CHAPTER - 11

CONCLUSION AND SUGGESTIONS
11.1 INTRODUCTION:

Article 22 of the Constitution of India guarantees certain Fundamental Rights to every arrested person. Clause (1) and (2) of Article 22 confer following four Fundamental Rights on such person.

(1) Right to be informed, as soon as may be, of the grounds for such arrests.

(2) Right not to be denied the right to consult and to be defended by a legal practitioner of his choice.

(3) Right to be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of Magistrate.

(4) Right not to be detained in custody beyond the said period of twenty-four hours without the authority of a Magistrate.

Clause (3) contains two exceptions and provides that the above mentioned constitutional guarantees do not apply to enemy aliens and persons arrested or detained under any preventive detention law. Clauses (4) to (7) of Article 22 lay down certain fundamental principles as to preventive detention and guarantee certain Fundamental Rights to persons who are kept under preventive detention. Any law relating to preventive detention must in order to be valid, satisfy the requirements of clauses (4) to (7) of this Article. The Fundamental Rights, guaranteed by clauses (4) to (7) to persons detained under any law for preventive detention, relate to the maximum period of the detention, the provision of an Advisory Board to consider and report on the sufficiency of the cause for detention, the right to be informed of the grounds of detention and the right to have the earliest opportunity of making a representation against the order of detention. The power of preventive
detention is thus acquiesced in by the Constitution as a necessary evil. But it is hedged in by various procedural safeguards to minimise as much as possible the danger of its abuse.

The research study identifies the different component parts of rights under Article 22 in the light of the Supreme Court decisions. The study is an modest attempt to trace the vicissitudes of judicial interpretation on Article 22 with a view to finding out the judicial trend in relation to this fundamental right.

11.2 **CONCLUSION**:

**Chapter - 1**

Under the doctrine of judicial review the Supreme Court performs the role of interpreting the Constitution and exercises power of declaring any law or administrative action which may be inconsistent with the constitutional provisions as *ultra vires* the Constitution and hence void. The Supreme Court plays a very vital role in the interpretation of the Constitution of India especially fundamental rights. For appreciating the correct position of law regarding any fundamental right, it is necessary to read the text in the Constitution along with the gloss put thereon by the Supreme Court. Bare text of Article 22 will not give correct idea of the fundamental rights included in it unless the Article is visualised in the perspective of judicial pronouncements on it. In order to portray the whole panorama of Article 22, the research problem under study was defined as 'Review of the Judicial Gloss on Article 22 of the Constitution of India'.

This research is essentially a doctrinal research. Analytical methodology is adopted by the researcher for obtaining the findings and coming to the conclusion. To some extent, a comparative method is adopted in Chapter-10 on 'Global perspective of the right against arbitrary arrest and detention', where provisions in other countries and International Conventions
corresponding to Article 22 of the Constitution of India are briefly given and some relevant case law is also cited.

The field of research was limited to reviewing of the judicial gloss put on Article 22 of the Constitution of India. The decisions of only Supreme Court of India were studied. All the decisions of the Supreme Court of India from January 1950 to December 2001 were studied. Research study also depicts global perspective comparable to Article 22.

The main data for this research is primary. The source of this primary data being all the cases reported in All India Reporter from January 1950 to December 2001; the cases relating to Article 22 decided by the Supreme Court only being collected. The total number of cases were 300. Out of these 300 cases only 18 cases were related to clause (1) and (2) of Article 22 and all remaining cases i.e. 282 cases were related to preventive detention provisions. The secondary data consisted of sixty-three treatises (text books, reference books etc.) written by renowned authors, one official report (Constituent Assembly Debates) and few periodicals and legal journals of international repute.

In this research study, methodology of data collection was of Census Survey as the whole Universe was studied. The Universe comprised the cases relating to Article 22 decided by the Supreme Court of India and reported in the Journal, All India Reporter from January 1950 to December 2001. Consequently, there was no sampling. This ensured accuracy and comprehensiveness of the research study.

The main objectives of this study were, to trace the genesis of Article 22, to explore the relationship of Article 22 with Articles 14, 19, 20 and 21, to identify the different component parts of Fundamental Right under Article 22, to analyse the trend of judicial decisions relating to Article 22, to study foreign
legal provisions corresponding to Article 22, to come to a conclusion whether the Supreme Court of India is gradually moving from static and literal interpretation to dynamic and liberal interpretation of Article 22.

The thesis comprises of 11 chapters. These are: 1) Introduction, 2) Genesis of Article 22 and it's correlation with Articles - 14, 19, 20 and 21, 3) Rights of arrested person under Article 22(1) and (2), 4) Grounds of preventive detention, 5) Detenu's right of representation, 6) Validity of detention, 7) Article 22 and Emergency, 8) Role of the Advisory Board, 9) Maximum period of preventive detention, 10) Global perspective of the right against arbitrary arrest and detention, 11) Conclusion and suggestions.

Chapter - 2

In the original Draft Constitution submitted by the Drafting Committee to the President of the Constituent Assembly on 21st February 1948, no Article containing provisions of present Article 22 was existing. A new Article, Article 15 A (now Article 22) was later introduced on 15th September 1949. The reasons for the incorporation of this Article lie in the dropping of "due process" clause from Article 15 (now Article 21). Article 21 had been severally criticised by the public outside as it merely prevented the executive from making any arrest. All that was necessary was to have a law allowing arrest and that law need not be subject to any conditions or limitations. It was felt that while this matter was included in the Chapter on Fundamental Rights, Parliament was being given plenary powers to make and provide for the arrest of any person under any circumstances as Parliament may think fit. What was being done by Article 22 was a sort of compensation for what was done in Article 21. The Constituent Assembly provided the substance of "due process" by different door i.e. the introduction of Article 22. This Article in it's first two clauses, merely lifted from the Code of Criminal Procedure two of the most fundamental principles which every civilised country followed as principles of
international justice. However, by making them a part of the Constitution, the Constituent Assembly made a fundamental change by putting a limitation on the authority of both Parliament and State legislatures not to abrogate those provisions. While denying the safeguards under clause (1) and (2) to a person who is preventively detained, Dr. B.R. Ambedkar defended the sub-clause (b) of clause (3) by observing that in the circumstances prevailing then in the country, it may be necessary for the executive to detain a person who tampers either with public order or with the Defence Services of the country and that the exigency of the liberty of the individual should not be placed above the interests of the State. While defending generally the provisions relating to preventive detention in Article 15 A (now Article 22), he pointed out that this power of preventive detention had been hedged in by two limitations: One is that the Government shall have power to detain a person in custody under these provisions only for three months. If they want to detain him beyond three months, they must be in possession of a report made by an advisory board which will examine the papers submitted by the executive and will probably also give an opportunity to the detenu to represent his case and come to the conclusion that the detention is justifiable. It is only under that that the executive will be able to detain him for more than three months. Secondly, detention may be extended beyond three months if Parliament makes a general law laying down in what class of cases the detention may exceed three months and state the period of detention. A large number of amendments were moved to Article 15 A. There was a prolonged, stormy and spirited debate in which about twenty members of Constituent Assembly participated. The consensus of opinion amongst the members who spoke was that the draft Article 15 A as proposed by Dr. B.R. Ambedkar left much to be desired. In reply, Dr. B.R. Ambedkar dealt with the draft Article and the criticism against it clause by clause. One point raised was that while clause (1) of Article 15 A gave a right to an accused person to 'consult' a legal practitioner of his choice, it made no
provision for ‘defending’ by a legal practitioner. In other words, a distinction was made between the right to consult and the right to be defended. Dr. B.R. Ambedkar thought that the words “to consult” included also the right to be defended because, in his view, consultation would be utterly purposeless if it was not for the purpose of defence. However, in order to provide clarity and remove any ambiguity he added the words “and be defended by a legal practitioner” after the words “to consult”. In the case of the persons who are being arrested and detained under the ordinary law as distinct from the law dealing with preventive detention, a provision was made in clause (1) of Article 15 A that the accused person shall be informed of the grounds of his arrest. Such provision was not made in the case of a person who is detained under preventive detention. This omission was criticised by some members of the House. Dr. B.R. Ambedkar agreed that this was legitimate criticism and consequently he amended that part of the Article requiring the authority passing an order of detention to communicate the grounds of such detention to the detenu, as soon as may be, unless it was against the public interest to disclose the facts. When the Indian Constitution was being discussed in the Constituent Assembly, national security was being threatened by infiltrators and invaders at the borders and by reactionaries within. The partition of the country had led to turmoil and communal violence resulting in huge loss to life and property. Then again, Pakistan had let loose raiders and infiltrators in the State of Jammu and Kashmir resulting in arson, looting and other acts of lawlessness. These conditions were perhaps responsible for the inclusion of provisions with respect to preventive detentions in the Constitution of India.

Various Articles in Part III of the Constitution may be seen as bodies of one solar system influencing one another with their gravitational pull and held together by their celestial force. Articles 19 to 22 appear in Part III of the Constitution of India under the common heading ‘Right to Freedom’. Article 19 confers various freedoms there mentioned on citizens alone, whereas the
rights conferred by Articles 20 to 22 are not restricted to citizens but apply to all persons. The subject matter of Articles 20, 21 and 22 falls under criminal law. Article 14 falls into the category “Right to Equality”. The procedure prescribed by law for arrest, detention, trial and conviction resulting in a sentence of imprisonment must conform to Article 22 (1) and (2), to Article 20, to Article 14. However, to preventive detention, Article 20 has no application. Article 21 and 22 are the two organs of an integrated constitutional machinery which provides the safeguards available against unauthorised invasion upon personal liberty. In *Gopalan's case*¹ Kania C.J. held that Article 19 has no application to preventive detention laws because by their very nature the rights given under Article 19 (1) are freedoms of a person assumed to be in full possession of his personal liberty. He did not accept the contention that Article 22 is a complete code. According to him Article 21 has to be read as supplemented by Article 22. To the extent the procedure is prescribed by Article 22, the same is to be observed; otherwise Article 21 will apply. To the extent the points are dealt with, and included or excluded, Article 22 is a complete code. On the points of procedure which expressly or by necessary implication are not dealt with by Article 22, the operation of Article 21 will remain unaffected. Patanjali Sastri, Das and Mukherjea JJ. were in complete agreement with Kania C.J. on the point of correlation of Article 22 to Article 19 and 21. Only Mahajan J. held that Article 22 was a self-contained code in respect of the laws on the subject of preventive detention and that the validity of the law on the subject of preventive detention cannot be examined either by the provisions of Article 21 or by the provisions of Article 19 (5). Fazl Ali J. (minority opinion) said that Articles 19, 20, 21 and 22 overlap each other to some extent. The case of a person who is convicted of an offence will come under Articles 20 and 21 and also under Article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with in Article 22 also
amounts to deprivation of personal liberty which is referred to in Article 21 and is also a violation of the right of freedom of movement dealt with in Article 19 (1)(d). In his view the preventive detention is a direct infringement of the right guaranteed in Article 19 (1) (d) and therefore, the law of preventive detention is subject to such limited judicial review as is permitted under Article 19 (5). In Bank Nationalization case a Bench of 11 Judges by a majority of 10:1 reconsidered Gopalan and purportedly overruled it on this point. The question for consideration in the Bank Nationalization case related to the acquisition of business and property, that is, to civil rights of parties while in Gopalan's case the principal constitutional question was the effect of deprivation of a personal liberty by preventive detention. So, it was wholly inappropriate in the Bank Nationalization case to purport to overrule Gopalan. The decision of the Bank Nationalization case in so far as it relates to correlation of Article 19 to Article 21 and 22 may be characterised as obiter dicta. Following Bank Nationalization case it has also been held in some cases that a law under Article 22 must also pass the test of reasonableness under Article 19 (1)(d). In H.Saha v. State of W.B. the Court was of the opinion that Articles 19 and 22 are mutually exclusive but it proceeded curiously on the assumption (in view of the observations on Gopalan in the Bank Nationalization case) that the Act which is for preventive detention may be tested with regard to it's reasonableness with reference to Article 19. It is generally understood that the opinion of Shah J. in Bank Nationalization case and Bhagwati J. in Maneka Gandhi's case relating to correlation of Article 19 to Article 21 and 22 have overruled the authority of Gopalan and it "no longer holds the field". However, objective study indicates that the ratio in Gopalan's case that Article 19 can have no application where a person is deprived of his personal liberty under Articles 21 and 22 has not yet been expressly overruled. Nonetheless, in several cases the Supreme Court has assumed the applicability of Article 19 and sometimes Article 14 to test the validity of a law of
preventive detention. The stand of the Supreme Court does not appear to be consistent in this regard. Consequent to the conflicting decisions on this question, the position is obscure on this point.

Chapter - 3

As to the right to consult and to be defended by a legal practitioner of his choice mentioned in Article 22 (1), the Supreme Court held in 1951 in Janardhan Reddi v. State of Hyderabad that 'the right to be defended by a legal practitioner of his choice' could only mean a right of the accused to have the opportunity to engage a lawyer and does not guarantee an absolute right to be supplied with a lawyer by the State. This is a literal view of Article 22 (1). Nandini Satpathy's case decided in 1978 makes a clear departure from the literal interpretation stance of the Supreme Court in earlier cases. The case added an additional fortification to the right to counsel. The Supreme Court went a step forward in holding that Article 22 (1) does not mean that persons who are not strictly under arrest or custody can be denied the right to counsel. The Court enlarged this right to include right to counsel to any accused person under circumstances of near-custodial interrogation. However, the Court took the help of Article 20 (3) and Miranda decision for this liberal interpretation. In Joginder Kumar's case a dynamic approach was adopted to the interpretation of Article 22 (1) but with the help of Article 21. The Supreme Court recognised three incidental rights of arrested person in this regard: i) The right to have some one i.e. his relative or friend informed about his arrest. ii) The right to consult privately with lawyer. iii) The right to know from the police officer about this right. The Supreme Court imposed corresponding duties on the police officers. In D.K.Basu v. State of W.B., a Public Interest Litigation, the Supreme Court issued 11 requirements to be followed in all cases of arrest and detention. D.K.Basu's case not only travels a path of few steps ahead of Joginder Kumar but also takes a big leap forward. In it's anxiety to protect the interests of the arrested person, the Court has
exhibited an instance of judicial over-activism, rather judicial waywardness. The Supreme Court arrogated to itself the Constituent or at least legislative power in laying down eleven requirements in this connection. It is submitted that it is a case of out-right judicial legislation. The Supreme Court while interpreting a provision of the Constitution may fill in the interstices but the zeal to artificially create such interstices and then fill it should be deprecated. Though these eleven requirements comprise human rights jurisprudence and it would be in the fitness of the things, if these were law. These sweeping eleven requirements laid down by the Supreme Court, it is submitted, cannot have the status of law as it's source is not legislature but judiciary. It may be noted that these requirements were held to flow from Article 21 and 22 (1) jointly. In Article 22 (1) the opportunity for securing services of lawyer is alone guaranteed. The Article does not require the State to extend legal aid as such but requires to allow all reasonable facilities to engage a lawyer to the person arrested and detained in custody. However, in *M.H.Hoskot's case*\(^{12}\) the Supreme Court did not hesitate to imply this right in Article 22 (1) and 21 jointly while pressing into service application of Directive Principle of State Policy under Article 39 A of Equal Justice and free legal aid. This is an example of dynamic and liberal interpretation of Article 22 (1) which carves out a right for the indigent prisoner or the prisoner in incommunicado situation to be assigned a counsel by the Court at the State's cost. It seems that after the decision of *Maneka Gandhi* giving a new dimension to Article 21, the Supreme Court's judicial activism started blossoming in this regard. *Hussainara Khatoon's case*\(^{13}\) reiterates the right of every accused person who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situation, to have free legal services provided to him by the State. The Court added a further protection to this right by holding that if free legal services are not provided to such an accused, the trial itself may run the risk of being vitiated as contravening Article 21.
The Constitution commands that every person arrested and detained in custody shall be produced before the nearest Magistrate within 24 hours excluding the time requisite for the journey from the place of arrest to the Court of the Magistrate. In *State of Punjab v. Ajaib Singh*\(^{14}\) the Supreme Court held that the language of Article 22 (1) and (2) indicates that the fundamental right conferred by it gives protection against such arrests as are effected *otherwise than under a warrant* issued by a Court on the allegations or *accusation* that the arrested person has, or is suspected to have committed, or is about or likely to commit an act of a *criminal or quasi-criminal* nature or some activity prejudicial to the public or the State interest. In other words, Article 22 (1) and (2) gives protection against the act of the executive or other non-judicial authority. In *Gumupati Keshavram v. Nafisul Hasan*\(^{15}\) it was held that the protection conferred by clauses (1) and (2) of Article 22 extends to arrest and detention in pursuance of an order of the Speaker of a Legislature on a charge of breach of privilege. *M.S.M. Sharma v. Sri Krishna Sinha*\(^{16}\) did not follow *Gunupati's case* so far as it gave primacy to the fundamental right under Article 22 (2) over the privilege of the State Legislature. In *Keshav Singh's case*\(^{11}\) the Supreme Court observed that the observations of the Court in *M.S.M.Sharma's case* about the correctness of the earlier decision in *Gunupati's case* were *obiter* and should not be taken as having decided the point in question. Thus, on the question whether the person arrested in pursuance of an order of the Speaker of a Legislative Assembly on a charge of breach of privilege should be produced before a Magistrate within 24 hours of his arrest, each case added to the confusion on the point and so, law on this point is not clearly settled. In a case involving arrest and deportation of a person it is not necessary to produce such a person before the Magistrate if he was produced before the High Court.\(^{18}\) The Court emphasized in *Madhu Limaye's case*\(^{19}\) that at the stage of remand, the magistrate before directing detention in jail custody should apply his mind to all relevant matters. The
remand orders should not be patently routine and made mechanically. In *Bhim Singh v. State of J.& K.*\(^{20}\) the police had obtained remand of arrested person without producing him before magistrate within requisite period. While holding this as gross violation of his rights under Article 21 and 22 (2), the Court added that in appropriate cases the Court has the jurisdiction to compensate the victim by awarding suitable monetary compensation. This is an instance of dynamic interpretation of Article 22 (2) while pressing into service Article 21.

**Chapter - 4**

On the point of preventive detention the Supreme Court has drawn several propositions to ensure that the detaining authority effectively communicates grounds to the detenu in such manner that his constitutional right to make a representation against his detention is exercised properly. The Court can examine the grounds disclosed by the Government to see if they are relevant to the object which the legislation has in view.\(^{21}\) By holding that giving vague ground to the detenu infringes the constitutional safeguard provided under Article 22 (5), the Supreme Court in *Atma Ram's case*\(^{22}\) created a possibility of an indirect judicial review of subjective satisfaction of the necessity of detention apparently with a view to securing to detenu an opportunity for an effective representation. The Supreme Court analysed the implications of vague, irrelevant and non-existent grounds on the rights of the detenu in *Mohd. Yousuf v. State of J. & K.*\(^{23}\) The Court observed that a detenu has two rights under Article 22 (5) of the Constitution: (1) to be informed, as soon as may be, of the grounds on which the order of detention is based, that is, the grounds which led to the subjective satisfaction of the detaining authority and (2) to be afforded the earliest opportunity of making a representation against the order of detention, that is, to be furnished with sufficient particulars to enable him to make a representation which on being considered may obtain relief to him. The inclusion of an irrelevant or non-
existent ground among other relevant grounds is an infringement of the first of the rights and the inclusion of an obscure or vague ground among other clear and definite grounds is an infringement of the second of the rights. In either case there is an invasion of the constitutional rights of the detenu. The question whether one of several grounds being vague, irrelevant or nonexistent among other valid grounds would infringe the constitutional safeguard provided in Article 22 (5) was answered by the Supreme Court in the affirmative. The Supreme Court supported such a decision on the ground that the decision of detaining authority is made on the totality of impressions of all the grounds and it could not be said in what manner and to what extent the valid and invalid grounds operated on the mind of the authority and contributed to the creation of his subjective satisfaction which formed the basis of the order. In such cases it can never be certain to what extent the bad reasons operated on the mind of the authority concerned or whether the detention order would have been made at all if only one or two good reasons had been before them. To nullify the rationale of all these decisions, Section 5 A of the COFEPOSA Act, 1974 was introduced by Amendment Act, 1975. Section 5 A stipulates that when the detention order has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly that if one irrelevant or one inadmissible ground had been taken into consideration that would not make the detention order bad. A nine Judge Bench of the Supreme Court held in Attorney General for India v. Amratlal Prajivandas that S. 5 A of COFEPOSA Act, 1974 (which is in identical terms with S. 5 A of National Security Act, 1980) is not inconsistent with Article 22 (5) and is not invalid or void. It is submitted by the researcher that Amendment of COFEPOSA Act, 1974 to insert S. 5 A in it, is an unwelcome device used by the legislature in over-riding judicial verdicts. It is also strange that the Supreme Court meekly submitted to this attitude of the legislature and did not assert itself by showing
courage striking down S. 5 A. S. 5 A is totally inconsistent with the stance adopted by the Supreme Court so far. The reasoning adopted by the Court in *Amrattal’s case* in coming to this conclusion is not satisfactory and convincing.

In *State of Bombay v. Atma Ram* the Supreme Court held that grounds are conclusions of facts and not a complete detailed recital of all the facts. However, the person detained is entitled in addition to the right to have the grounds of his detention communicated to him, to a further right to have particulars as full and adequate as the circumstances permit furnished to him so as to enable him to make a representation against the order of detention. It was further held that the sufficiency of the particulars is a justiciable issue, the test being whether it is sufficient to enable the detained person to make a representation. In course of time, the Supreme Court expanded the scope of ‘ground’ so as to include more and more things under it’s umbrella. In *Khudiram Das v. State of W.B.* the Court did not restrict the connotation of the word ‘grounds’ to a bare statement of conclusions of fact but held that it meant all the basic facts and materials which have been taken into account by the detaining authority in making the order of detention. The Court insists that all the basic materials relied upon or referred to in the grounds must be supplied to the detenu with reasonable expedition. in *Icchu Devi v. Union of India* the Court pointed out that the grounds of detention in their entirety must be furnished to the detenu and the Court further added that the copies of documents, statements and other materials relied upon in the grounds of detention must also be furnished to the detenu within the prescribed time. While taking note of various phraseology used in this connection the Supreme Court made it clear in *Kirit Kumar v. Union of India* that whether the documents concerned are ‘referred to’, ‘relied upon’, ‘based on’ or ‘taken into consideration’ by the detaining authority, they have to be supplied to the detenu as part of the grounds so as to enable the detenu to make an effective
representation. The right of the detenu under Article 22 (5) to be furnished with the grounds of detention and particulars thereof is subject to the limitation under Article 22 (6) whereby disclosure of facts considered to be against public interest cannot be required. It was held in *Lawrence D'Souza v. State of Bombay* that the duty to consider whether the disclosure of any facts involved therein is against public interest is vested in the detaining authority, not in any other. In *Bhut Nath v. State of W.B.* the Supreme Court held that the fundamental constitutional mandate of Article 22 (5) is that the authority shall communicate to the detenu ‘all the material grounds on which the order has been made’ The communication of facts is the cornerstone of the right of representation and orders of detention based on uncommunicated materials are unfair and illegal. In *Wasi Uddin v. District Magistrate, Aligarh* the Supreme Court held that it is imperative that the detaining authority must apprise a detenu of his constitutional right under Article 22 (5) to make a representation against the order of detention and of his right to be heard before the Advisory Board. It is significant to note that this rule of apprising detenu of his constitutional rights is neither to be specifically found in the Constitution nor in statutory provision. This judicially evolved rule shows judicial concern for ensuring constitutional rights to detenus. This is dynamic interpretation of Article 22 (5).

As to language of communication, the detenu must be given the grounds in a language which he can understand, and in a script which he can read, if he is a literate person. Article 22 (5) requires that the grounds of detention must be “communicated” to the detenu. “Communicate” is a strong word. It means that sufficient knowledge of the basic facts constituting the “grounds” should be imparted effectively and fully to the detenu in a language, which he understands. 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 the purpose is not served and the constitutional mandate in
Article 22 (5) is infringed.\footnote{35} The authority making the order of detention is required under clause (5) of Article 22 to communicate to such person *as soon as may be* the grounds on which the order has been made. *'As soon as may be'* means reasonable dispatch and what is reasonable must depend on the facts of each case. No arbitrary time limit can be set down.\footnote{36} The sufficiency of the grounds, which gives rise to the satisfaction of the Government is not a matter for examination by the Court; the sufficiency of the grounds to give the detained person the earliest opportunity to make a representation can be examined by the Court, but only from that point view.\footnote{37}

**Chapter – 5**

The second right given by Article 22 (5) to the detenu is that he should be given the earliest opportunity of making a representation against the order of detention. The Supreme Court in various decisions expanded the scope of the detenu's right of representation. In *Pankaj Kumar v. State of W.B.*\footnote{38} the Court held that it is clear from clauses (4) and (5) of Article 22 that there is a dual obligation on the appropriate Government and a dual right in favour of the detenu, namely (1) to have his representation irrespective of the length of detention considered by the appropriate Government and (2) to have once again that representation in the light of the circumstances of the case considered by the Board before it gives it's opinion. Whereas the Government considers the representation to ascertain whether the order is in conformity with it's power under the relevant law, the Board considers such representation from the point of view of arriving at it's opinion whether there is sufficient cause for detention. In *Jayanarayan v. State of W.B.*\footnote{39} the Supreme Court stated four principles to be followed in regard to representation of detenus : (1) The appropriate authority is bound to give an opportunity to the detenu to make a representation and to consider the representation of the detenu as early as possible. (2) The consideration of the representation of the detenu by the appropriate authority is entirely
independent of any action by the Advisory Board including the consideration of the representation of the detenu by the Advisory Board. (3) There should not be any delay in the matter of consideration. However, no hard and fast rule can be laid down as to measure of time taken by the appropriate authority for consideration. (4) The appropriate Government is to exercise its opinion and judgment on the representation before sending the case along with the detenu’s representation to the Advisory Board. In *J.N.Roy v. State of W.B.* it was made clear by the Court that consideration of representation need not as a rule be done before the Government refers to detenu’s case to the Board. Such consideration, however, must be done without any inordinate delay. The order of the Government rejecting the representation of the detenu need not be a speaking order. The detaining authority is under no obligation to grant any oral hearing at the time of considering the representation. A detenu does not have any right to be heard in person by the detaining authority, nor can he be permitted cross-examination of rebuttal evidence. The detenu has no right to appear before the detaining authority by a legal practitioner. It was held in *K.M. Abdulla Kunhi and B.L. Abdul Khader v. Union of India* that the time imperative for consideration of representation can never be absolute or obsessive. It depends upon the necessities and the time at which the representation is made. The representation may be received before the case is referred to the Advisory Board but there may not be time to dispose of the representation before referring the case to the Advisory Board. In that situation the representation must be forwarded to the Advisory Board along with the case of the detenu. The representation may be received after the case of the detenu is referred to the Board. Even in this situation the representation should be forwarded to the Advisory Board provided the Board has not concluded the proceedings. In both the situations there is no question of consideration of the representation before the receipt of the report of the Advisory Board. Nor it could be said that the Government had delayed
consideration of the representation unnecessarily awaiting the report of the Board. It is proper for the Government in such situation to await the report of the Board. It is respectfully submitted that this last observation appears to be clearly wrong because it is obvious that even where the Advisory Board reports that there is in its opinion sufficient cause for the detention of the detenu, the detaining authority or Government is not bound to confirm the order of detention. Therefore, the Government, when it receives the representation of the detenu, must consider it and decide whether to confirm or cancel the detention without waiting for the report of the Advisory Board as suggested in this case. This observation of the Supreme Court is also inconsistent with few earlier decisions of the Supreme Court.

In preventive detention, the personal liberty of a person is at stake. So, it was held by the Supreme Court in *Jayanarayan v. State of West Bengal*\(^4\) that the appropriate Government is bound to consider the representation of the detenu as expeditiously as possible. However, no hard and fast rule can be laid down as to measure of time taken by the appropriate authority for consideration. It will depend upon the facts and circumstances of each case whether the appropriate Government has disposed of the case as expeditiously as possible. Without expeditious consideration with a sense of urgency the basic purpose of affording earliest opportunity of making the representation is likely to be defeated. In *Frances Coralie v. W.C. Khambra*\(^4\) the Supreme Court observed that expedition is essential at every stage. However, the time-imperative can never be absolute or obsessive. There has to be a lee-way, depending on the necessities of the case. But no allowance can be made for lethargic indifference. But allowance must surely be made for necessary consultation where legal intricacies and factual ramifications are involved. The burden of explaining the necessity for the slightest departure from the time-imperative is on the detaining authority. There is no prescribed period either under the provisions of the Constitution or under any preventive
detention law within which the representation should be considered. The judiciary moved to fill the vacuum. The Supreme Court, while giving liberal interpretation to the right of consideration of representation to be found in Article 22 (5) held in *Vijay Kumar v. State of J. & K.*\(^{46}\) that the word 'earliest' which qualifies the opportunity must equally qualify the corresponding obligation of the state to deal with the representation, if and when made, as expeditiously as possible. The detenu would ordinarily be in a position to send his representation through the jail authorities. The jail authority is merely a communicating channel. The intermediary authorities who are communicating authorities have also to move with an amount of promptitude. The corresponding obligation of the State to consider the representation cannot be whittled down by merely saying that much time was lost in transit. It was held in *Rajammal v. State of Tamil Nadu*\(^{47}\) that it is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration of delay but how it is explained by the authority concerned. Even a delay of 35 days\(^{48}\) in considering representation which was satisfactorily explained by the authority was held not to invalidate the order of detention; on the other hand, a delay of 17 days\(^{49}\) which was unexplained or not satisfactorily explained was held to have violated Article 22 (5) invalidating the order of detention.

**Chapter – 6**

Preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order *etc.* ordinarily it is not needed when the detenu is already in custody, the detaining authority must show it's awareness to the fact of subsisting custody of the detenu and take that factor into account while making the order; but even so, if the detaining authority is reasonably satisfied on cogent material that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time he must be detained
in order to prevent him from indulging in such prejudicial activities, the
detention order can be validly made even in anticipation to operate on his
release. The preventive detention power cannot be quietly used to subvert,
supplant or to substitute the punitive law of the Penal Code. The immune
expedient of throwing into a prison cell one whom the ordinary law would
take care of, merely because it is irksome to undertake the inconvenience of
proving guilt in Court is unfair abuse. The power of preventive detention is a
precautionary power exercised in reasonable anticipation. It may or may not
relate to an offence. An order of preventive 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. There is no
reason why executive cannot take recourse to it’s powers of preventive
detention in those cases where the executive is genuinely satisfied that no
prosecution can possibly succeed against the detenu because he has influence
over witnesses and against him no one is prepared to depose.

Once the detaining authority is satisfied regarding the necessity to
make an order of detention a quick action is contemplated. Unreasonable
delay in making of an order of detention may lead to an inference that the
subjective satisfaction of the authority was not genuine as regards the
necessity to prevent the person from indulging in any prejudicial activity and
to make an order of detention for that purpose. The grounds of detention have
to be reasonably proximate in time. But there can be no hard and fast rule as
to what is the length of time which should be regarded sufficient to snap the
nexus between the incident and the order of detention. It is not right to
assume that an order of detention has to be mechanically struck down if
passed after some delay. It is necessary to consider the circumstances in each
individual case to find out whether the delay had been satisfactorily explained
or not. Similarly long and unexplained delay in execution of the order of preventive detention has been held in several cases to lead to an inference that satisfaction was not genuine.\textsuperscript{56} In \textit{D.S. Roy v. State of W.B.}\textsuperscript{57} the Supreme Court held that confirmation of the opinion of the Advisory Board to continue the detention beyond three months must be within three months from the date of detention in conformity with the mandate in clause (4) of Article 22. Confirmation after the expiry of that period would be without the authority of law and so illegal. However, it cannot be said that the confirmation must be communicated within three months from the date of detention. Thus the Supreme Court by it's judicial activism and by liberal and dynamic interpretation of various provisions of preventive detention laws and the Constitution has evolved rules like the time-lag between the prejudicial activity and the order of detention, delay in making arrest after the order of detention, delay in confirmation of the detention order would vitiate the order of detention.

Preventive detention can be ordered for maintenance of 'public order'. The Supreme Court has differentiated 'public order' from 'law and order'. It has interpreted the phrase 'public order' divergently in various cases. The criteria evolved by the Court to distinguish 'public order' from law and order are: i) gravity of the disorder,\textsuperscript{58} ii) seriousness of disorder and it's capacity to directly affect community or injure the public interest,\textsuperscript{59} iii) potentiality of the act, degree and extent of the reach of the act upon the society, disturbance of the current of life of the community,\textsuperscript{60} iv) creating panic and terror in the locality,\textsuperscript{61} v) length, magnitude and intensity of the terror wave unleashed by a particular act,\textsuperscript{62} vi) feeling of insecurity among the general public.\textsuperscript{63}

Doctrine of subjective satisfaction of 'detaining authority was recognised in \textit{Gopalan's case}\textsuperscript{64} where Section 3 of the Preventive Detention Act, 1950 was impugned on the ground that it did not provide an objective
standard of conduct. Kania C.J. speaking for the Court held that no such objective standard of conduct can be prescribed, except as laying down conduct tending to achieve or to avoid a particular object. For preventive detention, action must be taken on good suspicion. It is a subjective test based on the cumulative effect of different actions. The Court, in effect, excluded any possibility of judicial review on this point. This was a literal and static interpretation of the legal provisions. But, in course of time, the Court started carving out an area where judicial review may operate. In *State of Bombay v. Atmaram*,

while generally accepting this doctrine, the Court held that the subjective satisfaction must be based on some grounds and there can be no satisfaction if there are no grounds for the same. The Court added that the grounds should be such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained. So, the doors were slightly opened for judicial review in this regard. In *P. Mukherjee v. State of W.B.*

the Court observed that it has power to review if the grounds furnished to the detenu are vague or irrelevant and the detenu may also challenge the validity of his detention on the ground of *mala fides*. The Court further observed that it is only in this incidental manner that the question of reasonableness or propriety of subjective satisfaction can become justicable. In *Anil Dey v. State of W.B.*

the Supreme Court observed that even if the incident attributed to the detenu has some connection with the obnoxious activities, it should not be too trivial in substance nor too stale in point of time as to snap the rational link that must exist between the vicious episode and the prejudicial activity sought to be interdicted. It was held in *Daktar Mudi v. State of W.B.*

that the Supreme Court can look into the record for satisfying itself that the authority could have arrived at the conclusion and the Court would not accept the mere *ipse dixit* of the authority on this point. The Supreme Court expressly accepted in *Khudiram Das v. State of W.B.*

that the subjective satisfaction of the detaining authority is not
wholly immune from judicial reviewability and validity of subjective satisfaction can be subjected to judicial scrutiny though in limited circumstances. The Court said that subjective satisfaction being a condition precedent for the exercise of the power conferred on the executive, the Court can always examine whether the requisite satisfaction is arrived at by the authority; if it is not, the exercise of power would be bad. The Court observed that in case of non-application of mind by the detaining authority, subjective satisfaction is vitiated. The satisfaction, moreover, must be a satisfaction of the authority itself and therefore, if in exercising the power the authority has acted under the dictation of another body, the exercise of power would be bad. The satisfaction would also be bad where it is based on the application of a wrong test or the misconstruction of a statute. Thus, in later decisions the Court has, by narrowing down the scope of subjective satisfaction and extending the scope of judicial review, given dynamic and liberal interpretation to the legal provisions and devised various methods of judicial control with a view to protecting personal liberty and preventing misuse, abuse or arbitrary use of power in the hands of detaining authorities.

On the point of post-detention treatment of detenus the Supreme Court observed in *A.K. Roy v. Union of India* a case decided in 1982, that there is no reason not to permit them to wear their own cloths, eat their own food, have interviews with the members of their families at least once in a week and have reading and writing material according to their reasonable requirements. The Court further observed that laws of preventive detention cannot by the back door, introduce procedural measures of a punitive kind. Detention without trial is an evil to be suffered, but to no greater extent and in no greater measure than is minimally necessary in the interest of the country and the community. It is neither fair nor just that a detenu should have to suffer detention in “such place” as the Government may specify. The normal rule has to be that the detenu will be kept in detention in a place which is within the
environs of his or her ordinary place of residence. In order that the procedure attendant upon detentions should conform to the mandate of Article 21 in the matter of fairness, justness and reasonableness, it is imperative that immediately after a person is taken in custody in pursuance of an order of detention, the members of his household, preferably the parent, the child or the spouse, must be informed in writing of the passing of the order of detention and of the fact that the detenu has been taken in custody. Intimation must also be given as to the place of detention, including the place where the detenu is transferred from time to time. It is necessary to treat detenu consistently with human dignity and civilized norms of behaviour. In the opinion of the researcher the decision exhibits the judicial concern for human rights of the detenu. The decision is also an example of dynamic and liberal interpretation of preventive detention law passed under Article 22. Such interpretation is given taking the help of Article 21 of the Constitution of India.

Chapter – 7

Enforcement of Article 22 was suspended in 1962 Emergency for purposes of the Defence of India Act and the rules made thereunder. The Makhan Singh's case was decided during the period of this Emergency. Enforcement of Article 22 was suspended generally in 1975 Emergency. The Habeas Corpus case was decided during the period of this Emergency. Makhan Singh's case, a 7 Judge-Bench decision is an authority for the proposition that in spite of the Presidential Order under Article 359 (1) suspending right to move the Courts for enforcement of fundamental rights under Articles 21 and 22, the detenu's right to challenge his detention on following grounds remains intact: (i) The detention order is in violation of the mandatory provisions of the preventive detention law. (ii) The detention has been ordered mala fide. (iii) The operative provision of the law under which he was detained suffers from the vice of excessive delegation. (iv) The law
authorising detention was colourable exercise of legislative power *i.e.* it was passed by the legislature having no legislative competence. (v) The violation of fundamental rights other than those rights specified in the Presidential Order. *Makhan Singh’s case* held that the detenu can move the Court for a writ of *habeas corpus* on any one of the above pleas. The plea thus raised by the detenu cannot at the threshold be said to be barred by the Presidential Order. In terms, these are not pleas relatable to the fundamental rights specified in the Presidential Order. These are the pleas which are independent of the said rights. It is submitted by the researcher that the above ruling of the Supreme Court lays down the correct law on the point and majority judgment in *Habeus Corpus case* passing the following order is patently wrong:

> In view of the Presidential Order dated 27th June 1975, no person has *locus standi* to move any writ petition under Article 226 before a High Court for *habeas corpus* or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by *mala fides* factual or legal or is based on extraneous considerations.

There is a contradiction between the judgments and the final order of the Court. The startling conclusion was reached in this case that the effect of the President’s Order under Article 359 was that no redress was available against violation of the law or against *mala fide* actions of the executive authorities. It is important to note in this regard that Article 359 does not confer power on the President to issue an Order providing that the right of any person to move any court for *any purpose* is barred. The Supreme Court was wrong in not following *Makhan Singh’s case* in *Habeus Corpus case*. It appears that the majority judges in deciding this case were placed in the vortex of confusion. In deciding this case the judges were more concerned with the language of the law than with the spirit of the Constitution; more concerned in protecting executive action than the oppressed detenus. Dissenting judgment of Khanna J. is convincing and correct. During the dark days of 1975 emergency on the ground of ‘internal disturbance’ the Supreme Court blew off
the light of liberty. It gave absolute judicial approbation to authoritarianism and emergency excesses.

**Chapter - 8**

The reference to the Advisory Board is a safeguard against Executive vagaries and high-handed action. Advisory Board is a machinery to review the decision of the Executive on the basis of a representation made by the detenu and the grounds of detention. Article 22 (4) provides that no law providing for preventive detention shall authorise the detention of a person for a longer period than 3 months unless an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as Judges of a High Court, has reported before the expiration of the said period of 3 months that there is in its opinion sufficient cause for such detention. Section 3 of the 44th Constitution Amendment Act, 1978 made an important amendment to Article 22 (4). The main points of distinction between the amended provisions and the existing provisions of Article 22 (4) are that whereas under the amended provisions (i) the Constitution of the Advisory Board has to be in accordance with the recommendations of the Chief Justice of the appropriate High Court; (ii) the chairman of the Advisory Board has to be a serving Judge of the appropriate High Court, and (iii) the other members of the Advisory Board have to be serving or retired Judges of any High Court. Under the existing provision, (i) it is unnecessary to obtain the recommendations of the Chief Justice of any High Court for constituting the Advisory Board and (ii) the members of the Advisory Board need not necessarily be serving or retired Judges of a High Court, it is sufficient if they are “qualified to be appointed as Judges of a High Court”. It is curious to note that this Amendment has not been brought into force as yet even after a quarter of century! Under Article 22 (7) (c), power is given to Parliament to prescribe the procedure to be followed by an Advisory Board in an inquiry under Article 22 (4)(a). The Advisory Board is to report whether there is sufficient cause for such
detention. If the Advisory Board reports that the detention is justified, then only the detaining authority determines the period of detention. On the other hand, if the Advisory Board reports that the detention is not justified, the detained person must be released. Clause (4) of Article 22 does not require that the Advisory Board has to determine whether the person detained should be detained for more than three months. What it has to determine is whether the detention is at all justified.73

Parliament is empowered to pass a law of preventive detention under Article 22 (4)(b) read with clauses 7(a) and (b) and dispense with the necessity of consulting an advisory board for detention beyond a period of three months. Clause 7 (a) requires Parliament to prescribe in such a law the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months without obtaining the opinion of the Advisory Board. Majority in *Gopalan's case*74 held that 'circumstances' and 'class or classes of cases' should be read as disjunctive and not conjunctive. So power of preventive detention beyond three months without consulting Advisory Board may be exercised either if the circumstances in which or the class or classes of cases in which, a person is suspected or apprehended to be doing the objectionable things mentioned in the law. This was a strained interpretation of clause 7 (a) of Article 22. However, in *S.N. Sarkar v. State of W.B.*75 a case decided in 1973, *Gopalan* was overruled on this point in holding that the meaning of the word 'and' in that clause must be held to have it's ordinary conjunctive sense, the context in that clause also requiring not the opposite but it's commonly understood sense, requiring Parliament to prescribe both the circumstances and the classes of cases in which only consideration by the Board can be dispensed with. This is a liberal interpretation of clause 7 (a) of Article 22 given by the Supreme Court which protects the liberty of the persons in confining the detention, without opinion
of the Advisory Board, to exceptional cases, where both the conditions i.e. the circumstances and the class of cases are fulfilled.

Normally, lawyers have no place in the proceedings before the Advisory Board. The functions of the Advisory Board are purely consultative. Section 10 (3) of the Preventive Detention Act, 1950 which excluded the right to appear in person or by any lawyer before the advisory board was challenged in *Gopalan v. State of Madras* as infringing fundamental right. Kania C.J. speaking for the Court pointed out that Article 22(1) which gives a detained person a right to consult or be defended by his own legal practitioner is specifically excluded by Article 22 (3) (b) in the case of legislation dealing with preventive detention. This was a literal interpretation to begin with in 1950. In *Kavita v. State of Maharashtra* departing from it's earlier approach of literal interpretation, the Supreme Court held that though it is true that S. 8 (e) of COFEPOSA Act disentitles a detenu from claiming as of right to be represented by a lawyer, it does not disentitle him from making a request for the services of a lawyer. Adequate legal assistance may be essential for the protection of the Fundamental Right to life and personal liberty guaranteed by Article 21 of the Constitution and the right to be heard given to a detenu by S. 8 (e) of COFEPOSA Act. These rights may be jeopardised and reduced to mere nothings without adequate legal assistance. That would depend on the facts of each individual case, in the light of the intricacies of the problems involved and other relevant factors. Therefore, where a detenu makes a request for legal assistance, his request would have to be considered on it's own merit in individual case. In *Nand Lal v. State of Punjab* the Court observed that it is increasingly felt that in the context of 'deprivation of life and liberty' under Article 21, the 'procedure established by law' carried with it the inherent right to legal assistance. The right to be heard before the Advisory Board, would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. It is quite clear upon the terms of sub-section (4) of section 11 of the
Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980 that the detenu had no right to legal assistance in the proceedings before the Advisory Board, but it did not preclude the Board to allow such assistance to the detenu, when it allowed the State to be represented by an array of lawyers. It was held in 1982 in *Hemlata v. State of Maharashtra* that Section 8 (e) of COFEPOSA does not bar representation of a detenu by a lawyer. It only lays down that the detenu cannot claim representation as of right. It has given discretion to the Board to permit or not to permit lawyer according to necessity of case. In complicated cases assistance of lawyers may be necessary. Thus in the cases of *Kavita, Nand Lal and Hemlata* the Supreme Court by allowing a representation of lawyer before the Advisory Board has virtually ignored Clause 3 (b) of Article 22 which expressly says that right to consult and to be defended by a legal practitioner is not available to a person who is detained under any preventive detention law. From *Gopalan* to *Hemlata* there is definite shift in the approach of the Supreme Court from literal and static interpretation to liberal and dynamic interpretation. The Court, by it's creativity added a new dimension to this matter in the case of *A.K. Roy v. Union of India* where it observed that the embargo on the appearance of legal practitioners should not be extended so as to prevent the detenu from being aided or assisted by a *friend* who, in truth and substance, is not a legal practitioner. This is an example of dynamic innovation shown by the Supreme Court. The Court ordained in this case that whenever demanded, the Advisory Board must grant the facility to be assisted by friend.

It is not the requirement of principles of natural justice that there must be an oral hearing. The representation is to be considered by the Advisory Board by following the substance of natural justice as far as it is consistent with the nature of the Act. However, various preventive detention laws provide that the Advisory Board shall if in any particular case it considers it
essential so to do or if the person concerned desires to be heard hear him in person. If report is submitted by the Advisory Board without hearing the detenu who desired to be heard it will be violative of the safeguards provided under Article 22. In *A.K. Roy v. Union of India* the Court observed that just as there can be an effective hearing without legal representation even so, there can be an effective hearing without the right of cross-examination. The Court was of the opinion that in the proceedings before the Advisory Board, the detenu has no right to cross-examine either the persons on the basis of whose statement the order of detention is made or the detaining authority. The Court justified this decision on the ground that in the proceedings before the Advisory Board, the question for consideration of the Board is not whether the detenu is guilty of any charge but whether there is sufficient cause for the detention of the person concerned. The detention is based not on facts proved either by applying the test of preponderance of probabilities or of reasonable doubt. The detention is based on the subjective satisfaction of the detaining authority that it is necessary to detain a particular person in order to prevent him from acting in a manner prejudicial to certain stated objects. The proceedings of the Advisory Board has therefore to be structured differently from the proceedings of judicial or quasi-judicial tribunals before which there is *lis* to adjudicate upon. The Court did not see any objection in granting to the detenu the right to lead oral or documentary evidence in rebuttal before the Advisory Board. There is no failure of justice by the opinion of the Advisory Board rejecting the representation of the detenu, not being a speaking order.

**Chapter - 9**

The Constitution does not lay down any maximum period of preventive detention but it enables the Parliament to lay down such maximum period. Article 22 (4) (a) of the Constitution says that no law providing for preventive detention shall authorise the detention of a person for a period longer than three months unless an Advisory Board has reported before the expiry of three
months that there is in its opinion sufficient cause for such detention. The proviso to the Article provides that nothing in sub-clause (a) shall authorise the detention of any person "beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7)" of Article 22. In *Fagu Shaw v. State of W.B.* the Supreme Court, by majority held that as ancillary to legislative power, Parliament and State Legislatures both have power to fix the period of detention also under entry 3 of List III of the Seventh Schedule. What the proviso to Article 22 (4) (a) means is that even if the Advisory Board has reported before the expiration of three months that there is sufficient cause for detention, the period of detention beyond three months shall not exceed the maximum period that might be fixed by any law made by Parliament under Article 22 (7)(b). The proviso cannot mean that even if Parliament does not pass a law fixing the maximum period under Article 22 (7)(b), the State legislatures, for example, cannot pass a law which provides for detention of a person beyond three month. An obligation cannot be imported under the proviso to Article 22 (4)(a) read with Article 22 (7)(b) that Parliament "shall" by law prescribe the maximum period of detention. However, Article 22 (4)(b) makes it obligatory upon Parliament if it wants to pass a law for detaining a person for a period of more than three months without making a provision in that law for obtaining the opinion of an Advisory Board within three months, to comply with sub-clauses (a) and (b) of Article 22 (7). The Court further held that it is not necessary that Parliament should fix a period in terms of years or months in order that it might be "the maximum period" for the purpose of Article 22 (7) (b). The maximum period can be fixed with reference to the duration of emergency. It is submitted that the decision of the Court in this regard is clearly at variance with the intention of the Constitution makers, according to whom if the detention is to be for a longer period than three months, whether under sub-clause a) or under sub-
clause (b) of clause (4), the Parliament must prescribe the maximum period of detentor.86

As to period of parole, the Supreme Court had held in *Poonam Lata v. M.L. Wadhawan*87 that where a detenu is released on parole, the period of parole has to be excluded in reckoning the period of detention. The Court expressly overruled this case in *Sunil Fulchand Shah v. Union of India*88 by holding that period of parole has to be counted towards total period of detention unless terms of grant of parole, rules or instructions prescribe otherwise. The Supreme Court justified this decision on the reasoning that parole only changes the mode of detention by restraining the movement of the detenu in accordance with the conditions prescribed in the order of parole. The detenu is not a free man while out on parole. He remains in legal custody of the State and under the control of its agents, subject to any time, for breach of condition, to be returned to custody. It is submitted that in *Poonam Lata’s case* decided in 1987, the Supreme Court gave literal and static interpretation to the provisions of preventive detention. This type of interpretation went against the interests of detenu. However, recently there appears to be a shift in the attitude of the Supreme Court in this regard in that in *Sunil Fulchand Shah’s case* decided in 2000 it departed from its earlier stand and gave liberal and dynamic interpretation relating to the provision of period of detention and held rightly that period of parole is to be counted in the period of detention.

**Chapter – 10**

As to global perspective of the right against arbitrary arrest and detention, by and large, preventive detention provisions are not to be found in the Constitution of various nations. These provisions are regulated by law which ordinarily are operative during emergency and war time. However, safeguards against arbitrary arrest and detention (punitive detention) corresponding to Article 22 (1) and (2) of the Constitution are to be found
mutatis mutandis in the Constitutions or statutes or both of almost all nations. The Supreme Court of U.S.A. has continually moved towards broadening the scope of situations requiring the assistance of the counsel. The 6th Amendment of U.S.A. Constitution provides for assistance of counsel for the defence of the accused in all criminal prosecutions. In U.S.A. there is no constitutional provision for preventive detention. In U.S., only the Congress is empowered to enact laws for preventive detention and that also only for prosecution of war, suppression of insurrection and repulsion of invasion. Provision for preventive detention was made in an 'emergency' by the Internal Security Act, 1950 also known as McCarran Act. English Parliament also never authorised preventive detention except in times of war or beyond the duration of such exigency. Regulation 14 B under the Defence of the Realm Consolidation Act, 1914 and Regulation 18 B under the Emergency Powers (Defence) Act, 1939 were passed in 1st and 2nd World War respectively making provisions of preventive detention in England. No person other than the Home Secretary had the authority to issue order of detention under these Regulations. The Police and Criminal Evidence Act, 1984 makes some provisions safeguarding right against arbitrary arrest and detention. Legal Aid and Advice Act in England provides for the supply at public expense of legal aid to poor persons accused of crime.

Article 9 and 14 (3) of the International Covenant on Civil and Political Rights correspond to Article 22 of the Constitution of India. The Covenant generally elaborates on the rights set forth in the Universal Declaration of Human Rights, 1948. India has acceded to this Covenant but with some reservations. The State Parties to the Covenant have under Article 2, undertaken to respect and to ensure to all individuals within their territories and subject to their jurisdictions the rights recognised in this Covenant. Regional Human Rights Conventions like European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, American
Constitution of India. In 1988, the General Assembly of the United Nations adopted the ‘Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment’. This instrument contains a detailed checklist of safeguards relating to personal liberty. These principles apply for the protection of all persons under any form of detention or imprisonment. In approving the Body of Principles, the General Assembly urged that every effort be made so that the Body of Principles becomes generally known and respected. This is strongly supportive language, but certainly not such as to suggest that the Assembly was seeking to promote their recognition as legally binding. These Principles cannot per se have the force of international law. Principles 10, 11, 12, 13, 14, 17, 18, 32 contain provisions corresponding to Article 22 of the Constitution of India.

**General**

Various preventive detention laws passed under Article 22 and considered by the Supreme Court in its decisions in connection with preventive detention cases are as follows:


Indian administration has become used to preventive detention ever since 1818 so much so that neither the administration nor any party in power can afford to do without it. According to Granville Austin, executive defends preventive detention as a necessary evil. He says about Indian experience that it remained an evil and a crutch ... dulling government's investigatory and prosecutorial skills. Patanjali Sastri J. in Gopalan's case has characterised preventive detention as sinister-looking feature. Paradigm shift is needed to minimise application of preventive detention laws. Preventive detention laws should only remain psychological deterrents.

The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) was placed in the IXth Schedule at Serial Number 104 by the Constitution 39th Amendment Act, 1975 while COFEPOSA Amendment Act, 1976 (20 of 1976) was placed in the IXth
Schedule at Serial Number 129 by the Constitution 40th Amendment Act, 1976. So, they enjoy the immunity conferred by Article 31-B. This means any provision of the COFEPOSA as amended cannot be challenged on the ground that it violates any of the Fundamental Rights (including Article 22). The researcher is astonished to note that in spite of this position the Supreme Court has in many cases considered and decided as to validity of various provisions of the COFEPOSA Act on the ground of their violation of Fundamental Rights, especially Article 22 and 21. Was the Supreme Court unaware of placing COFEPOSA in the IXth Schedule? Did not any counsel bring this fact to the notice of the Supreme Court?

To sum up, the Supreme Court has used its power in a creative manner in interpreting Article 22 of the Constitution of India and has played a vital role to control administrative discretion. The Apex Court widened the horizon of the right against arbitrary arrest and detention to incorporate new rights like free legal aid to the indigent, right of legal representation to detenu, expeditious consideration of the representation of the detenu etc. The Court has acted as ombudsman in administrative action of preventive detention. The Court has struck a fine balance between individual freedom and social control. A distinct jurisprudence of preventive detention has been evolved. The initial stage, which began with *Gopalan's case*, ushered in the era of static and literal interpretation of Article 22, the judicial review in this area remained marginal and peripheral. The Supreme Court gradually evolved judge made rules to control administrative discretion and to protect human rights. In later period, the Supreme Court changed its traditional paradigm of interpretative process and adopted by and large dynamic, liberal and progressive interpretation of Article 22. It looked to the spirit and purpose of the Fundamental Rights provisions rather than to the letter of the Constitution.
The findings of the research study support the hypothesis initially formulated. The hypothesis was:

"The Supreme Court of India is gradually moving from static and literal interpretation to dynamic and liberal interpretation of Article 22 of the Constitution of India".

However, it is also found that the Supreme Court in many cases was inclined to take the help of Article 21 while giving dynamic and liberal interpretation to Article 22. So, the hypothesis is accepted subject to a rider, and the corrected hypothesis would be in these words:

"The Supreme Court of India is gradually moving from static and literal interpretation to dynamic and liberal interpretation of Article 22 of the Constitution of India, occasionally with the help of Article 21".

11.3 SUGGESTIONS:

In the interest of Human Rights Jurisprudence, the researcher suggests some amendments to be made to Article 22 of the Constitution of India. These are as follows:

1) The Parliament alone should be authorised to pass the legislation of preventive detention. Presently, the Parliament as well as State legislatures can pass laws relating to preventive detention. It is better in the interest of the nation that there should be uniform law throughout India with respect to this unwholesome and unpopular matter of detaining people without trial. Central Government may take a dispassionate view rather than the State Government. It should be noted that in U.S.A., only the Congress is empowered to enact laws for preventive detention.
2) There should be periodical review of detention cases by Advisory Board every three months. Presently, once a person is detained and once the Advisory Board agrees to his detention for a period longer than three months, the fate of that person is virtually sealed. He will, then, be absolutely at the mercy of the Executive. After three months, conditions in the country may change. Something more may come to the light and those changed circumstances may be placed before the Advisory Board and the Advisory Board in view of the changed conditions and the fresh facts being placed before them, would be in a position to advise the Government whether the continued detention for another three months is necessary.

3) Maximum period of detention of one year should be mentioned in Article 22 itself instead of giving power to the Parliament to fix this period by legislation. One year is certainly not a very short period because if the police is not able to secure evidence within that year and place before the court, then the evidence on which the detenu is sought to be detained is not worth considering. This will require amendment of Article 22 (7) (b) accordingly.

4) Parliament should not be empowered to dispense with the consultation of the Advisory Board in any case where the detention is to last for more than three months. This will require repeal of clause 7 (a) and consequently clause 4 (b) of Article 22 of the Constitution.

5) There may be a justification for preventive detention for reasons of defence, foreign affairs and security of India (List I, Entry 9). But there is no need for the categories set out in Entry 3 of List III i.e. maintenance of public order, maintenance of supplies and services essential to the community. 'Security of State' in this Entry may be interpreted as a part of the Security of India in Entry 9 of List I.
Consequently, this Entry 3 in Concurrent List should be deleted. Providing preventive detention for purposes of maintenance of public order, maintenance of supplies and services essential to the community is putting the individual liberty of persons in great jeopardy. The ordinary laws are more than enough for the categories set out in List III Entry 3.

6) As to composition of the Advisory Board, only sitting High Court Judges or persons who had been High Court Judges should be appointed. It is dangerous to appoint persons who are merely qualified to be appointed as High Court Judges as the fundamental idea underlying the Constitution of the Advisory Board is that the matter should go before a judicial tribunal or before any authority which is capable of judiciously thinking. This provision may be abused. This provision would enable an unscrupulous executive to nominate persons who might be their own persons. High Court Judges and persons who had acted in that position are likely to be more independent and fair. Clause 4 (a) of Article 22 requires to be amended to incorporate this suggestion.
REFERENCES