Chapter VII

Summary, Suggestions and Conclusion
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Liberty or freedom is considered as the greatest possession of men. Even among animals there is an urge to live unhindered and a captive bird or animal attempts to shatter the chains or the cage which captivate it in order to live in an atmosphere of its own liking. Among human being, the urge to acquire freedom from restraint artificially imposed has been the commonest feature of the long history of the human race.1

"Man is born free; everywhere he is in chains." This statement of Rousseau describes what a man sees in the world. The inner urge for freedom is a natural phenomenon of human society.2

The term personal liberty has been defined by various jurists in different ways. According to Black stone, "Personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatever place one's own inclination may direct, without imprisonment or restraint unless by due process of law."3

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1Bansal VK, 'Right to Life and Personel Liberty in India,' Deep and Deep Publications, New Delhi-27, p.9
2ibid.
The Supreme Court of India, got the opportunity to define the term 'personal liberty' for the first time in A.K. GOpalan Vs State of Madras.  

According to Mukherjee, J. 'Personal Liberty' means liberty relating to or concerning the person or body of the individual and it is, in this sense, anti thesis of physical restraint or coercion. 'Personal liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification. This negative right constitute the essence of personal liberty.

Liberty seeks to develop the personality of the individual but it cannot be allowed to go untramelled. The individual has to grow within the social confines. Unsocial growth of the individual has to be prevented. This has to be done by reconciling individual liberty with social control.

Liberty must be controlled in the interest of society, but the social interest must be overpowering to justify the impairment of individual liberty. Social interests are not the interests or prejudices of the majority, for even the liberty of a single individual is precious and must be safeguarded against the violent opposition of an overwhelming majority. The burden must always be upon those who make encroachments upon liberty to justify them. Liberty can never

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4AIR 1950 SC 27.
5Ibid., pp.96-97.
6Supra Note 1, p.29.
be on the defensive, it is authority that must always be prepared to be challenged.\(^7\)

If people were given complete and absolute liberty without any social control the result would be ruin; if the government were given an absolute and complete power to delimit personal liberty without constitutional restrictions the result would be tyranny.\(^8\) Locke had rightly observed:

"Where law ends, tyranny begins"

There is some need of protecting personal liberty against governmental power and also some need of limiting personal liberty by governmental power. The ideal situation is a matter of balancing one against the other or adjusting conflicting interests. There has always been a search for a satisfactory equilibrium between government's power on the one hand and individual liberty on the other, as the conflict between the two is not irreconcilable. Indeed it may be argued that the most powerful motivating force leading to the creation of the political authority has through all history been a desire to preserve and protect liberty.\(^9\)

Exercise of the right of liberty can never be absolute. It is always subject to reasonable restrictions. The liberty of a few cannot be allowed to be asserted in such a manner as to destroy the

\(^7\)M.C. Chagla, "Law, Liberty and Life." pp. 16-17.
\(^8\)Supra Note 1, p. 29.
\(^9\)ibid., p. 30.
liberty of many. To safeguard the liberty of the weak, it becomes essential to put restrictions on the liberty of the strong.\textsuperscript{10}

The balance between the social control and individual liberty is essential. When government exercise social control, it, of course, delimits personal liberty, but the government does not exercise its control, the liberty of each may be destroyed by the actions of others in the exercise of the same liberty. So, the social control, which delimits individual personal liberty on the one hand, enlarges general personal liberty on the other hand. Perhaps no abstract standard can be formulated to determine in all cases whether it would be better to permit personal liberty or to have social control in a particular situation. It would depend upon the facts and circumstances.\textsuperscript{11}

Right to freedom being one of the basic tenets of democracy naturally got priority under the Indian constitution in its preamble as well as in Chapter-III which relates to fundamental rights of the citizens. But the more important cause for laying emphasis on his right was protection of life and personal liberty. Nevertheless, fundamental rights guaranteed under the Indian constitution are not based on the theory of natural rights and reasonable restrictions have been imposed on the exercise of different rights in the interest of the community. Pandit Nehru in this connection correctly said:

"No individual can override ultimately the rights of the community at large and no community should injure and invade the

\textsuperscript{10}J. Khanna H.R.; Inaugural address to the remainder on personal liberty at the Kurukshetra University on Dec 9, 1978, p.20.

\textsuperscript{11}ibid.
rights of the individual unless it be for the most urgent and important reasons."12

Article 21 provides that no person shall be deprived of his personal liberty except according to procedure established by law. It means that no member of the executive shall be entitled to interfere with liberty of others unless the action can be supported and justified by some provision of law. In short, no man can be subjected to any physical coercion that does not admit of legal sanction. It must be ensured that those who are called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and the rules of the law. The constitution under its Article 22 authorises legislature to make laws providing for preventive detention for reasons connected with the security of a state, the maintenance of public order, unity and integrity of India etc. It would be competent for the legislature to enact that a person should be detained without trial for any of the above reasons. Against such laws the individual shall have no right of personal liberty.

Preventive detention has become a necessary evil. Disruptive and terrorist forces at work in different parts of the country particularly in Punjab have endangered the territorial integrity and sovereignty of the nation. It had also created problems of the maintenance of public order and supply and services essential to the community. Smuggling of goods and black-marketing activities were

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clandestinely organised were carried on a large scale in India and in Punjab. In recent years India has been facing a problem of transit traffic in illicit drugs. The spill-over from such traffic has caused problems of abuse and addiction. These terrorist and other activities have amply justified the existence of the provision of preventive detention under the constitution of India.

When the independence of the nation is at peril and the socio-economic fronts are being deteriorated by internal elements like black marketers hoarders, smugglers and drug traffickers and is equally assisted by external forces (like I.S.I. of Pakistan) then individual freedom and liberty has no meaning.

Furthermore, it cannot be claimed that the framers of the Indian constitution could draft a wholly indigenous or a novel constitution to achieve this objective of rightly balancing the interest of the individual with those of the community. Dr Ambedkar was correct when he remarked that there could be nothing new in a constitution framed so late in the history of the world. According to him, "the only new thing if there can be any in a constitution framed so late in the day are variations made to remove the faults and to accommodate it to the needs of the country." And no where this stark fact and pragmatic approach are more apparent than in the formulation of the fundamental rights and specially in setting forth systematically the rights relating to freedom.

Right to freedom of citizens is not absolute and is contingent upon society. In a civil society, neither unfettered freedom nor complete immunity from restraint and interferences is possible, for that would lead to anarchy. Consequent upon which, the desires of an individual have to be controlled, regulated and reconciled with the desires of other individuals. Right to freedom, thus, signifies those rights which should be guaranteed to a citizen without in any way harming similar rights of other citizens. The very concept of freedom carried judicious limits to it.\(^\text{14}\)

The provisions for preventive detention, explicitly provide wide powers in the hands of the legislature to detain persons. They may be informed of the grounds of detention and they may not be informed of the ground, of detention. Even when these provisions were under discussion in the constituent Assembly they were subjected to very seven criticism. Replying to the criticism Dr Ambedkar, the Chairman of the Drafting Committee, observed:

"If all of us follow constitutional methods to achieve our objective. I think the situation would have been different and probably the necessity of having preventive detention might not be there at all. But I think in making a law we ought to take into consideration the worst and not the best... There may be many parties and persons who may not be patient enough to follow constitutional methods but are impatient in reaching their objective and if for that purpose (they) resort to unconstitutional methods.

\(^{14}\)A.K. Gopalan Vs State of Madras, AIR 1950 SC p.27.
Then there may be a large number of people who may have to be detained by the executive."\textsuperscript{15} He then gave a list of safeguards which had been provided in the constitution to prevent misuse of the provisions of preventive detention. The greatest safeguard according to him against abuse of preventive detention was that it takes place under the law.\textsuperscript{16} The idea of preventive detention did not occur in the original draft constitution but was incorporated at the final stage. Hence, something which occurred in between the draft constitution and its final passage must have determined its inclusion. Some of the factors which might have impelled the constitution framers to include provisions regarding preventive detention were the division of the country, the food scarcity in the country, the exploitation of the situation by political opportunists and adventures, profiteers and foreign agents to undermine political integrity and financial stability.\textsuperscript{17}

Dr B.R. Ambedkar had anticipated that there would be no need to detain preventively but the expectations were soon belied. Resort had to be taken to preventive detention Act since the inauguration of the constitution. It was first passed at the initiative of Sardar Patel and later renewed at different intervals. It has thus almost become an integral part of the constitution. For from being permissive it has almost become obligatory in nature.\textsuperscript{18}

\textsuperscript{15}CAD, IX, p.1556.
\textsuperscript{16}CAD, X, p.575.
\textsuperscript{17}Dwivedi KC, 'Right to freedom and the supreme court.' Deep and DeepPublications, New Delhi-27, p.125.
The detention without trial was not a new idea introduced by the framers of Indian constitution, for the first time. It was in existence in pre-civilisation period particularly in slave age feudal society. Preventive detention was also used in Mugle period quite frequently. Avrangzib dismissed Morad from his pretended sovereignty without even the ceremony of a quarrel. He was kept in confinement at Gwalior, the great state prison of those days for the maintenance of law and order and security of the state Aurangzib also detained Shah Jahan at Agra for similar reason.\textsuperscript{19}

It was also in existence since the early days of British India, under the notorious Bengal Regulation 111 of 1818 and similar enactment's in Madras and Bombay which laid no fetters upon the powers of the government to detain a person on suspicion. Then it was Rule 26 of the Rules framed under the Defence of India Act, 1939, which authorised the government to detain a person whenever it was satisfied with respect to that particular person that such detention was necessary to prevent him from acting in any manner prejudicial to the defence and safety of the country and the like.\textsuperscript{20} It was, of course, a war time measure modelled on similar legislation in England, during world war II, the validity of which had been upheld by the House of Lords.\textsuperscript{21}

The makers of the constitution of India simply made it possible for such legislation to be continued under the Constitution, subject

\textsuperscript{19}Mountstreet Elphinstone, 'History of India, Vol.11,' Atlantic Publishers & Distributors, Ansari Road, Darya Ganj, New Delhi-110002, pp.220-21.

\textsuperscript{20}Emperor Vs Sibnath, SIR 1945, PC at p.156.

\textsuperscript{21}Liversidge Vs Anderson, 1942 AC, p.206.
to certain safeguards laid down therein because they painfully visualised that the circumstances which had necessitated such abnormal legislation in the past had not disappeared at the birth of India's independence. It is common knowledge that the Republic had its birth amidst anti social and subversive forces and the ravages of communal madness involving colossal loss of life and property. In order to save the infant Republic from the assaults of any such subversive elements, therefore this power had to be conferred upon the State. But the makers of the constitution improved upon the existing law by subjecting the power of preventive detention to certain constitutional safeguards upon the violation of which the individual would have a right to approach the Supreme Court or the High Court because the safeguards are fundamental rights, for the enforcement of which the constitutional remedies would lie.\textsuperscript{22}

Our republic had its birth amidst anti social and subversive forces and the ravages of communal madness involving colossal loss of lives and property. In order to save the infant Republic from the inroads of any such subversive elements, therefore this power had to be conferred upon the state.\textsuperscript{23}

B.M. Gupta had observed:

"Those who occupy seats of authority and responsibility... warn us that the aftermath of war and partition has unchained forces which if allowed to gain upper hand will engulf the country in anarchy and

\textsuperscript{23}ibid.
ruin. They therefore advocate the parliament must be able to pass law arming the Executive with adequate powers to check these forces of violence, anarchy and disorders."24

H.V. Pataskar had observed:25

"It is better in the interest of the Central Government, it is better in the interest of the nation that we have one uniform law throughout the land with respect to this unwholesome and unpopular matter of detaining people without trial. I learn on good reliable authority that even in foreign countries we are being blamed for the way in which some of these provisions are being carried out. It is not desirable therefore that we have one uniform legislation? We have got our freedom newly. People have not learnt to behave democratically and there are so many actions which are beyond control and resort has to be had to detention without trial. I would submit, let us not be warped by what is happening in the present. let us be guided by the wholesome principles which should prevail and if at all this thing is to be done, that should be done by the central government which may take a more dispassionate view rather than by the provincial governments."

However Acharya Kirpalani participating in the Lok Sabha debates had cautioned:

"It is not the opposition, it is not the goondas, it is not the black-marketers, it is not even the communists, it is you (referring to the government) who are the greatest enemies of this infant

democracy. If ever this democracy dies, you will be responsible for it. You may live for a day and be no more, but this will be the judgement of history to your ever lasting shame."26

The moderate opposition and even the government is distressed by the propaganda points the government is forced to give away by enacting the policy of preventive detention. It gives the communist opposition an opportunity to denounce the government not only from the points of view of justice, but also from the points of view of legal jurisprudence, humanity, democracy and self-respect.27

Democrats in India are caught in the age-old predicament of having to walk on a fence between freedom and control. Should they fail to constrain the sometimes frantic and destructive forces of divergence and discontent, the rule of law may give place to the law of the Jungle. Direct action then becomes firmly rooted as the only sure way of attracting the attention of the powers that be.28

The above provisions of the constitutions are unique from another view point. They are not self-executory but require a law to be made by the legislature for its execution and must conform to the conditions, laid down in the Article 22 of the constitution. Moreover the preventive detention legislation can subsist only so long the central or state legislature desire. The preventive detention Act, 1950, was thus passed by the Indian Parliament which constituted the first law of preventive detention of free India.

26 Lok Sabha Debates, Dec 13, 1954, Col.2731.
Sardar Patel, who piloted the first Bill relating to preventive detention, conceded that he had two sleepless nights before introducing that Bill in the Parliament. Though the preventive detention Act was passed in the year 1950 as a short time measure but it continued until 1969. Even after that no vacuum was created in the area of preventive detention. The state legislatures immediately adopted laws relating to preventive detention.

The revival of anarchist forces obliged parliament to enact a new Act, named the Maintenance of Internal Security Act (popularly known as MISA) in 1971, having provisions broadly similar to those of the preventive detention Act of 1950.

The number of persons detained under the Maintenance of Internal Security Act (MISA) which replaced preventive detention Act was 34,630 on 19 March 1977. This included 28,386 persons detained under Section 16-A. After the release of political prisoners the tally was 6,851. This included a large number of prisoners under MISA and the defence of India rules and other laws. The then Home Minister Mr Charan Singh declared that spies, rebels who believed in violence and nexalities whose release might harm the security of state would continue to be in prison. The grounds on which preventive detention was resorted to in 1977 were "the defence of India," "the Security of the State," relations with foreign powers and maintenance.

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31Section 16-A was inserted by MISA (Amendment) Act, 1975. 56. It incorporated special provisions for dealing with Emergency.
of supplies and services essential to the community. Both Sardar Patel and C. Rajagopalachari brought the measure before the dominion legislature reluctantly as an exceptional measure, and sought to do away with it as soon as conditions permitted but later it degenerated into a necessity.

Frank Anthony, a veteran Anglo-Indian leader, considered the preventive detention (continuance) Bill a blot on the government's capacity to govern. He observed:

"It is shameful thing to invoke the constitution, to invoke a part of the fundamental right as a sanction for detention without trial in times of peace, which is something utterly abhorrent and must be abhorrent to any civilized community."

The leader of the communist group in Rajya Sabha, Mr Bhupash Gupta and even member of the ruling party P.N. Sapru objected to the incorporation of preventive detention Act on the stature book. It was considered as a slur on the whole country and a "successor to Rowlatt Act."

However, the ruling party was of the view that application of preventive detention Act in India was novel. According to Tek Chand provisions similar to the Indian position were to be found in the internal security act, 1950 of the United States. Similarly the

33 LSD, Vol.V. No.76, 30 May 1956, Col.10048.
35 See also RS. PD, Vol.XLV, No.26, 21 December 1963, Col.4553.
37 LSD, Vol.V. No.76, 30 May, 1956, Col.10089.
Emergency Powers Act, 1920 had earlier given similar powers to the crown in United Kingdom. According to Tek Chand both were peaceful measure. He observed:

"The reason for retention of such a law should be this, whenever the day to day peaceful avocation of the peace loving citizen can be threatened by forces of disruption, by forces of subversion and if it become, impossible to have resort to the normal law, when people stop their business, when the law and the procedure stop, allowing this matter a good deal of deliberation there may be a resort to such measure."  

The then Home Minister Nanda defended the measure on the ground that the measure does not stifle or corrupt democracy but enlarges it.

He further observed:

"...there is need to preserve the tranquillity and peace and the stability of the nation and also to work for these ends - the economic and social ends and objective - the law is required."

In times of peace, preventive detention was something unknown in the United States of America, United Kingdom, Australia and in Canada. In India, the adoption on permanent footing, of the power of executive to arrest persons on suspicion, which is tolerated in other countries only during emergencies, cannot, on principle, but justified by any lover of liberty. But no proper assessment of this provision of

38 ibid., Col.10089.
40 RS, PD. Vol.XVL, No.27, 23 Dec 1963, Col.4705.
Indian constitution is possible without taking note of the then prevailing circumstances.

In 1974, Parliament passed the conservation of foreign exchange and prevention of smuggling Activities Act, 1974 (commonly referred to as the COFEPOSA), as an economic adjunct of the MISA. While the MISA was, in general, aimed at subversive activities, the COFEPOSA is aimed at anti-social activities like smuggling, racketing in foreign exchange and the like. MISA, 1971 was repealed in April, 1978, but COFEPOSA, 1974, still remains on the statute book. Later two Acts, namely the prevention of black-marketing and maintenance of supplies of essential commodities Act, 1980 and the National Security Act, 1980, were passed by the Parliament. Then again in the year 1988 parliament passed another legislation namely the prevention of illicit Traffic in Narcotic Drugs and Psychotropic substances Act, 1988 (commonly known as PITNDPS) to deal effectively with persons engaged in illicit traffic of drugs and psychotropic substances within the country.41

It is now fairly settled principle that an order of preventive detention is liable to be struck down if it has been made for a purpose other than those indicated in the enabling statute.42 Thus the courts have been required to consider whether the use of preventive detention in particular cases is for the purpose indicated in the enabling statute.

41Supra Note 31, p.137.
42State of Bombay Vs Atma Ram Vaidya, AIR 1951, SC 11.
The courts have always insisted on the strict compliance of the law. Thus where detention is permitted on the ground of public order, the court invalidated detention on the ground of law and order.

Justice Hidyatullah (as he was then) observed:43

"Public order comprehends disorders of less gravity that those affecting 'security of the state.' 'Law and order' also comprehends disorders of less gravity than those affecting 'Public Order.' One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of the state. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not the security of the state."

Clauses 5 and 6 of Article 22 have been discussed by the Supreme Court in numerous of its judgements. The real meaning and effect of clauses 5 and 6 of Article 22 came in for considerable consideration by the Supreme Court in state of Bombay Vs Atma Ram Sridhar Vaidya.44 The judgement of the case have since then influenced the judgements of this court in several later decisions.

The Supreme Court observed45 by a majority in the Atma Ram Vaidya case as thus:

"Clause(5) of Article 22 confers two rights on the detenu, namely, first, a right to be informed of the grounds on which the order of detention has been made, and secondly (a right) to be

44AIR 1951 SC 157.
45ibid.
afforded the earliest opportunity to make a representation against the order, and though these rights are linked together, they are two distinct rights. If grounds which have a retinal connection with the objects mentioned in Section 3 (of the preventive detention Act, 1950) are supplied, the first condition is complied with. But the right to make a representation implies that the detenu should have information so as to enable him that the detenu should have information so as to enable him to make a representation, and if the grounds supplied are not sufficient to enable the detenu to make a representation, and if the grounds supplied are not sufficient to enable the detenu to make a representation, he can rely on the second right. He may if he likes ask for further particulars which will enable him to make a representation. On an infringement of either of these two rights the detained person has a right to approach the court (of law) and complain that there has been an infringement of his fundamental right, and even if an infringement of the second right under Article 22(5) is alone established he is entitled to be released by Court."

It is now settled that communication of grounds which is required by the earlier part of clause 5 of Article 22 is for the purpose of enabling the detenu to make a representation, the right which is guaranteed by the latter part of the clause. A communication in this context must, therefore, mean imparting to the detenu sufficient and effective knowledge of the facts and circumstances on which the order of detention is passed, i.e. of the
prejudicial acts which the authorities attribute to him. Such a communication would be there when it is made in a language understood by the detenu.46

'Communicate' is a strong word. It requires that sufficient knowledge of the basic facts constituting the grounds should be imparted effectively and fully to the detenu in writing in a language which he understands, so as to enable him to make a purposeful and effective representation. If the grounds are only verbally explained to the detenu and nothing in writing is left with him in a language which he understands, then that purpose is not served, and the constitutional mandate in Article 22(5) is infringed.47

The grounds of detention have now become severable. Section 5-A has been incorporated by Act No.35 of 1975 in COFEPOSA, 1974 and by NSA (Second Amendment) Act, 1984 in NSA.48 The courts had earlier consistently taken the view that entire order of detention is liable to be struck if one or some of the grounds is or are vague, non-existent, non-relevant, stale or invalid for any other reason since it was not possible to hold that the detaining authority making the order reached the requisite subjective satisfaction as provided in Section 3 of the Central Legislations with reference to the remaining ground or grounds and made the order of detention.49

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46Kubic Darvsz Vs Union of India, AIR 1990 SC 605.
47Ibid.
48Section 5-A COFEPOSA 1974, Section 5-A NSA, 1980 and Section 6 of PITNDPS Act, 1988. For all purposes these three sections are identical.
A close scrutiny of the provisions indicate that in case a detention order has been made on two or more grounds, such an order of detention shall not be deemed to be invalid or in operative merely because one or some of the grounds are vague or invalid. In the opinion of the author this is a retrogatory step. The Executive now while exercising its subjective satisfaction before passing the order of detention would not be careful enough to ensure that cause of detention is really in existence and not vague, non-existent or not relevant. He would simply frame the charges against the detenu in as detail as possible and would be benefitted even all the grounds except one is found to be valid and would not alter order of detention. This gives enough scope to the detaining authority to exercise power of detention whimsically.

Though the Constitution has recognised the necessity of laws as to Preventive Detention, it has also provided safeguards to mitigate their harshness by placing fatters on legislative powers conferred on the legislatures. One of the safeguards is review by the Advisory Board of Preventive Detention cases.

Art.22(4) prior to the 44th Amendment Act, 1978, provided that no law providing for preventive detention shall authorise the detention of a person for a period longer than three months unless the Advisory Board constituted of persons who are or have been qualified to be High Court Judges has reported before the expiration of the said

period of three months that there is in its opinion sufficient cause for such detention.

The 44th Amendment Act, 1978, has substituted a new clause for clause(4) which now reduces the maximum period for which a person may be detained without obtaining the opinion of the Advisory Board from 3 months to 2 months.

The Amendment has also changed the composition of the Advisory Board. The Advisory Board shall be constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court. It shall consist of a chairman and not less than two other members. The Chairman of an Advisory Board shall be sitting judge of the appropriate High Court and the other members shall be sitting or retired judges of any High Court. Thus an Advisory Board as envisaged under the Amendment Act of 1978 shall now be an independent an impartial body i.e. free from executive control. However, the 44th Amendment Act, 1978 as discussed above has not been implemented so far.

The composition of the Advisory Board in the opinion of the author should be strictly as per the changes of the 44th constitution (Amendment) Act, 1978. Therefore, it should be implemented at the earliest. If would certainly give credibility to the proceedings of the Advisory Board, by appointing serving or retired judges of the High Court preferably serving as a member of Advisory Board and drawn from a panel recommended by the Chief Justice of the concerned High Court. The judges either serving or retired are expected to act
with complete fairness and competence. But the influence of the party in power over a few judges cannot be absolutely ruled out. However, this appointment of High Court judges from other states than the home state would definitely remove the doubts if any regarding the favourable attitude towards the government.

The deduction from three months to two months beyond which a person cannot be detained without the opinion of the Advisory Board as suggested by the 44th Amendment Act, 1978 should also be made effective immediately. It would reduce considerably the hardships cause to the dëtenus. More over two months period is certainly enough for the Executive to present their cases before the Advisory Board.

The Janta Government also sought sincerely to alleviate the rigors of the procedure for preventive detention by effective changes in clauses 4 and 7 by enacting the Constitution (44th Amendment) Act, 1978. But the relevant provisions of this Amendment Act could not be brought into effect immediately since some changes in the machinery of the Advisory Board had to be made. Hence, the Amendment Act of 1978 empowered the central government to bring into force these provisions by issuing notifications paradoxically. nevertheless, before any such notifications could be issued, the Janta Government had its fall and Mrs Gandhi returned to power in January, 1980. The government refused to issue any such notification notwithstanding adverse comments by the Supreme Court in view of
the inordinate delay. In the results the original clause relating to preventive detention in Article 22 subsist till today and the relevant provisions of the Amendment Act of 1978, solemnly passed by Parliament, remain dead letter. If India's pledge to the world community for the protection of the human rights has to be fulfilled, (India being a signatory to the human rights conventions) then the constitutional provisions relating to preventive detention must aim towards more controls on the legislative and the Executive authorities and lesser restrictions on the detenus. Further the measure must be limited to extra-ordinary situations which shall include the defence and the security of the country, and that it should form part of emergency provisions. In a federation the central legislature alone should have such a power and that too for a limited time. A responsible authority should be conferred with extra-ordinary powers and the erring executive should be brought to book. The provisions for liability should be incorporated in the various statutes itself dealing with preventive detention. This would operate as a check on the executive while exercising the powers of detention arbitrarily.

The author is of the view that care must be taken so that preventive detention laws are handled by persons fully trained and having experience in such matters. The rights of the citizens can be safeguarded and the precious time of the court can be saved by following this suggestion. The detaining authorities are required to

deal with such cases with more care and circumspection. They should not leave such cases to be dealt with by lower officials, and should keep a track on such cases from beginning to the end and also take care that the representation if any made by the detenus are also dealt with expeditiously without any delay.

In matters where the detention orders are passed in relation to such persons who are already in jail under some other laws, the detaining authorities should always apply their mind and show their awareness in this regard before passing an order of preventive detention. It became clear to the author while interviewing various preventive detenus that once the detaining authority could not successfully defend the cases of penal nature and there was every possibility of the release of the detenu than the detaining authorities as a matter of routine serve on the detenus other grounds of detention of a preventive detention law while the detenu is already in jail. Such power of detention should be exercised where it is necessary to detain the person in the larger interest of the society. It is hoped that the concerned authorities shall deal with such matters with special care.

The time is ripe when we cannot ignore the warning give by Chief Justice Gajendragadkar\textsuperscript{33} and Justice Hedge\textsuperscript{34} that the continuous exercise of such a power will make the concerned authorities, if not blunt, more insensible towards the right to personal liberty and this attitude of the Executive will pose a threat to the

\textsuperscript{33}Rajeev Dhavan & Jacob Alice, Edited.
\textsuperscript{34}Sections 107, 151 of Cr.PC, 1973.
basic values on which the democratic way of life should be founded. In order to respond to the warning the legislature must do away with the existing provisions relating to preventive detention. The existing situation in the country does not call for such an extra-ordinary measure. The provisions under the general criminal law of land are sufficient to deal effectively with such problems. The fact that state failed in solving problem, should not be a ground to have recourse to such an extraordinary measure.

It stands out clearly that the largest number of preventive detenu in the State of Punjab hail from Amritsar followed by Ferozpur and then again followed by Gurdaspur district. The region for the detenus coming from these three board districts is their ability to get arms and ammunitions from across the boarder without much difficulty utilising also the services of smugglers. The ethno-religious composition of the population of these three border districts suits best to such anti-social elements for building a mass base with the help of religiosity and religious fundamentalism.

The recent developments in Punjab have shaken the whole country and have attracted world wide attention. These developments however, are not altogether isolated from what has been happening in some other parts of India. There indeed are some factors peculiar to Punjab. To understand the Punjab events, it is necessary to examine the common factors as they have operated in Punjab and also factors peculiar to this border state which have aided and abetted such anti-national activities.
Various views have been put about the factors responsible for the rise of activities prejudicial to the unity and integrity of the country in Punjab. There are some different views about internal factors. Some argued that poverty and un-employment were the main factors for the phenomenon with which the author also agrees.

A study of the background of some 125 detenus in Punjab picked up at random reveals that a majority of them is drawn from the rich peasant or land lord and the urban middle classes and nearly one-third belong to the highly educated group. Age wise nearly 65% fall in 20-30 years age group. Only 10% are drawn from amongst the teenagers. Most of them do not have any political background. This means that political youths coming from upper strata of the society provide leadership to such detenus or to persons engaged in activities prejudicial to the state.

In the state of Punjab there are only two main political parties which dominated and have captured power since its re-organisation in the year 1966. These are the Congress and the Akalis. Both these parties have frequently resorted to preventive detention legislations whenever they win power either to detain the political rivals and the other citizens merely on the fact that it failed to solve the day to day problems like law and order or maintenance of public peace.

The national political parties have failed to improve the state of affairs in Punjab through their collective efforts. Instead of facing the challenge at political level, most of the parties have escaped into the background and have become marginalised and irrelevant in the then
prevailing circumstances. The Akali government which was in power during 1977-1980 and then again during September 1985 to 10th May 1987 stands divided, demoralised and isolated. The fact that the Akalis, the Congress and other bourgeois' parties gave the first place to their narrow electoral and other partisan interest where the main factors which hindered and prevented a political solution. In frustration they resorted to prevent detention measures in large numbers.

The foregoing profile and analysis of the Punjab tangle proves the point that the people have been at the receiving end in the state, mainly because of the failure of the elite at the helm of affairs to rise to the occasion and to galvanize the people to assert collectively to retrieve the situation. Punjab has already suffered a lot due to the adverse condition prevailing in the state. The frequent use of the various preventive detention legislations have not succeeded in achieving the intended goals i.e., peace and prosperity of the State. A limited use of preventive detention legislation may be permitted and it should be connected with the emergency provisions like defence, external aggression or internal disturbances. Only a correct and judicious applicability of the preventive detention legislations would be productive and useful to the society as well as to the State.

Regarding treatment of detenus under preventive detention the supreme court has held that they should be given all reasonable facilities for an existence consistent with human dignity. For this, they may be allowed to wear their own cloths, eat their own food.
socialise with family and friends and get reading material. Above all they should be separated from ordinary criminals.55

If an earning member of family is arrested under Article 22, his family should be provided with a maintenance allowance.56 The Punjab Detenus (conditions of detention) orders 1974; 1980 and 1981 provide for such ex-gratia family allowance.57 However, the family allowance provided under the three orders is too meager and needs considerable enhancement as per the socio-economic conditions of the family. The author is of the opinion that it should be a minimum of Rs.200 per month per member of the family.

The role of non-governmental organisations in the protection of human right particularly right to life is laudable. Working at the international national or state level, these organisations function as un-official ombudsmen safeguarding the right to life against governmental infringement. These non-governmental agencies for protection of human rights use all the available techniques such as diplomatic initiatives, reports, public statements, efforts to influence the deliberations of human right bodies established by inter-governmental organisations, campaign to mobilise public opinion, and attempts to affect the foreign policy of some countries with respect to their relations to state which are regularly responsible for violation of rights to life. The reports of Amnesty international, people's union for civil liberties, people's union for democratic rights, the citizens

55A.K. Roy Vs Union of India 710.
57Section 4 of the three orders of 1974; 1980 and 1981.
for democracy and Punjab human rights organisation have caused prison conditions to be ameliorated, prisoners to be released, torture highlighted and stopped and more attentions to be paid to the fundamental rights of many citizen. The Ladha kothi in the Sangrur District where number of preventive detenus were detained and tortured were highlighted and got redressed by such organisation (see chapter VI).

The Indian legislatures have a tendency to multiply legislations even on a single subject. There are numerous instances where parliament passed more than one legislation for the same subject of course with a little variation. Similarly on the subject of preventive detention parliament has passed four central legislation besides various legislations passed by the different state legislatures (see Annexure-I). The state government can not absolve from its responsibility of maintaining law and order or controlling socio-economic problems simply by adding to the list of legislations. This could be done by simply amending section 3 of an already existing legislation and by adding new grounds to it. There seems to be absolutely no justification to have numerous legislation on a single subject when all the provisions of various central end state legislations are (except section 3) almost identical.

Abolitionist of the provision argue that there is no need for preventive detention legislations, since, there is sufficient power in

58The Children Act, 1960, and the Juvenile Justice Act, 1986, and carbon copy of each other except its application. The children Act, 1960 is applicable to the Union Territories whereas the Juvenile Justice Act, 1986 is applicable to the rest of the country.
section 41 of the criminal procedure code which enables a police officer to arrest any person without warrant if a complaint is received against him or credible information or reasonable suspicion exists against him. However, there remains a basic difference between section 41 and Article 22. Under the former, reasonable suspicion or credible information is justifiable in a court of law. Under the later, subjective satisfaction has to be sustained before the Advisory Board only.

Preventive detention is labelled as a draconian law. It confers extra-ordinary powers on the government to physically restrain any person according to the subjective satisfaction of the officer concerned. It thereby causes physical and mental agony to the detenus. It is therefore sometime argued that such provision should not have be incorporated in the constitution and there should have been no Act of the Parliament on the subject. But it must be remembered that preventive detention legislations are open to further refinement. The excesses committed are no ground for throwing the baby with the bath water. After all the interest of the state is paramount which cannot be compromised at any cost or reasoning.

The main basis for preventive detention is mere suspicion. To equate the citizens with aliens only on suspicion is not justified. The denial of the assistance or choice to be defended by the lawyer of one's own choice is again adding insult to the injury and which is also against all principles of natural justice and therefore it should be provided by a constitutional amendment.
Although the doctrine of separation of powers has not been recognised under the constitution in its absolute rigidity but the constitution makers have meticulously defined the functions of various organs of the state. Legislature, Executive and Judiciary have to function within their own spheres demarcated under the constitution. No organ can usurp the functions assigned to another. The constitution trusts to the judgement of these organs to function and exercise their discretion by strictly following the procedure prescribed there in. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facts of people's will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of state function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While excise of powers by the legislature and executive is subject to judicial restraint, the only check on the judicial exercise of power is the self-imposed disciplines of judicial restraint.59

When a state action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers

and functions assigned under the constitution and if not, the court must strike down the action. While doing so the court must remain within its self-imposed limits. The court sits in judgement on the action of a coordinate branch of the government. While exercising power of judicial review of administrative action, the court is not an appellate authority. The constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the constitution lies within the sphere of legislature or Executive, provided these authorities do not transgress their constitutional limits or statutory powers.\textsuperscript{60}

Entrustment of power to those in charge of the governance of the country calls for utmost vigilance. Those in power can always create mass illusions and thus play with cherished values and basic liberties. Man sometimes behaves like the wolf who kills the lamb and at the same time professes to dream of the day when the wolf and the lamb shall lie together. Experience should teach us to be on guard against insidious erosion of liberty.\textsuperscript{61}

So long the party in power do not use preventive detention legislations as a tool for their political ends and is used in the interest of the country, no objection can be raised. The judiciary no doubt has a responsibility to balance the individual's right and personal liberty and the national interests. The Executive and the legislature must also exercise there role very honestly and sincerely rising above party politics or affiliation. If the preventive detention legislation is

\textsuperscript{60}Ibid., Ashif Hameed.
\textsuperscript{61}Ibid., p.25.
used arbitrarily and for selfish ends by the Executive and party in power then it would continue to recoil on them and then there is no end to it. The ramparts of defence against tyranny and arbitrariness are ultimately in the hearts of the people. If these are shattered by the deeds of either Executive or Legislatures if might yield only temporary gains. After all it is hard to compromise with self-respect. And then in that situation no constitution, no law, no court would be able to do much in the matter.