into force, the very first case in which Preventive Detention laws were challenged was in A.K. Gopalan's case.\(^{(7)}\) The Court was asked to pronounce upon the true meaning of Article 21 of the Constitution, which all the Judges of the Court recognised as providing for the foremost aspects of personal liberty, namely, the right to live and the right to personal freedom.

3.16 The petitioner A.K. Gopalan was detained under the Preventive Detention Act. It was contended on his behalf that his detention was an infringement of his fundamental rights of freedom of movement under Article 19 (1) (d) and of personal liberty under Article 21 and that the law under which he was detained did not pass the test of reasonable restrictions in the interests of the general public laid down in sub-clause (5) of Article 19.
According to the majority view as to Article 21, it decided that the words "according to procedure established by law" in the Article meant "according to the substantive and procedural provisions of any enacted law". If, therefore, a person was deprived of his life or personal liberty by a law enacted by a legislature, however drastic and unreasonable the law, he would be rightly deprived of his life or liberty. There would be no infringement of Article 21 in such a case. In effect, the decision meant that a fundamental right which is generally a right against the State including the legislature and which by provisions of Article 13 the Legislature cannot override, was no fundamental right at all against the legislature. To put it in plain language the decision was that the Legislature in India was untrammelled in the matter of passing any legislation affecting life or personal liberty excepting such aspects of personal liberty as were specifically dealt with in the various clauses of Article 19 (1). As to the fundamental right of freedom of movement under Article 19 (1) (d) the Court put a restricted construction. The article conferred a mere right of movement from one place to another and not a right generally to personal freedom. Further, in any case, it could be enjoyed only by persons who were free and not by persons who were preventively or punitively detained.

Thus the majority held that in respect of fundamental right to life and personal liberty no person in India had any remedy against legislative action. On behalf of the petitioner it was repeatedly asked whether if this view of Article 21 were accepted the result would not be that:

"the Constitution would permit a law being enacted abolishing the mode of trial permitted by the existing law and establishing the procedure of trial by battle or trial by ordeal which was in vogue in olden times in England."
3.19 According to the interpretation adopted by the majority of Article 21, such a law could be passed, without challenge under our Constitution. Justice Sastri (one of the Judges who gave majority opinion) was perturbed by such a narrow construction and he posed a question as under:

"....Could it then have been the intention of the framers of the Constitution that the most important fundamental right to life and personal liberty should be at the mercy of legislative majorities as, in effect, they would be if 'established' were to mean merely 'prescribed'? In other words, as an American Judge said in a similar context, does the Constitutional prohibition in Article 13 (2) amount to no more than "you shall not take away life or personal freedom unless you choose to take it away" which is mere verbiage." (9)

Asserting that the suggested interpretation "Completely stultifies article 13(2) and indeed, the very conception of a fundamental right" the learned Judges opined that "procedure established by law" in the article may be taken to mean "ordinary and well established criminal procedure", that is to say, "those settled usages and normal modes of proceeding sanctioned by the Criminal Procedure Code, which is the general law of criminal procedure in the Country." (10)

3.20 The middle course suggested by Justice Sastri was not accepted by the majority Judges. The argument for the petitioner that the deprivation of the personal liberty of the petitioner under the Preventive Detention Act was an invasion of his right "to move freely through-out the territory of India" and that such a right could be taken away only by a law which imposed reasonable restrictions on such movement in the interests of the general public under clause (5) of Article 19 raised the question of the interpretation of Article 21 in relation to Article 19 (1) (d) and to other freedoms generally
in Article 19 (1). According to Justice Sastri, Article 19 guarantees protection for the more important civil liberties of citizens who are in the enjoyment of their freedom, while at the same time laying down the restrictions which the legislature may properly impose on the exercise of such rights, and it has nothing to do with the deprivation of personal liberty or imprisonment which is dealt with by the succeeding three articles. Justice Mukherjee expressed the view as follows:

".....that Article 19 of the Constitution gives a list of individual liberties and prescribes in various clauses the restraints that may be placed upon them by law so that they may not conflict with public welfare or general morality. On the other hand, Articles 20, 21 and 22 are primarily concerned with penal enactments or other laws under which personal safety or liberty of persons could be taken away in the interests of the society and they set down the limits within which the State control should be exercised.....In my opinion the group of Articles 20 to 22 embody the entire protection guaranteed by the Constitution in relation to deprivation of life and personal liberty both with regard to substantive as well as to procedural law."(1)

In this manner Article 19 (1) (d) and clause (5) of Article 19 was not made applicable to the case.

3.21 The views expressed by learned Judges may be broadly summarised under three heads -

(1) To invoke Article 19 (1), a law shall be made directly infringing that right,

(2) Articles 21 and 22 constitute a self-contained Code.

(3) The freedoms under Article 19 postulate a free man.
3.22 It was only Justice Fazal Ali, who gave a dissenting opinion:

"What are we to put in the scales against the construction which I am inclined to adopt and in favour of the view that preventive detention does not take away the freedom of movement guaranteed in Article 19 (1) (d)? The inevitable answer has always been that while in one of the scales we have plain and unambiguous language, the opinion of eminent jurists, judicial dicta of high authority, constitutional practice in the sense that no Constitution refers to any freedom of movement apart from personal liberty ......a person who is preventively detained cannot claim the right of freedom of movement, because he is not a free man and certain other things which, whether taken singly or collectively, are too unsubstantial to carry any weight. In these circumstances, I am strongly of the view that Article 19 (1) (d) guarantees the right of freedom of movement in its widest sense, that freedom of movement being the essence of personal liberty, the right guaranteed under the Article is really a right to personal liberty and preventive detention is a deprivation of that right.....the law of preventive detention is subject to such limited judicial review as is permitted under Article 19 (5). The scope of the review is simply to see whether any particular law imposes any unreasonable restrictions" (12)

3.23 The wide contention put forward in Gopalan's case that the word 'law' in Article 21 meant law in the sense of natural law which was accepted by Justice Fazal Ali was rejected by the majority who held that the law referred to in Article 21 was enacted law. It was stated by Justice Mukherjee and even by other majority Judges that the enacted law spoken of in Article 21 had to be a valid law. Justice Mukherjea observed as follows:
"My conclusion, therefore, is that in Article 21 the word 'law' has been used in the sense of State-made law and not as an equivalent of law in the abstract or general sense embodying the principles of natural justice. The article pre-supposed that the law is valid and binding law under the provisions of the Constitution having regard to the competency of the legislature and the subject it relates to and does not infringe any of the fundamental rights, which the Constitution provides for."(13)

3.24 The above para gives a glimmer of hope that in near future the Court may re-consider Gopalan's case and take a wider view of personal liberty in Article 21. The word "Law" in Article 21 has to be a law which does not infringe any of the fundamental rights provided in the Constitution, it must be a law which satisfied the requirement of clauses (2) to (6) of Art. 19. To put it differently even a law depriving a person of life and liberty enacted by the legislature will have to be a law imposing reasonable restrictions on the citizens and in the public interest and to that extent subject to judicial review.

3.25 Though the Supreme Court denied freedom to A.K. Gopalan, in several subsequent cases the Supreme Court stood firmly on the side of freedom and liberty and the Courts insisted that even if one amongst several grounds alleged against the detenu are vague or irrelevant, the detenu was entitled to be set at liberty.

3.26 The most important case which was decided by our Supreme Court during the recent past on preventive detention was in A.K. Roy v. Union of India.(14) In post Maneka cases a trend was visible wherein our Courts
tried to uphold the dignity and personal liberty of the individuals to the greatest extent, but here in this case the majority Judges (including Justice Bhagwati) tried to toe the line of the Government and though the Court tried to bring about a change in prison conditions, the broad principles and concepts of personal liberty enumerated by our Courts in earlier cases were disregarded.

3.27 In Roy's case a group of writ petitions were filed under Article 32 of the Constitution of India challenging the validity of the National Security Ordinance and certain provisions of the National Security Act, 1980. Mr. A.K. Roy, a Marxist Member of Parliament, was detained under the Ordinance by an order passed by the District Magistrate, Dhanbad, on the ground that he was indulging in activities which were prejudicial to the public order. The respondents confined their attack mainly against the National security Ordinance, Section 1 (3) of the Constitution (44th Amendment) Act, 1978 and the National Security Act, 1980.

3.28 The main grounds of attack against the Ordinance were: Firstly, the Ordinance was not law within the meaning of Article 21 and no person could be deprived of his life or liberty by an Ordinance; moreover, the procedure prescribed under an Ordinance was not procedure established by law ordained in Article 21, and secondly the Ordinance violated the principles of separation of power, a basic structure of the Constitution of India.

3.29 As regards the first contention, Chief Justice Chandrachud, rejected the said argument. He was of the opinion "that the Constitution makes no distinction in principle between a law made by the Legislature and an Ordinance issued by the President."

The learned Chief Justice arrived at this conclusion on the basis of the provisions of Article 123, 13 (3), 367 (2), etc. According
to him, Article 123 which conferred the power to issue ordinance upon the President came under the heading "Legislative powers of the President". And the clause (2) of Article 123 provided that an Ordinance promulgated under that Article "shall have the same force and effect as an Act of Parliament". The majority view also took the help of Article 13 (3) which included "Ordinance" in the definition of "law".

3.30 Chief Justice Chandrachud pointed out that the provisions of Article 367 (2) provided that "any reference in this Constitution to Acts or laws of, or made by the legislature shall be construed as including a reference to an ordinance". He opined that an ordinance and law "equally are products of the exercise of legislative power and, therefore, both are equally subject to limitation which the Constitution has placed upon that power".^[16]

3.31 In the light of above stand, the majority held that an ordinance was a law in Article 21. If this meaning was not accepted, then, according to the learned Chief Justice, an ordinance "will stand released from the wholesome and salutary restraint imposed upon the legislative power by Article 13 (2) of the Constitution".^[17]

3.32 The majority also rejected the contention that an ordinance could be equated with the procedure established by law. The word "established" required "the procedure prescribed by law must be defined with certainty in order that those who are deprived of their fundamental right of life or liberty must know the precise extent of such deprivation". Thus a procedure to be valid under Article 21, should, according to the majority view be "definite and reasonably ascertainable".^[18]
Justice Gupta dissenting, did not agree with the view that an ordinance was "law" within the meaning of Article 21 of the Constitution. According to the learned Judge, "Article 123 (2) does not say that an ordinance promulgated under this Article shall be deemed to be an Act of Parliament to make the two even fictionally identical." He also drew a distinction on the basis of the provisions of Articles 123 and 357 the former providing for ordinance making power, and the latter, conferred on the President to make laws. Thus the difference between an ordinance and law according to Justice Gupta, "is clear and cannot be ignored". Further the majority view following Patanjali Sastri J. in the Gopalan's case(l9) laid down that the "law" in Article 21 "implies some degree of fairness, permanance and general acceptance", whereas an ordinance had "provisional" and "tentative character" and as such, the learned Judge concluded that an ordinance under Article 123 would not be the "law" as required in Article 21. Justice Gupta expressed the apprehension that if contrary view was taken, the result would be that an ordinance providing for taking away life may result in execution before an Act of Parliament.

It is submitted that the minority view is in consonance with the judicial zeal leaning in favour of the right to personal liberty. An ordinance is hasty measure of the Executive. And in this emergency, personal liberty and life should not be left to the mercy of the Executive under the garb of legislative power. The nineteen months' Emergency and the dramatic onslaught of the right to personal liberty necessitated the constituent power to amend Article 359 so as to avoid the eclipse of the Presidential emergency power on the right to personal liberty and life. This can be an important support to avoid any ordinance under Article 123 interfering with the said right. The Supreme Court of India has been commended for their activist approach in case of protecting the right to personal liberty. It may be further
submitted that the apprehension of the Chief Justice that if an ordinance was not treated as "law", in the said Article, then the ordinance shall ride roughshod or in his words, "will stand released from the wholesome and salutary restraint", is also not in right perspective. Once a distinction is accepted between an Ordinance under Article 123 and "law" for the purpose of Article 21, then such an ordinance will not stand the test of Article 21 and to that extent the precious right will be preserved.

3.35 In the majority judgement, Justice Bhagwati was also one of the members, who gave restricted meaning to the words "procedure established by law" (whereas Justice Bhagwati's judgement in Maneka Gandhi's case had liberally interpreted the word established). The reasoning given by Justice Gupta seems to be proper, when he says that an ordinance under Article 123 does not satisfy the requirement of 'procedure established by law". "An ordinance which has to be laid before both the Houses of Parliament and cease to operate at the expiration of six weeks from the re-assembly of Parliament, or if before the expiration of the period resolutions disapproving it, are passed by both the Houses can hardly be said to have that "firmness" and "permanence" that the word established implies". In Fagu Shaw's case the minority view of Justice Bhagwati with Justice Alagiriswami was that vagueness in the law relating to preventive detention could not be tolerated by judiciary while dealing with cherished rights to personal liberty.

3.36 The majority in Roy's case in order to defend their conclusion that the ordinance was "definite and reasonably ascertainable", Chief Justice Chandrachud said : "in fact the preventive detention laws were in their inception of a temporary character since they had a limited duration".
3.37 The above said observation is not at all correct. In the beginning the preventive detention laws were for short duration, i.e. the Act was continued initially every year, then every two years, and now it has become a permanent law.

3.38 Another ground of attack was against the National Security Act, 1980 that it violated Articles 14, 19 and 21. The Supreme Court held: "The Act cannot be challenged on the broad and general ground that such Acts are calculated to interfere unduly with the liberty of the people". (25)

3.39 In the light of the nature of the sacrosant rights under Articles 14, 19 and 21 and after the case of Maneka Gandhi, it would absolutely be unreasonable to completely close the door of judicial review only by saying, "no entry to all question as to the constitutional validity".

3.40 Chief Justice Chandrachud reaffirmed his Maneka position that Article 21 did not permit judicial review of reasonableness of substantive portion of the law. It allowed judicial scrutiny of procedural fairness only. He held that "the power to judge the fairness and justness of procedure established by law for the purpose of Article 21 is one thing "but" power to decide upon the justness of the law itself is quite another thing and such powers springs from a "due process" provision such as to be found in the Fifth and Fourteenth Amendments of the American Constitution". (26)

3.41 Interestingly enough Justice Bhagwati was a party in Roy's case giving majority judgement. In his dissenting opinion delivered by him in 1982 in Bachan Singh's case (27) just prior to Roy's case, he took a different view of Article 21. He interpreted procedure as including both substantive
and procedural due process. He observed:

"The word 'procedure' in Article 21 is wide enough to cover the entire process by which deprivation is effected and that would include not only adjectival, but also substantive part of law....Every facet of the law which deprives a person of his life or personal liberty would, therefore, have to stand the test of reasonableness, fairness, and justness in order to be outside the inhibition of Article 21"(28)

According to Justice Bhagwati, substantive and procedural portions of law affecting deprivation are so inseparable that both must stand the test of reasonableness, fairness and justness. He believes that rule of law permeats the entire fabric of the Constitution and constitute its basic feature. Rule of law excludes arbitrariness and, therefore, "law must not be arbitrary or irrational and it must satisfy the test of reason and the democratic form of policy" and the framers of law are accountable to the people.

In the light of the above said observations, if the Court closes its eyes to all questions, it will be shirking its responsibility as the guardian of fundamental rights and specially this was not expected from a Judge who is known as activist judge and who is known for his contribution to human rights and social justice. Judicial activism on the part of the Court is visible when the Court comes to the prison condition, which is already dealt with separately in this thesis.

In Hem Lall Bhandari's case(29) Section 8 (1) of the National Security Act, 1980 was flagrantly violated. The grounds of detention had to be communicated as soon as may be but not later than 5 days and in exceptional circum-
stances for reasons to be recorded, not later than 15 days. In this case the reasons had not been recorded and the grounds of detention were not communicated within 5 days. No satisfactory explanation was given for the delay in serving the grounds of detention.

3.45 Justice Khalid for himself and Justice Chinnappa Reddy reaffirmed the principle that the statutory and constitutional provisions relating to preventive detention must be strictly construed. On the facts of the case, the detention of the petitioner was quashed. In the words of Justice Khalid:

"....It is not permissible in matters relating to the personal liberty and freedom of a citizen, to take either a liberal or a generous view of the lapses on the part of the officers. In matters where the liberty of the citizens is involved, it is necessary for the officers to act with utmost expedition and in strict compliance with the mandatory provisions of law. Expeditious action is insisted upon as a safeguard against the manipulation". (30)

3.46 The principle laid down in the above case was reaffirmed by the same Bench in Abdul Latif v. B.K. Jha. (31) The petitioner was served a detention order under the Gujarat Prevention of Anti-Social Activities Act, 1985 on June 20, 1986. Section 11 of the Act provided for a reference to an Advisory Board that in every case where detention order had been made under the Act, the State Government shall within three weeks from the date of detention of the person under the order, cause to be placed before the Advisory Board, the ground on which the order had been made. At the time when petitioner was served with the detention order, no Advisory Board had been constituted. Even Article 22 (4) required that before the expiry of 3 months the Advisory Board should give its opinion that there are sufficient grounds for detention.
The period of three weeks expired on July 14, 1986 and the petitioner was entitled to be released on that day as no reference was made to Advisory Board as given in Section 11. However, the petitioner was not released till August 4th, 1986 and a fresh order of detention was made on the same facts. The petitioner challenged this second order of detention. An Advisory Board was constituted on August 18, 1986 and a reference to it was made on August 20th, 1986. The Advisory Board gave its report on September 26, 1986 which was three months after the first detention order but within three months from the date of second detention.

3.47 Under Section 15 (2) of the Act, the order of revocation of the earlier detention order does not prevent a subsequent detention order under the Act against a person subject to the proviso that if there were no fresh facts, the maximum period of detention shall not extend beyond 12 months from the date of detention under the earlier detention order. If the validity of Section 15 was to be upheld, it ought to be read down so as to make it conform to the requirement of Article 22 (4). Justice Chinappa Reddy for himself and Justice Khalid upheld this contention and held that unless Section 15 were read down, a fresh order of detention could be made every 99th day making it unnecessary to obtain the report of the Advisory Board within 3 months of the detention. The Court held that if the Report of the Advisory Board was not made within 3 months from the date of the first order of detention the detention became illegal, notwithstanding that it was made within 3 months from the date of the second detention order. The detention order was quashed by the Court. The observation made by the Court is as under:

"...We only desire to add that in a habeas corpus proceeding, it is not a sufficient answer to say that the procedural requirements of the Constitution and the statute have been complied with before the
date of hearing and, therefore, the detention should be upheld. The procedural requirements are, therefore to be strictly complied with if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard". (32)

3.48 In Prabhu Dayal's case (33) a smuggler of rice was detained by a District Magistrate in exercise of his powers under the Maintenance of Internal Security Act on the evidence of some incidents of illegal transport of this essential commodity across the State borders. One of the grounds lacked precise particulars and was therefore, vague and indefinite. The Supreme Court proceeded to release him because the constitutional right of the detenu to make an effective representation had been infringed. Observations of Justice Mathew speaking for the majority of the Court, have now become a part of the country's legal literature:

"Under our Constitution, the only guarantee of personal liberty for a person is that he will not be deprived of it except in accordance with the procedure established by law. The need today for maintenance of supplies and services to the community cannot be over-emphasised. There will be no social security without maintenance of adequate supplies and services essential to the community. But social security is not the only goal of a good society. There are other values in a society. Our country is taking singular pride in the democratic ideals enshrined in its Constitution and the most cherished of these ideals is personal liberty. It would indeed be ironic if, in the name of social security, we would sanction the subversion of this liberty. We do not pause to consider whether social security is more precious than personal liberty in the scale of values, for any judgement as regards that would be a value judgement on which opinions might differ. But whatever
be the impact on the maintenance of supplies and services essential to the community when a certain procedure is prescribed by the Constitution or the laws for depriving a citizen of his personal liberty, we think it our duty to see that procedure is rigorously observed, however, strange this might sound to some ears". (34)

The principle which Justice Mathew propounded in such felicitous prose was only a reiteration of what had been said earlier in many cases.

3.49 In Sk. Salim's case (35) Justice Chandrachud said:

"Laws of preventive detention by which subjects are deprived of their personal liberty without the safeguards available in a judicial trial ought to be construed with the greatest strictness. Courts must therefore be vigilant to ensure that the detenu is not deprived of the modicum of rights and safeguards which the preventive law itself affords to him. The Maintenance of Internal Security Act containing what is evidently thought to be a scheme of checks and counter-checks by which the propriety or necessity of a detention order may at various stages be examined by various authorities.....This time schedule evolved in order obviously to provide an expeditious opportunity at different levels for testing the justification of the detention order has to be observed scrupulously and its 'rigour cannot be relaxed on any facile assumption that what is good, if done within 7, 12 or 30 days could as well be good if done, say, within 10, 15 or 35 days". (36)

3.50 In Sher Mohammad v. State of West Bengal (37) a detenu had to be released because the State Government did not report the detention within 7 days which was the requirement of the Statute. Justice Krishna Iyer explained:
"In short, there has been an infringement of the procedural safeguard. This Court has in several rulings held that the liberty of the citizen is a priceless freedom, sedulously secured by the Constitution. Even so, during times of emergency, in compliance with the provisions of the Constitution, the freedom may be curtailed, but only in strict compliance with statutory formalities which are the vigilant concern of the Courts to enforce.... We have pointed out how in the present case, there has been a failure on the part of the State Government to comply with Section 3 (4). Judicial engineering prevents breaches of constitutional dykes protecting fundamental freedoms".  

3.51 In Wasi Uddin Ahmed's case Justice A.P. Sen correctly observed:

"The words 'and shall afford' in Art. 22(5) have a personal liberty. The law insists upon the literal performance of a procedural requirement. The need for observance of procedural safeguards, particularly in cases of deprivation of life and liberty is of prime importance to the body politics".  

3.52 In Vijay Narain Singh v. State of Bihar Justice Venkataramiah with whom Justice Chinnappa Reddy fully concurred, observed:

"The Court should examine the case without being overwhelmed by the gruesomeness of the incident involved in the criminal trial. It is well settled that the law of preventive detention is a hard law and, therefore, it should be strictly construed. Care should be taken that the liberty of a person is not jeopardised unless his case falls squarely within the four corners of the relevant law. The law of preventive detention should not be used merely to clip the wings of an accused, who is involved
in a criminal prosecution. It is not intended for the purpose of keeping a man under detention when under ordinary criminal law, it may not be possible to resist the issue of orders of bail, unless the material available is such as would satisfy the requirements of the legal provisions authorising such detention. When a person is enlarged on bail by a competent criminal Court, great caution should be exercised in scrutinising the validity of an order of preventive detention which is based on the very same charge which is to be tried by the Criminal Court". (42)

3.53 In State of Punjab v. Jagdeo Singh Talwandi (43) Chief Justice Chandra- chud, speaking for the Constitution Bench, made the following pertinent remarks:

"This Court has observed in numerous cases that while passing orders of detention, great care must be brought to bear on their task by the detaining authorities. Preventive detention is a necessary evil but essentially an evil. Therefore, deprivation of personal liberty, if at all, has to be made on the strict terms of the Constitution. Nothing less. We will utter the oft-given warning yet once more in the hope that the voice of reason will be heard". (44)

3.54 In Ichhu Devi's case (45) the validity of detention of the son of the petitioner under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 was in question. This case deserves notice for two reasons: Firstly, it asserts that in a case for habeas corpus "the practice evolved by Courts is not to follow strict rules of pleadings, nor place undue emphasis on the question as to on whom the burden of proof lies. Even a post card written by a detenu from jail has been sufficient to activate
this Court into examining the legality of detention." Justice Bhagwati pointed out that whenever a petitioner approached the Court for habeas corpus, it almost invariably issued a rule requiring the detaining authority to justify the detention. On the issuance of such a rule, the detaining authority was bound to place before the Court all relevant facts and to justify the detention under the mandatory provisions of law. Secondly, Justice Bhagwati's judgement emphasises the Court's attitude towards liberty: 'The Court should always be in favour of upholding personal liberty for it is one of the most cherished values of mankind without it life would not be worth living. It is one of the pillars of free democratic society....This Court has through the judicial pronunciation created various legal bulwarks and breakwaters into the vast powers conferred on the executive by the laws of preventive detention.'

3.55 Other interesting interpretations of Article 21 are given below due to their relevance to the theme of preventive detention. In Francis Coralie Mullin's case(46) the Supreme Court held that any act which damages or injures or interferes with the use of, any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21. Not only this, every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Thus, there is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading
3.56 The same consequences would follow even if this problem is considered from the point of view of the right to personal liberty enshrined in Article 21. 'Personal Liberty' would include the right to socialise with members of the family and friends subject, of course, to any valid prison regulations. The right of a detenu to consult a legal adviser of his choice for any purpose not necessarily limited to defence in a criminal proceeding, but also for securing release from preventive detention or filing a writ petition or prosecuting any claim or proceeding, civil or criminal, is also included in the right to live with human dignity and is part of personal liberty and a prison regulation may, therefore, regulate the right of a detenu to have interview with a legal adviser in a manner which is reasonable, fair and just; but it cannot prescribe an arbitrary or unreasonable procedure for regulating such an interview and if it does so, it would be violative of Articles 14 and 21. Moreover, presence of an officer at the time of the interview also seem to be an unreasonable procedural requirement.

3.57 In State of Maharashtra v. Prabhakar Pandurang Sanzgiri the Supreme Court held:

"There are five distinct lines of thought in the matter of reconciling Article 21 with Article 19, namely: (1) if one loses his freedom by detention, he loses all the other attributes of freedom enshrined in Article 19; (2) personal liberty in Article 21 is the residue of personal liberty after excluding the attributes of that liberty embodied in Article 19; (3) the personal liberty included in Article 21 is wide enough to include some or all the freedom mentioned in Article 19, but they are two distinct fundamental rights - a law to be valid shall not
infringe both the rights; (4) the expression, 'law' in Article 21 means a valid law and, therefore, even if a person's liberty is deprived by law of detention, the said law shall not infringe Article 19; and (3) Article 21 applies to procedural law, whereas Article 19 to substantive law relating to personal liberty.'

3.58 In yet another case of Masood Alam v. Union of India the Supreme Court held that:

"Our Constitution undoubtedly guarantees various freedoms and personal liberty to all persons in our Republic. But the constitutional guarantee of such freedoms and liberty is not meant to be abused and misused so as to endanger and threaten the very foundation of the pattern of our free society in which the guaranteed democratic freedoms and personal liberty is designed to grow and flourish. The larger interests of our multi-religious nation as a whole and the cause of preserving and securing to every person the guaranteed freedoms peremptorily demand reasonable restrictions on the pre-judicial activities of individuals which undoubtedly jeopardise the rightful freedoms of the rest of the society. These restrictions within the constitutional limits have to be truly effective if the detaining authority is of opinion on grounds which are germane and relevant that is necessary to detain a person from acting prejudicially as contemplated by section 3 of the Act, then it is not for the Supreme Court to consider objectively how imminent is the likelihood of the detenu indulging in these activities."

3.59 Although there are quite a large number of cases on Preventive Detention most of them have gone before the Courts some of which on real grounds and others as a last resort of a drowning man catching at a straw with a resigned
philosophy that if some relief comes from the Court by a speculative legal-try well and good! (51)

3.60 Thus from all the above mentioned cases it is observed that in preventive detention cases, liberty of the individual is always affected. The preventive detention laws are considered to be evil laws and if these evil laws are put into service for an ostensibly beneficial purpose people would tolerate it but the authoritarian Government may start using the same law against innocent persons or good persons whom it despises, then it would be creating a havoc with the liberties of the people.

3.61 According to this Researcher, preventive detention laws are not at all necessary in mature democracies, specially as a peace time measure. In America preventive detention laws are absolutely unknown and even in England they are resorted to only during war time. In fact, there is no country in the world which makes use of preventive detention during peace time as it is done in India. If other countries can do without preventive detention, is the situation in India so critical that for all times preventive detention laws are resorted to by the Executive?

3.62 Since the time our constitution came into force in the year 1950, preventive detention laws have been used by the Executives indiscriminately without bothering about the liberties of the people. Even in our Constituent Assembly preventive detention was discussed and in the back ground of circumstances prevailing at that time (violence had erupted on the partition of India and because of Telangana Movement) our leaders thought it necessary to include the provisions of preventive detention in our Constitution.
3.63 In the opinion of this researcher preventive detention laws should be made use of only during grave national emergency. In India the emergency was declared twice because of external aggression by foreign countries once in the year 1962 (Chinese aggression) and for the second time in the year 1971 (Pakistan). Under such circumstances the Government is under great pressure and its dominant purpose is the successful prosecution of war and if during those periods the preventive detention is resorted to by the Executive, people would not mind. But the manner in which preventive detention was made applicable during the emergency of 1975-77, has raised greatest doubts as to whether preventive detention should at all be a part of our liberal democratic Constitution. The most glittering example of it is Shivkant Shukla’s case.\(^{(52)}\) Our Constitution which embodies the principle of rule of law and dignity of the individual, has also granted unbridled powers to the Executive in the form of preventive detention which are used by them not for the good of the people, but to satisfy their own whims and fancies. The continued use of unfettered powers would pose a serious threat to the democratic way of life in this country and would be disastrous for all its people. The people of India elect their representatives in the hope that their liberties will be secure in their hands but instead they are harassed by harsh, tyrannical and oppressive laws and oppressive Executive actions.

3.64 Therefore, preventive detention should be made use of only at the time of grave national emergency and not during peace time or normal times. The safeguards provided for detaining a person should be strictly enforced and a very narrow interpretation should be given to preventive detention. Care should be taken that liberty of a person is not jeopardised unless his case falls squarely within the four corners of the relevant law.

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NOTES. Chapter Three

1. C.A.D. Vol. 9 p. 1547.

2. Mr. H.M. Seervai has discussed this point in his book, "Emergency, Future Safeguards and Habeas Corpus case: A Criticism", pp. 84-95 wherein he has reached the conclusion that preventive detention in times of peace, is unjustified.


5. Id. at p. 1436.

6. In Punjab and Union Territory of Chandigarh the amendment is much more drastic. A detenu can be detained for six months without a reference to the Advisory Board. The maximum period of detention has been raised from one year to two years.


8. Id. at p. 60.

9. Id. at p. 73.

10. Id. at p. 74.

11. Id. at pp. 93-94.

12. Id. at p. 56.

13. Id. at p. 103.

14. A.K. Roy v. Union of India AIR 1982 SC 710. The Bench consisted of C.J. Chandrachud, Bhagwati, Gupta, Tulzapurkar and Desai, JJ. The majority judgement was given by C.J. Chandrachud for himself and on behalf of Bhagwati and Desai, JJ. Justice Gupta delivered dissenting opinion Justice Tulzapurkar concurred with majority, but joined the minority on only one issue.

15. Id. at p. 720.

16. Ibid.

17. Id. at p. 722.

18. Ibid.

19. Id. at p. 755.

20. See supra note 7 at p. 74.

21. Supra Note 14 at p. 722.

22. Id. at p. 755.


24. Supra Note 14 at p. 722.

25. Id. at p. 739.

26. Id. at p. 726.


28. Id. at p. 1340.


30. Id. at p. 766.

31. AIR 1987 SC 725.

32. Id. at p. 728.


34. Id. at p. 199.


36. Id. at pp. 603-604.

37. AIR 1975 SC 2049.

38. Id. at p. 2050.

In Chapter VI Emergency Provisions have been discussed in details.

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