Chapter I

Introductory
Chapter I

Introductory

1. Meaning and Nature of Preventive Detention:

Preventive detention is a necessary evil.\(^1\) It is both a sword and a shield. Though it is undemocratic yet it is also a weapon for safeguarding democracy. Preventive detention means detention of a person against whom there is a suspicion that he is likely to commit an offence, so as to prevent him from committing that offence.

Preventive detention is a black spot on the fair name of democracy and liberty but it enhances their beauty. It invades liberty of the detenu but is resorted to protect liberty of others. Preventive detention of a person may also be resorted to where the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detenu but still is sufficient to justify his detention.

Preventive detention is the arch enemy of the right to personal liberty. It envisages detention without trial which is against the basic canons of criminal jurisprudence. At times when the liberty of the individual crosses the limit and threatens the very existence of the State and at the point of time it fails to control the enjoyment of individual's liberty, then the State uses the preventive detention.

\(^1\) Raj Kumar Singh Vs. State of Bihar AIR 1986 SC 2173.
measure. This measure is not unknown in the dictatorial and the democratic regimes; the capitalist, the socialist and the communist governments. However, there was a difference in the exercise of the said power; some countries tried to handle this measure carefully and cautiously. They adopted it casually and only in grave situation affecting the very existence of the State. In other countries it became a part of the life of the country. They used the measure indiscriminatory in time of war and peace and thus in such countries the right to personal liberty remained in eclipse.

Preventive detention as part of the constitution is a very unusual provision in constitutional jurisprudence. The logic of its place in the midst of fundamental rights is difficult to explain. The Indian Constitution is perhaps the only exception.

There is no authoritative definition of the term 'Preventive Detention' in Indian Law, though as description of a topic of Legislation it occurred in the Legislative lists of the Government of India Act, 1935, and has been used in item 9 of list I and item 3 of list III in the Seventh Schedule of the Constitution. The expression has its origin in the language used by Judges or the Law Lords in England while explaining the nature of detention under Regulation 14(B) of the Defence of Realm Consolidation Act, 1914, passed on the outbreak of the First World War; and the same language was repeated in connection with the emergency regulations made during

---

the last World War. The word 'Preventive' is used in contradiction of the word 'Punitive'.

In Rex V. Halliday, Lord Finlay said, 'it is not a punitive but a precautionary measure'. According to Lord Macmillan, the object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence.

Preventive detention was discussed in the Constituent Assembly against the background of the violence which had erupted on the partition of India, and of a revolutionary movement in 'Telegana. Therefore, inspite of grave misgivings, the provisions relating to preventive detention were passed, all the more so because leaders of the stature of Jawaharlal Nehru and Sardar Patel thought them necessary. At that time it seemed reasonable to believe that freedom fighters were not likely to abuse the powers entrusted to them after freedom had been won. Nevertheless 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.

4 (1917) A.C. 260 at p.269.
5 Liversidge Vs. Anderson (1942) A.C. 206 at p.254.
7 Supra Foot Note No.2.
However, preventive detention during the latest emergency (1976) has raised the gravest doubts as to whether preventive detention should form part of a liberal democratic constitution like ours which is based on the 'Rule of Law' and the 'dignity of the individual'.

Those who are entrusted with the task of administering the land have another viewpoint. According to them, although they are conscious of the value of human liberty but they cannot afford to be oblivious of the need of the security of the State or the maintenance of Public Order. Personal liberty has value if the security of the State is not jeopardised and the maintenance of Public Order is not threatened. There can be, the administrators assert, no freedom to destroy freedom.8

The ultimate aim of government is not to rule not to restrain by fear, nor to exert obedience, but to free every man from fear, that he may live in possible security; in other words, to strengthen his natural right to exist and to work without injury to himself or others. The object of government is not to change rational beings into beasts or puppets, but to enable them to develop their minds and bodies in security and to employ their reason unshackled; neither showing hatred, or anger nor watched with the eyes of jealously and injustice. In fact, the true aim of government is liberty and not detention whether preventive or punitive.9

---

9 Baurch Spino Z.A - Konvitz's 'Constitution and Civil Rights'.
2. Preventive Detention and Punitive Detention: Distinction:

It is important as well as necessary to keep in mind the distinction between 'Preventive Detention' and 'Punitive Detention'. There is a vital distinction between these two kinds of detentions. Distinguishing between these two terms Hon'ble Bhagwati, J. observed in Francis Coralie Mullin Vs. The Administrator, Union Territory of Delhi.¹⁰

"Punitive detention is intended to inflict punishment on a person, who is found by the judicial process to have committed an offence while preventive detention is not by way of punishment at all, but it is intended to prevent a person from indulging in conduct injurious to the society. The power of preventive detention has been recognised as a necessary evil and is tolerated in a free society in the larger interest of security of the state and maintenance of Public Order. It is drastic power to detain a person without trial and there are many countries where it is not allowed to be exercised except in time of war or aggression."

It must always be remembered that preventive detention is qualitatively different from punitive detention and so their purposes are different from each other. In case of punitive detention, the person concerned is detained by way of punishment after he is found guilty of wrong doing after a trial where he has the fullest opportunity to defend himself, while in case of preventive detention, he is detained merely on suspicion with a view to preventing him from doing harm in future. Having regard to this distinctive character of preventive detention, which aims not at punishing an

individual for a wrong done by him, but at curtailing his liberty with a view to preventing his injurious activities in future, it has been laid down by the Supreme Court in Sampat Prakash Vs. State of Jammu and Kashmir that the restrictions placed on a person preventively detained must, consistently with the effectiveness of detention, be minimal.\footnote{A.I.R. 1969 SC 1153.}

Similarly in Haradhan Vs. The State of West Bengal\footnote{A.I.R. 1974 SC 2154.} Ray, C.J. observed:

The basis of preventive detention is the satisfaction of the Executive of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from repeating the same. A criminal conviction on the other hand is for an act already done which can only be possible by a trial and legal evidence. There is no parallel between prosecution in a court of law and a detention order under the Act. One is punitive action and the other is a preventive act. In one case a person is punished on proof of his guilt and the standard is proof beyond reasonable doubt whereas in preventive detention a man is prevented from doing something which it is necessary for reasons mentioned in various statutes on preventive detention.

The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive

\footnote{A.I.R. 1969 SC 1153.}\footnote{A.I.R. 1974 SC 2154.}
detention may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution.

Thus the two powers, namely, the one to bring a culprit to book by prosecuting and punishing him and the other by imposing a check upon his criminal activities, which if followed unwatched, would put public order in jeopardy are distinct from each other; they are different and their objects and purposes are also distinct from each other. One can not impinge on the other and both may simultaneously or otherwise be pressed into service for achieving the desired objectives.\textsuperscript{13}

A clear distinction has to be drawn between preventive detention in which anticipatory and precautionary measure is taken to prevent the recurrence of apprehended events and punitive detention under which the action is taken after the event has already happened. The power of preventive detention is a precautionary power exercised reasonably in anticipation and may or may not relate to an offence. It cannot be considered to be a parallel proceeding.\textsuperscript{14}

3. **Necessity of Preventive Detention Laws:**

The law of preventive detention - detention 'without trial is an anathema to all those who love personal liberty. Such a law makes deep in road in the basic human freedoms which we cherish and which occupy prime position among the higher values of life. It is,

\textsuperscript{13} Naresh Kumar Vs. District Magistrate, Dehradun, 1983 All. L.J. 505.

\textsuperscript{14} The State of Punjab Vs. Sukhpal Singh, J.T. 1989 (4) SC 95.
therefore, not surprising that those who have an abiding faith in the rule of law and sanctity of personal liberty do not easily reconcile themselves with a law under which persons can be detained for long periods without trial. The proper forum for bringing to book those alleged to be guilty of the infraction of law and commission of crime, according to them, is the court of law where the corrections of the allegation can be gone into in the light of the evidence advised at the trial. The resting of power of detention without trial in the executive, they assert has the effect of making the same authority both the prosecutor as well as the Judges and is bound to result in arbitrariness.15

Those who are entrusted with the task of administering the land have another viewpoint. According to them, although they are conscious of the value of human liberty, they cannot afford to be oblivious of the need of the security of the state or the maintenance of public order. Personal liberty has a value if the security of the state is not jeopardised and the maintenance of public order is not threatened. There can be, the administrators assert, no freedom to destroy freedom. Allegiance to ideals of freedom cannot operate in vacuum. Danger lurks and serious consequences can follow when thoughts become encysted in fine phrases oblivious of political realities and the impact of real politic. No government can afford to take risks in matters relating to security of state. Liberty, they accordingly claim, has to be measured against community need for security against internal and external peril.16

16 Ibid., p. 1242.
The justification - and the only justification - for preventive detention is the sovereign need of national security. It would be worthwhile to quote the observations of Patanjali Sastri, J. in Gopalan's case\textsuperscript{17} where his Lordship explained the necessity of a law dealing with the preventive detention.

"...This sinister-looking feature, so strangely out of place in a democratic constitution which invests personal liberty with the sacro sanctity of a fundamental right and so incompatible with the promises of its preamble is doubtless designed to prevent the abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant Republic."

The peculiarity of the provision of preventive detention under the Indian Constitution is that it is not limited to times of war or emergency, but it is recognised even during time of peace and in normal times. It is true that some safeguards are laid down in clauses (4) to (7) of Article 22 of the Indian Constitution, but they are a 'pale shadow of safeguards'\textsuperscript{18}

In State of West Bengal Vs. Ashok Dey\textsuperscript{19} the Supreme Court observed that the security of 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. Article 22, therefore, must be construed on its plain language consistently with the basic requirement of preventing anti social subversive elements from imperiling the security of State of

\textsuperscript{17} A.I.R. 1950 SC 27.
\textsuperscript{18} Seervai, H.M., Constitutional Law of India, 527 (2nd ed.).
\textsuperscript{19} A.I.R. 1972 SC 1660.
maintenance of Public Order or of essential supplies and services therein.

The founding fathers, while framing the constitution, gave a constitutional status to preventive detention so as to prevent anti-social and subversive elements from imperiling the welfare of the infant Republic and to safeguard the rule of law. At the same time, they took the precaution of providing constitutional safeguards so that the Executive will exercise with great diligence and care in accordance with law, this extraordinary power to deprive the liberty of an individual.

The first Prime Minister of India, Pandit Jawaharlal Nehru addressing the nation from the ramparts of the Red Fort on August 1949 said:

"We must remember the basic fact that we can achieve little unless there is peace in the country, no matter what policy we pursue. There are some misguided people who indulge in violence and try to create disorder. Therefore, it is the duty of every one, no matter what his politics, to help in the maintenance of peace in the country. The people have every right to exchange laws and even change governments and they can exercise that right in a peaceful and democratic manner. But those who choose the path of violence have no faith in democracy. If their way were to prevail, there would be complete chaos, in the country and condition of the people would deteriorate even more. All progress will cease and the next few generations would have to carry a heavy burden."

Again, speaking in the House of People on 22nd May, 1952, the Prime Minister said:
"It is obvious that violence, vulgarity and coarseness degrade people; once you let them enter into you, it is not easy to get rid of them. India is a country in which many forces are at work. Some tend to disrupt, others to consolidate. Today, it is a matter of the utmost consequence that the disruptive forces in India do not gain strength. If we indulge in violence even for a supposedly good cause, I have not a shade of doubt that it will result in ultimate disruption. It may mean civil war which from the stand point of vulgarity, coarseness and the spirit of violence, is worse than international war. It is because of this that the promotion of law and order becomes the normal business of the government. As I said, law and order are words I do not fancy very much, but is the bounden duty of any government, any group or any individual who thinks rightly, to prevent violence, to prevent the degradation or disintegration of our public life and the civil conflicts it may bring about. We cannot have both civil conflict, we shall have to pay a terrible price for it."

Again, on 15th December, 1952, speaking in the House of the People, the Prime Minister said:

"We, in this country, must not think of approaching our objectives through conflict and force. We have achieved many things by peaceful means and there is not reason why we should suddenly abandon that method and take to violence. There is a very special reason why we should not do so. I am quite convinced that if we try to attain our ideals and objectives however high they may be, by violent methods, we shall delay matters greatly and help the growth of the very evils we are fighting."
India is not only a big country with a good deal of variety; and if one takes to the sword, he will inevitably be faced with the sword of some one else. This clash between swords will degenerate into fruitless violence, and in the process, the limited energies of the nation will be dissipated or, at any rate, greatly undermined."

As early as in the year 1916 Lord Parker too had observed:

"Those who are responsible for the national security must be the sole judges of what the national security requires."20

Much water has flown in the ganges since the observation of Pandit Jawaharlal Nehru and Lord Parker but the words of caution, of wisdom and of untrammelled freedom are as relevant today. The current law and order problems, as well as socio-economic problems like smuggling, foreign exchange, black-marketing and supply of essential commodities, trafficking in narcotic drugs and psychotropic substances are still a cause of grave concern to-day.

The realists knew that we became free amidst blood bath and chaos, and the environs of belligerency. The delicate balance between security and liberty had to be kept consciously knowing fully that the defenses of a nation can be destroyed and the morale of its people broken not only by external aggression but also by internal disturbance. The sensitive underside of the nation can be wounded by those who break up public order, break state security, blow up essential supplies and services, deal in trafficking in Narcotic Drugs and Psychotropic Substances. Hence the unavoidable necessity.

Being committed to the rule of law, a primary article of faith, the framers of the constitution mis-trusted uncanalised power in the

Executive and wrote into the paramount law provisions regulating preventive detention and proclamations of emergencies.\textsuperscript{21}

The House of Lord, in Rex Vs. Halliday\textsuperscript{22} and Liveridge Vs. Anderson\textsuperscript{3} observed that it is the settled law:

"That parliament may empower the executive to make regulations for the detention without trial of persons whose detention appears to be expedient in the interests of the Public Safety or the defence of the realm."

However, Lord Action's\textsuperscript{23} dictum that absolute power corrupts absolutely is of relevance. Therefore, where freedom is in peril and justice is threatened, the citizen shall receive the fullest protection from the court within the four corners of Article 22 providing safeguards.

Preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it and to prevent him from doing. The justification for such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence. Thus, preventive measures even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment but are taken by way of precaution to prevent mischief to the state.\textsuperscript{24}

\textsuperscript{22} (1917) AC 260.
\textsuperscript{23} (1942) AC 206.
\textsuperscript{24} Hemlata Vs. State of Maharashtra, A.I.R. 1982 SC 8.
4. **Writ of Habeas Corpus and Preventive Detention:**

In *A.D.M. Jabalpur Vs. Sukla*,[25] Justice Khanna observed that writ of Habeas Corpus and subjiciendum, which is commonly known as the writ of Habeas Corpus, is a process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. At the instance of a subject aggrieved the High Court may command the production of the subject, and inquire into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released. Release on habeas corpus is not, however, an acquittal, nor may in writ be used as a means of appeal.[26]

Justice Khanna further quoted the case of *Greene Vs. Secretary of State for Home Affairs*[27] where Lord Wright had observed:

"It is clear that the writ of habeas corpus deals with the machinery of Justice, not the substantive law. except in so far as it can be said that the right to have the writ is itself part of substantive law. It is essentially a procedural writ, the object of which is to enforce a legal right... . The inestimable value of the proceedings is that it is the most efficient mode ever devised by any system of law to end unlawful detainments and to secure a speedy release where the circumstances and the law so required."

Lord Birkenhead in *Secretary of State for Home Affairs Vs. O'Brien*[28] observed:

---

[27] (1923) AC 603 at p. 609.
[28] (1923) AC 603 at p. 609.
"It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by courts of law as a check upon the illegal usurpation of power by the executive at the cost of the liege."

The existence of the power of the courts to issue a writ of Habeas Corpus is regarded as one of the most important characteristic of democratic States under the rule of law. The significance of the writ for the moral health of the society has been acknowledged by all jurists. Hallam described it as the "principal bulwark of English liberty. The uniqueness of habeas corpus in the procedural armoury of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention. Of course, this does not mean that prison doors may readily be opened. It does mean that explanation may be exacted why they should remain closed. It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom. The great writ of habeas corpus has been for centuries esteemed the best and sufficient defence of personal freedom."

No one can deny the power of the state to assume vast powers of detention in the interest of the security of the state. It may indeed be necessary to do so to meet the peril facing the nation. The

considerations of security of the state must have a primacy and be kept in the forefront compared to which the interests of the individuals can only take a secondary place. The motto has to be "who lives, if the country dies." Extraordinary powers are always assumed by the government in all countries in times of emergency because of the extraordinary nature of the emergency. The exercise of the power of detention, it is well settled, depends upon the subjective satisfaction of the detaining authority and the courts can neither act as courts of appeal over the decisions of the detaining authority nor can they substitute their own opinion for that of the authority regarding the necessity of detention. There is no antithesis between the power of the state to detain a person without trial under a law of preventive detention and the power of the court to examine the legality of such detention.30

Lord Atkin observed in rex Vs. Halliday31 while dealing with the argument that the Defence of Realm Consolidation Act of 1914 and the regulation made under it deprived the subject of his right under the several Habeas Corpus Acts,32 that is the entire misconception. The subject retains every right which those statutes confer upon him to have tested and determined in a court of law, by means of a writ of Habeas Corpus, addressed to the person in whose custody he may be the legality of the order or warrant by virtue of which he is given into or kept in that custody.

30 Ibid., at p. 1007.
31 (1917) A.C. 260 at p.272.
32 The Habeas Corpus Act, 1640; the Habeas Corpus Act, 1816.
In Smt. Icchu Devi Chorasia Vs. Union of India\textsuperscript{33} the Supreme Court observed that in case of an application for a writ of Habeas Corpus no rule of strict pleading is followed. Even a post-card written by a detenu from jail has been sufficient to activise the supreme court into examining the legality of detention. This practice marks a departure from that obtaining in England where observance of the strict rules of pleading is insisted upon even in case of an application for a writ of habeas corpus, but it has been adopted by the Supreme Court of India in view of the peculiar socio-economic conditions prevailing in the country, where large masses of people are poor; illiterate and ignorant and access to the courts is not easy on account of lack of financial resources, it would be most unreasonable to insist that petitioner should be set out clearly and specifically the grounds on which he challenges the order of detention and makes out a prima facie case in support of those grounds before a rule is issued or to hold that the detaining authority should not be liable to do anything more than just meet the specific grounds of challenge put forward by the petitioner.\textsuperscript{34}

5. **Doctrine of Res-Judicata and Preventive Detention Vis-a-Vis Writ of Habeas Corpus:**

The question as to whether repeated applications for habeas corpus would be competent under the Indian Constitution was raised in Danyao Vs State of U.P.\textsuperscript{35} and was left open.

Gajendragadkar J. (as he then was) speaking for the Constitution Bench, held that where the High Court dismisses a writ

\textsuperscript{33} A.I.R. 1980 SC 1983.

\textsuperscript{34} Ramniklal Mohanlal Pandit Vs. C.J. Jose: 1982 Cri. L.J. 1906.

\textsuperscript{35} A.I.R. 1961 SC 1457.
petition under Article 226 of the Constitution after hearing the matter on the merits on the ground that no fundamental right was proved or contravened or that its contravention was constitutionally justified, a subsequent petition to the Supreme Court under Article 32 of the Constitution on the same facts and for the same reliefs filed by the same party would be barred by the general principle of res-judicata. It was further clarified that the rule of res-judicata as indicated in Section 11 of the Code of Civil Procedure, has no doubt some technical aspects, for instance, the rule of constructive res-judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by courts of competent jurisdiction, and it is also in the public interest that public should not be vexed twice over with the same kind of litigation.36

If these two principles form the foundation of the general rule of res-judicata, they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32. It is also noted that the liberty of the individual and the protection of his fundamental rights are the very essence of the democratic way of life adopted by the Constitution, and it is the privilege and the duty of this court to uphold these rights. Though a right is given to the citizen to move this court by a petition under Article 32 and to claim an appropriate writ against the unconstitutional infringement of his fundamental rights, yet, in dealing with an object based on the principle of res-judicata may

36 Ibid.
even apply to a successive petition. However, the court did not answer the question as to whether repeated applications for habeas corpus would be competent under our Constitution.\footnote{Ibid.}

This question was considered by a five Judge Constitution Bench in Ghulam Sarwar \textit{Vs.} Union of India\footnote{A.I.R. 1967 SC 1335.} where learned Chief Justice Subba Rao summed up the position:

"On the question of res-judicata, the English and the American Courts agreed that the principle of res-judicata is not applicable in a writ of habeas corpus, but they came to that conclusion on different grounds. It was held in England that a decision in a writ of habeas corpus was not a judgement and, therefore, it would not operate as res-judicata and on that basis it was thought at one time that a person detained could file successive application before different judges of the same High Court. But subsequently the English courts held that a person detained cannot file successive petitions for a writ of habeas corpus before different courts of the same Division or before different Divisions of the same High Court on the ground that the Divisional Court speaks for the entire Division and that each Division for the entire court and one Division cannot set aside the order of another Division of the same court. The administration of Justice Act, 1960 has placed this view on a statutory basis for under the said Act no second application can be brought in the same court except on fresh evidence. The American Courts reached the same conclusion, but on a different principle."
But unlike in England, in India the person detained can file original petition for enforcement of his fundamental right to liberty before a court other than the High Court, namely, Supreme Court.39

In Lalubhai Jogibhai Patel Vs. Union of India and others40, the Supreme Court considered the applicability of the doctrine of constructive res-judicata in a writ of habeas corpus for an illegal detention. The question before the court was, whether the doctrine of constructive res-judicata applies to a subsequent petition for a writ of habeas corpus on a ground which he might and ought to have taken in his earlier petition for the same relief.

In England, before the Judicature Act, 1873, an applicant for habeas corpus had a right to go from court to court, but not from one bench of a court to another bench of the same court. After the Judicature Act, 1873, right was lost, and no second application for habeas corpus can be brought in the same court, except on fresh evidence.41

Lord Parker,42 C.J., after surveying the history of the right of habeas corpus, arrived at the conclusion that it was never the law that the term, successive writs of habeas corpus lay from Judge to Judge.43

Harman J. also pointed out that since the Judicature Act had abolished the three independent courts, namely, the Courts of Exchequer, the King's Bench Division and the Common Pleas, and

---

39 Ibid.
42 In re. Hastings (No.3), (1958) 3 All. E.R. 625.
43 In re. Hastings (No.4),(1959) 1 All. E.R. 698.
had constituted one High Court, when an application for writ of habeas corpus has been disposed of by one Divisional Court, no second application on the same ground lies to another Divisional Court of the High Court. This position was given statutory recognition in the Administration of Justice Act, 1960.44

In a Full Bench decision of the Punjab and Haryana High Court, which purports to follow these English decisions and two decisions of Supreme Court in Daryao V. State of U.P.45 and Biren Dutta V. Chief Commissioner of Tripura46 held:

"No second petition for writ of habeas corpus lies to the High Court on a ground which a similar petition had already been dismissed by the Court. However, a second such petition will lie when a fresh and a new ground of attack against the legality of detention or custody had arisen after the decision on the first petition, and also where for some exceptional reason a ground has been omitted in an earlier petition, in appropriate circumstances, the High Court will hear the second petition on such a ground for ends of justice. In the last case, it is only a ground which existed at the time of the earlier petition, and was omitted from it, that will be considered. Second petition will not be competent on the same ground merely because an additional argument is available to urge with regard to the same."47

In the ultimate analysis the position that emerges from a survey of the above decisions was observed by Justice Sarkaria in

44 Ibid.
46 A.I.R. 1965 SC 596.
The doctrine of constructive res-judicata is confined to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus under Article 32 of the Constitution on fresh grounds, which were not taken in the earlier petition for the same relief.

Again the Supreme Court in Kirit Kumar Chamanlal Kundaliya Vs. Union of India approved the views it expressed in Lallubhai’s case. The court observed:

"the doctrine of finality of judgement or the principles of res-judicata are founded on the basic principle that where a court of competent jurisdiction has decided an issue, the same ought not be allowed to be agitated again and again. Such a doctrine would be wholly inapplicable to cases where the two forums have separate and independent jurisdictions. In the instant case, the High Court decided the petition of the detenu under Article 226 which was a discretionary jurisdiction to grant relieve while a petition under Article 32 filed in the Supreme Court is guaranteed by the Constitution and once the court finds that there has been a violation of Article 22(5) of the Constitution, then it has no discretion in the matter but is bound to grant the relief to the detenu by setting aside the order of detention. The doctrine of res-judicata or the principle of finality of judgement cannot be allowed to whittle down or override the express constitutional mandate to the Supreme Court enshrined in Article 32 of the Constitution."

The Supreme Court observed, once again, in Sunil Dutta Vs. Union of India and others\textsuperscript{50} that it is well settled now that the dismissal of the earlier writ petition for habeas corpus will not operate as a bar to the maintainability of any other writ petition.

In a subsequent writ petition under Article 32, the Supreme Court observed, that where the counsel does not make full submission on all aspects arising in the petition and is relying only on one submission which however the Supreme Court considered and rejected then subsequent alegation by the counsel that if the court had indicated to him in course of arguments that the submission on the said only point did not find favour with the court he would have proceeded to argue the other points were held to be not proper.\textsuperscript{51}

The Andhra Pradesh High Court in Azam Ali Vs. The Government of A.P. observed:\textsuperscript{52}

"... It is true that a person cannot be permitted to agitate the same grounds by challenging the order of detention in successive writ petitions. But having regard to the history of this writ it would be in the interest of justice as also in accordance with our constitutional ethos not to deny the right to any person to approach this court by a subsequent petition on a ground not taken in earlier writ petition. The doctrine of constructive res-judicata which is based on the principle of public policy of avoidance of multiplicity of proceedings cannot be invoked in proceedings of habeas corpus wherein the question is one of personal liberty of a citizen which is a

\textsuperscript{50} A.I.R. 1982 SC 53.
\textsuperscript{52} 1992, Cri. L.J. 2597.
principle of paramount importance and the most cherished constitutional objective of all the civilized nations. Therefore, the doctrine should yield to be constitutional objective. The doctrine of constructive res-judicata does not apply to proceedings of writ of habeas corpus when the subsequent writ petition is based on a ground not urged in earlier writ petition.53

In Jethmal Vs. Union of India54 an order of detention passed under the COFEPOSA was challenged by the detenu under Article 226 of the Constitution of India. That writ petition was dismissed. Subsequently, he filed another writ petition challenging the same order on fresh grounds. A Division Bench of Bombay High Court held that the subsequent writ petition was not barred by principle of constructive res-judicata. The same view was taken by another Division Bench of Bombay High Court in Kochu Krishnan Vs. State of Maharashtra.55

The principles which finally emerge are:-

(i) Dismissal of the earlier writ petition for habeas corpus will not operate as a bar (Res-Judicata) to the maintainability of another writ petition on fresh and new grounds.

(ii) Omission of certain grounds for exceptional reasons will not operate as a bar (Res-Judicata) for second petition on such a ground for ends of justice.

54 1986 Cri. L.J. 1645.
before its service upon the detenu yet the order can be sought to be quashed on following limited grounds. on the pleading of the parties:

(i) that the impugned order is not passed under the Act under which it is purported to have been passed;

(ii) that it is sought to be executed against a wrong person;

(iii) that it is passed for a wrong purpose;

(iv) that it is passed on vague, extraneous and irrelevant grounds;

(v) that the authority which passed it had no authority to do so.

7. Scope of Writ of Mandamus in Cases of Apprehended Preventive Detention:

On the question of maintainability of a writ of mandamus, in cases of prospective detention the Supreme Court in the Additional Secretary to the Government of India Vs. Smt. Alka Subhash Godia\textsuperscript{60} observed:

"It is not correct to say that the courts have no power to entertain grievances against any detention order prior to its execution. The courts have the necessary power and they have used it in proper cases, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number... . The refusal by courts to use their extraordinary powers of the judicial review to interfere with the detention orders prior to their execution does not amount to the abandonment of the said power or

\textsuperscript{60} (1991) 1 J.T. SC 549.
to their denial to the proposed detenu, but prevents their above and
the perversion of the law in question."

In a special criminal appeal the Division Bench of Gujarat High Court\textsuperscript{61} had occasion to examine the question as to whether the High Court can entertain a petition before the order of detention is executed and the person concerned is put in detention. The Bench observed:

"In our opinion whether the order is passed according to the provision of the Act or whether it is passed by the detaining authority applying its mind would be required to be decided after taking into consideration the grounds of detention and the materials which are required to be supplied to the petitioner. Merely because the petitioner alleges that there are no grounds for detaining him cannot be accepted. If the petitioner's contention is accepted the purpose of the Act would be frustrated which essentially operates in suspicion jurisdiction."

The Bench further observed:

"The very chapter of fundamental rights which guarantees and protects individual liberty has provided for the preventive detention also. Therefore, while giving utmost importance for safeguarding the individual liberty, the High Court cannot be oblivious of the fact that in certain case executive is authorised to detain a person without trial. provided the constitutional safeguards mentioned in Article 22 and in the relevant law providing the preventive detention are complied with... . In such cases it has got to be borne in mind by the High Court that preventive detention is not

\textsuperscript{61} 1986 Cr. L.J. (Guj.) 290.
by way of punishment at all. It is intended to pre-empt or restrain a person from indulging in any conduct injurious to the society. In case of preventive detention a person is detained merely on suspicion with a view to preventing him from doing harm in future. Since the objective of preventive detention is not to punish a person for having done something, but it is to intercept him before he does it and to prevent him from doing it, ordinarily, it would not be proper for High Court to entertain petition before the order of detention is executed and the person concerned is put under detention. If this is done, the very purpose and object of preventive detention would be frustrated."

The Bench of the High Court after referring to the various decisions of the Supreme Court observed:

"However, this does not mean that in proper cases the High Court has no jurisdiction to entertain such petition. But such petition would be the rarest of the rare. By no stretch of reasoning it can be said that such type of petitions can be entertained because grounds of "malafides" and that of "non-application" of mind are alleged in the petition. It is difficult to enumerate the cases in which the High Court may entertain such petitions even before a person is detained. There may be a case where no examination of fact be necessary. On the face of it without further examination of facts or law, it should appear that the action of detaining a person is illegal and malafide. However, even in such cases it would be wiser and proper for the courts not to issue ex-parte interim order and direct the executive authority to refrain from implementing its order of detention. More appropriate and wiser course would be to hear
such matters immediately, say, within day or two or within a week's time and pass an appropriate order of release of the detenu."\(^{62}\)

It is clear that a detenu cannot ordinarily seek a writ of mandamus, in cases where he has not surrendered nor has been served with an order of detention, he cannot ordinarily invoke the jurisdiction of the High Court under Article 226 of the Constitution. But in exceptional cases and in rarest of rare cases wherein the order of detention appears to be ab initio void, the detenu can invoke the jurisdiction of the High Court under Article 226 of the Constitution even before he surrenders and even before the order of detention is served upon him.\(^{63}\)

8. **Electoral Rights and Preventive Detention:**

We owe a tremendous debt to our great national leader and the first Prime Minister, Pandit Jawaharlal Nehru who boldly introduced the concept of adult suffrage in our country notwithstanding fears expressed by timid souls that a largely rural and unsophisticated population would not be able to measure up to the responsibilities of political democracy.

Article 326 of the Constitution provides:

"The election to the House of People and to the Legislative Assembly of every State shall be on the basis of adult suffrage, that is to say, every person who is a citizen of India and who is not less than eighteen years of age\(^{64}\) on such date as may be fixed in that behalf by or under any law made by the appropriate legislature and is

\(^{62}\) Ibid.


\(^{64}\) Substituted by S. 2 of the Constitution (61st Amendment) Act, 1988; assented by President on 28.3.89.
not otherwise disqualified under this constitution or any law made by the appropriate legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.

As a necessary consequence, the Representation of People Act, 1950\(^65\) was passed which provides along with other things, the qualifications of voter as well as the preparation of electoral rolls and matters connected therewith.

Sub-section 5 of Section 62\(^66\) of the Representation of the People Act, 1951 provides that no person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in lawful custody of the police:

Provided that nothing in this sub-section shall apply to a person subject to preventive detention under any law for the time being in force. Chapter III\(^67\) of the Representation of the People Act, 1951 further provides disqualifications for membership of Parliament and State Legislatures. Similarly, Chapter IV\(^68\) provides disqualifications for voting. But nowhere in these chapters it is provided that detenus under preventive detention legislations are either disqualified for contesting the elections both for the Parliament and the State legislature, or from voting in these elections. However, section 11-A of the Act provides for the disqualification which applies only in case of convictions for certain

\(^{65}\) Act (43 of 1950).

\(^{66}\) Section 62 provides Right to vote.

\(^{67}\) Sections 8, 8A, 9, 9A, 10, 10A and 11.

\(^{68}\) Section 11A and 11B.
offences punishable under the Act and not in case of preventive detention.69

Section 60 of the Representation of the People Act, 1951 provides special procedure for voting by the detenus of preventive detention. Sub-clause (b) of Section 60 runs as under.

any person subjected to preventive detention under any law for the time being in force to give his vote by postal ballot, and not in any other manner, at an election in a constituency where a poll is taken, subject to the fulfillment of such requirements as may be specified in those rules.

Nevertheless, the central government has framed the conduct to Election Rules, 196170 by virtue of the powers given to it under section 169 of the Representation of People Act, 1951. Relevant portion of the various rules connected with Preventive detention are reproduced here:

Rule 18. Person Entitled to Vote by Post:

The following persons shall, subject to their fulfilling the requirements hereinafter specified, be entitled to vote by post, namely:

(a) at an election in a Parliamentary or assembly constituency:

69 The relevant portion of Section 11-A of the Representation of People Act 1951 is as follows:

Section 11-A: Disqualification arising out of Conviction and Corrupt Practices:

1. If any person after the commencement of the Act:
(a) is convicted of an offence punishable under section 171-E or Section 171-F of the Indian Penal Code, or under Section 125 or Section 135 or cl. (a) of sub-section (2) of Section 136 of this Act,
(b) is found guilty of a corrupt practice by an order S. 99
he shall, for a period of six years from the date of the conviction or from the date on which the order takes effect, be disqualified for voting at any election.

2. Any person disqualified by a decision of the President under sub-section (1) of Section 8-A for any period shall be disqualified for the same period for voting at any election.

(iv) electors subject to preventive detention;
(b) at an election in a council constituency:
(ii) electors subject to preventive detention; and
(c) at an election by assembly members:
(i) electors subject to preventive detention; and

The procedure for electors under preventive detention has been provided under Rule 21 of the Conduct of Election Rules, 1961.

**Rule 21 - Electors Under Preventive Detention:**

(1) The appropriate government shall, within 15 days of the calling of an election, send an intimation to the returning officer that he wishes to vote by post, specifying his name, address, electoral roll number and place of detention.

(3) The returning officer shall issue a postal ballot paper to every elector subject to preventive detention whose name has been intimated to him under sub-rule (1) or under sub-rule (2)

The other relevant rules of the Conduct of Election Rules, 1961 deal with form of ballot paper (Rule 22), issue of ballot paper (Rule 23), Recording of Vote (Rule 24), re-issue of ballot paper (Rule 26) and return of ballot paper (Rule 27).

After recording his vote, a person under preventive detention signs the declaration in Form 13A and would have to obtain the attestation of his signature by the Superintendent of the jail or the commandant of the detention camp in which he is under detention.

The next question is whether a prevent detenu can also contest a Parliamentary or a Legislative Assembly election? Sub-section (b) of Section 171-A of the Indian Penal Code defines the term electoral rights. It means right of a person to stand or not to stand as, or to
withdraw from being, a candidate or to vote or refrain from voting at an election.

In Khoder Sheriff Vs. Munnuswami\textsuperscript{71} Venkatarama Ayyar J. had observed that under the Representation of People Act, 1951, a mere formation of an intention to stand for election is not sufficient to make a candidate a prospective candidate because it is of the essence of the matter that he should hold himself out as a prospective candidate. That can only be if he communicates that intention to the outside world by a declaration or conduct from which it can be inferred that he intends to stand as a candidate.

The qualifications, for contesting an election for the membership of the House of People, Council of States as well as for the Legislative Assembly is provided under the Constitution of India\textsuperscript{72} and the Representation of People Act.\textsuperscript{73} The only qualification is that he should be an elector. This is well established that a preventive detenu is an elector.

Similarly the disqualifications for contesting an election for the Parliament as well as for the Legislative Assembly is provided under the Constitution of India\textsuperscript{74} and the Representation of People Act, 1951.\textsuperscript{75} No where it is laid down that preventive detention is a disqualification. It is therefore absolutely clear that a person under

\textsuperscript{71} A.I.R. 1955 SC 775.
\textsuperscript{72} Article 84 (Parliament) Article 173 (State Legislature).
\textsuperscript{73} Sections 3 & 4, Chapter I of Part II - Qualification for Membership of Parliament. Sections 5, 5A,6, Chapter II of Part II - Qualifications for membership of State Legislatures.
\textsuperscript{74} Articles 101, 102, 103 and 104 - Disqualifications of Members of Parliament, Articles 190, 191, 192 & 193 - Disqualification of Members of the State Legislatures.
\textsuperscript{75} Sections 7 to 11, Chapter III, Part II - Disqualifications for membership of Parliament and the State Legislatures.
preventive detention has all the electoral rights. He can both contest
an election as well as vote in any election.

9. Preventive Detention and Parliamentary Privileges:

In Indra Nehru Gandhi Vs. Raj Narain,76 Ray, C.J. observed
that the composition of Parliament is not dependent on inability of a
member to attend its session for whatsoever reason. The purpose of
Article 85 is to give effect to the collective right of the House which
represents the nation to be called as often as the situation demands,
and in any case the interval between two sessions must not exceed
six months. Assuming a conflict were to arise between the privileges
of a member under Article 105(3) and the functions of the house to
assemble under Article 85 the privilege of the member will not
prevail. The detention of members of Parliament is by a statutory
authority in the exercise of his statutory powers.

When a member is excluded from participating in the
proceedings of the House, that is a matter concerning Parliament and
the grievance of exclusion is in regard to proceedings within the
walls of Parliament. In regard to rights to be exercised within the
walls of the House the House itself is the judge.77

The Chief Justice further observed that when under Article 359
the President during the operation of a proclamation of emergency by
order declares that the right to move any court for the enforcement of
rights conferred by Part III shall remain suspended and persons who
are members of House of Parliament are in detention under orders
made under the Maintenance of Internal Security Act, the detention

77 May, Erskine, 'Parliamentary Practice', 18th Ed. pp. 82-83.
is concerned, a member of Parliament can claim no special status higher than that of an ordinary citizen and that he is as much liable to be arrested and detained under it as any other citizen. It was also held that if an order of detention validly prevents a member from attending a session of Parliament, no occasion would arise for the exercise by him of the right of freedom of speech.

The question as to whether a member of Parliament has been validly detained under a law relating to preventive detention cannot be collaterally raised in proceedings like the present wherein the court is concerned with the validity of a constitution Amendment Act and an Act to amend the Representation of the People Act. Till such time as a finding is recorded in appropriate proceedings about the validity of the detention of the members of Parliament, the court would have to proceed upon the assumption that the detention has not been shown to be invalid.

Moreover, the act of detaining a person is normally that of an outside agency and not that of the House of Parliament. It would certainly look anomalous if the act of an outside agency which might ultimately turn out to be not legal could affect the validity of the proceedings of the House of Parliament or could prevent that House from assembling and functioning.\(^\text{81}\)

As regards the validity of the detention of the members of Parliament, that cannot be questioned automatically or on the bare statement by counsel that certain members of Parliament are illegally detained with some ulterior object. The enforcement of fundamental rights is regulated by Article 32 and 226 of the Constitution and the

---

\(^{81}\) 1975 Sipp. SCC p. 81 (per Khanna J.).
suspension of remedies under these articles is also governed by appropriate constitutional provisions. Their legality and regularity cannot be collaterally assailed by mere assertions made by counsel.82 Thus detention of a member of Parliament of state legislatures under a preventive detention law has not in any manner affected the Parliamentary privileges.

10. Compensation and Preventive Detention:

The justification for compensation in Preventive detention cases is hard to be established. The various safeguards provided under Article 22 of the Indian Constitution is difficult to be flouted. A detenu is produced before the Advisory Board within 3 months of detention and it is only on the confirmation by the Advisory Board that the detention is continued. So it is the period prior to the producement of a detenu before Advisory Board where the detaining authority could exercise power of detention arbitrarily and in a somewhat extra-constitutional manner.

It must be remembered that no situation howsoever grave gives a license to the State or to the detaining authority to act capriciously and if such actions are taken then the State will have to pay compensation by way of damages.

In Radul Sah Vs. State of Bihar83 the Supreme Court had observed:

"Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this court was limited to passing orders of release from illegal detention. One of the

telling ways in which the violation of the right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulet its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of Public interest and which present for their protection the powers of the State as a shield. If civilisation is not to perish in this country as it has been perished in some others too well-known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers. It may have recourse against those officers."\(^{84}\)

The Supreme Court once again considered the question of compensation in Bhim Singh Vs. State of J & K\(^{85}\) and observed that when a person comes to the Supreme Court with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free, the court may compensate the victim by awarding suitable monetary compensation.

It is now well established that arbitrary detentions both preventive and punitive cannot be shielded under any pretext. Even the Indemnity Acts cannot be passed to cover up such illegal

\(^{84}\) See also Sebastian M. Hongraphy Vs. Union of India A.I.R. 1984 SC 1026.

\(^{85}\) A.I.R. 1986 SC 494.
detentions. The State will be liable for such wrong deeds and will have to pay compensation.

**Methodology:**

This study is a synthesis of theoretical analysis coupled with empirical study about the preventive detention in India with special reference to its operation in the State of Punjab. Case laws have been critically examined to see if it is consistent with the philosophy and spirit of the constitution and changing needs of the society. The role of Supreme Court and the various High Courts have been analysed to find out their contribution in protecting and enforcing the rights of the detenus. Views of the constitution makers have been studied to know the background in which the present provisions relating to the subject matter of the present study were adopted.

The statistics of the preventive detention cases from 1983 to 1992 were critically examined to analyse the background of the detenus and applicability of various preventive detention laws in Punjab. A number of preventive detenus detained under different legislations were interviewed to find out how effectively and successfully the constitutional safeguards and provisions of preventive detention legislations are enforced and what is the real state of affairs. A comparative study with the preventive detention legislations in other countries have been made to find out justifications, if any, to have such laws in peace and normal times.

**Scheme:**

The study has been divided into seven chapters.

Chapter I is introductory. It deals with meaning, nature and necessity of preventive detention laws. It also deals with its
relationship with punitive laws, writ of habeas corpus and Res-
judicata, Mandamus and apprehended preventive detention laws. The 
electoral rights, parliamentary privileges and right to compensations 
of detenus have also been discussed.

Chapter II deals with historical perspectives of preventive 
detention laws in India. It traces its history from the British period 
upto the enforcement of Indian constitution. It also incorporates 
views of the various members of the constituent assembly.

Chapter III is on the preventive detention laws in U.K., U.S.A., 
Australia and Canada.

Chapter IV deals with constitutional provisions and legislation 
relating to preventive detention. It deals all the central and stage 
legislations from 1950 to 1988 incorporating all the amendments 
upto-date. Latest case laws have also been discussed to explain all 
the important provisions.

Chapter V is on the judicial review of preventive detection 
cases. The latest case laws have been incorporated to highlight the 
role played by Judiciary in the effective implementation of the 
various provisions on the subject.

Chapter VI is exclusively devoted to the empirical study of the 
preventive detention in Punjab regarding the enforcement of the 
rights of the detenus.

Chapter VII incorporates summary, suggestions and 
conclusions. It will be helpful in the suitable amendments in the 
constitutional provisions and legislations on the subject.