CHAPTER - 2

GENESIS OF ARTICLE 22
AND IT'S CORRELATION
WITH ARTICLES 14, 19, 20
AND 21
CHAPTER - 2
GENESIS OF ARTICLE 22 AND IT'S CORRELATION WITH ARTICLES 14, 19, 20 AND 21

2.1 INTRODUCTION:

It is very interesting to note how Article 22 came to be incorporated in the Constitution of India. Article 22 did not exist in the original, draft Constitution. It was later introduced by Dr. B.R. Ambedkar in the form of Article 15A. A large number of amendments were moved by the members of the Constituent Assembly to Article 15A (now Article 22). The draft of Article 15A as introduced by Dr. B.R. Ambedkar was generally criticised by the members. There was a prolonged and stormy debate in which many members of the Constituent Assembly participated. Some of the amendments moved by them were accepted. The members who participated in this discussion were: Pandit Thakur Das Bhargava, Naziruddin Ahmad, Smt. Purnima Banerji, Dr. P.S. Deshmukh, H.V. Kamath, H.V. Pataskar, R.K. Sidhwa, Dr. Bakshi Tek Chand, Alladi Krishna Swami Ayyar, Jaspat Roy Kapoor, M. Anathasayanam Ayyangar, Mahavir Tyagi, Dr. P.K. Sen, Pandit Hirday Nath Kunzru, B.M. Gupte, Smt. G. Durgabai, Shibban Lal Saxena, T.T. Krishnamachari. Dr. B.R. Ambedkar, a genius in this regard gave a final shape to Article 22.

2.2 GENESIS OF ARTICLE 22:

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. For the genesis of Article 22, we will have to turn to Article 15 (now Article 21) of the Draft Constitution. There was a marked difference of opinion amongst the members of the Constituent Assembly as to whether Article 21 should contain
‘due process’ clause of the American Constitution.¹ In the American Constitution, these words were first used in 1791:

“Nor shall any person . . . be deprived of life, liberty or property, without due process of law.”

The expression “due process”, however, as developed in the United States Supreme Court, has acquired a different connotation in a long course of American judicial decisions. Today, according to Prof. Willis, the expression means, what the Supreme Court says what it means in any particular case. In the development of this doctrine, the United States Supreme Court has not adopted a consistent view at all and the decisions are conflicting. It has no definite import. It all depended upon the particular Judges that presided on the occasion. There is no uniformity at all in the decisions of the United States Supreme Court. In America no such word as ‘personal’ existed. There the word liberty alone existed. “Due process” clause would enable the courts to examine not only the procedural part, the jurisdiction of the Court, the jurisdiction of the legislature, but also the substantive law. The term “without due process of law” has a necessary limitation on the powers of the State, both executive and legislative. What this phrase means is to guarantee a fair trial both in procedure as well as in substance. Under this clause the Court will have the power, in reviewing legislation, to see not only that the procedure is followed, namely that the warrant is in accordance with law or that the signature and the seal are there, but it has also the power to see that the substantive provision of law are fair and just and not unreasonable or oppressive or capricious or arbitrary. In the American Constitution, the words are used in connection with life, liberty and property. In Article 15 the word ‘property’ is omitted.

On 6th December 1948, in Constituent Assembly Debates, Kazi Syed Karimuddin, while speaking on Article 15 (now Article 21) said that if the
words "according to procedure established by law" are enacted, there will be very great injustice to the law courts in the country because as soon as a procedure according to law is complied with, there will be an end to the duties of the court and the judges cannot interfere with any law which might have been capricious, unjust or iniquitous. He was in favour of substitution of the words "without due process of law" for the words "except according to procedure established by law".

As regards why the original words "without due process of law" were omitted and the present words "except according to procedure established by law" are inserted, the reason was stated to be that the expression is more definite and such a provision finds place in Article XXXI of the Japanese Constitution of 1946. In the view of Mehboob Ali Baig Sahib Bahadur, it is no doubt true that in the Japanese Constitution, Article XXXI reads like this but if the other Articles that find place in the Japanese Constitution (viz. XXXII, XXXIII, XXXIV) had also been incorporated in the Draft Constitution that would have been a complete safeguarding of the personal liberty of the citizen. This Draft Constitution has conveniently omitted those provisions. Article XXXIV of the Japanese Constitution provides that "no person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of the counsel, nor shall be detained without adequate cause and upon demand of any such person such cause should be immediately shown in open court in his presence and in the presence of his counsel". Such a clear right has not been given in the draft provisions. If for the sake of clarity and definiteness Article XXXI of the Japanese Constitution was incorporated in the Draft Constitution, the draftsmen should in fairness should have incorporated these other Articles of the Japanese Constitution which are relevant and which were enacted for safeguarding the personal liberty of the honest citizens.
Pandit Thakur Dass Bhargava supported the substitution of the words "without due process of law" for the words "except according to procedure established by law". By using these words "without due process of law", he wanted the courts to be authorised to go into the question whether a particular law enacted by Parliament is just or not, whether it is good or not. He rightly remarked that if the words 'procedure established by law' remained in the Article, it will have to be found out what was the meaning of the word 'law'. These words would remain vague and it will result in misconceptions and misconstructions. He was of the view that unless and until the court is invested with such power and Article 15 is really made justiciable there is no guarantee that the people will enjoy the freedoms which the Constitution wants to confer upon them. He stressed the position that in a democracy, the courts are the ultimate refuge of the citizens for the vindication of their rights and liberties. He wanted the judiciary to be exalted to its right position of palladium of justice and the people to be secure in their rights and liberties under its protecting wings.

Shri Chimanlal Chakkubhai Shah pointed out that it would be wrong to say that the words "due process of law" were likely to lead to any uncertainty or unnecessary interference by the judiciary in reviewing legislation. In all Federal Constitutions, the judiciary has undoubtedly the power which at times allows it to review legislation. In several Articles of this Constitution express powers are conferred on the judiciary to pronounce any law to be unconstitutional or beyond the powers of the legislature. At times it does happen that the executive requires extraordinary powers to deal with extraordinary situations and they can pass emergency laws. The legislature, which is generally controlled by the executive-because it is majority that forms the executive-gives such powers to the executive in moments of emergency. Therefore, Shah thought it proper to give the right to the judiciary to review legislation.
One point of view in this debate was that “due process of law” must be there in this Article; otherwise the Article is a nugatory one. The other point of view was that the existing phraseology was quite sufficient for the purpose.

The question of “due process” raised in Dr. B.R. Ambedkar’s judgment the question of the relationship between the legislature and the judiciary to decide whether any particular law passed by the legislature is *ultra vires* or *intra vires* in reference to the powers of legislation which are granted by the Constitution to the particular legislature. Every law in a federal Constitution, whether made by the Parliament at the Centre or made by the legislature of a State, is always subject to examination by the judiciary from the point of view of the authority of the legislature making the law. The “due process” clause, in his judgment would give the judiciary the power to question the law made by the legislature on another ground. That ground would be whether that law is in keeping with certain fundamental principles relating to the rights of the individual. In other words, the judiciary would be endowed with the authority to question the law not merely on the ground whether it was in excess of the authority of the legislature, but also on the ground whether the law was good law, apart from the question of the powers of the legislature making the law. The question raised by the introduction of the phrase “due process” was whether the judiciary should be given the additional power to question the laws made by the State on the ground that they violate fundamental principles.

Analysing the two views on this point Dr. B.R. Ambedkar said.∗

One view is this: that the legislature may be trusted not to make any law which would abrogate the fundamental rights of man. Another view is this: it is not possible to trust the legislature; the legislature is likely to err, is likely to be led away by passion, by party prejudice . . . and the legislature may make a law which may abrogate what may be regarded as the fundamental principles which safeguard the individual rights of a citizen. We are therefore placed in two difficult positions. One is to give the judiciary the authority to sit in judgment over the will of the legislature and to question the law made by the legislature on the ground that it is not good law in consonance with fundamental principles . . . The second position is that the legislature ought to be trusted not to
make bad laws. It is very difficult to come to any definite conclusion (as to which is the desirable principle). There are dangers on both sides. For myself, I cannot altogether omit the possibility of a legislature packed by party men making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the Legislature and by dint of their own individual conscience or their bias or their prejudices be trusted to determine which law is good and which law is bad.

Dr. B.R. Ambedkar ultimately left it to the House to decide in any way it liked.

The amendment in Article 15, for the words "No person shall be deprived of his life or personal liberty except according to procedure established by law" the words "No person shall be deprived of his life or liberty without due process of law" to be substituted was negatived.

Thus during the session of the Constituent Assembly while discussing Article 15 (now Article 21) there was a great deal of controversy on the issue as to whether the words should be "except according to procedure established by law", or whether the words "due process" should be there in place of the words which now find a place in Article 21. It was ultimately accepted that instead of the words "due process", the words should be "according to procedure established by law". It seems that a large part of the House including Dr. B.R. Ambedkar were greatly dissatisfied with the wording of Article 15 and they were sensing that they have made some mistake which needs to be rectified in one way or the other. Moreover, Article 15 was bitterly criticised by the public outside because all that Article 15 does is this, it only prevents the executive from making an arrest. All that is necessary is to have a law and the law need not be subject to any conditions or limitations. In other words, it was felt that while this matter was being included in the Chapter dealing with Fundamental Rights, they are giving a carte blanche to Parliament to make and provide for the arrest of any person under any circumstances as Parliament may think fit. Therefore, Dr. B.R. Ambedkar
introduced a new Article, Article 15A with a view to making compensation for what was done then in passing Article 15. In other words, he intended to provide, through a different door, the substance of the law of “due process” by the introduction of Article 15A after Article 15. The Article 15A introduced on 15th September 1949 read thus:

**15A. Protection against certain arrests and detentions.**

1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult a legal practitioner of his choice.

2) Every person who is arrested and detained in custody shall 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 the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

3) Nothing in this article shall apply -
   a) to any person who for the time being is an enemy alien; or
   b) to any person who is arrested under any law providing for preventive detention; provided that nothing in sub-clause (b) of clause (3) of this article shall permit the detention of a person for a longer period than three months unless -
      a) 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 three months that there is in its opinion sufficient cause for such detention, or
      b) such person is detained in accordance with the provisions of any law made by Parliament under clause (4) of this article.

4) Parliament may by law prescribe the circumstances under which and the class or classes of cases in which a person who is arrested under any law providing for preventive detention may be detained for a period longer than three months and also the maximum period for which any such person may be so detained.
It may be noted that the provisions contained in clause (1) and clause (2) are already to be found in the Criminal Procedure Code. Dr. B. R. Ambedkar accepted the position that Article 15A merely lifts from the provisions of the Criminal Procedure Code two of the most fundamental principles which every civilised country follows as principles of international justice. While refuting a possible argument that they are not making any very fundamental change, he asserted that they are making a fundamental change because what they are doing by the introduction of Article 15A is to put a limitation upon the authority both of Parliament as well as of State Legislature not to abrogate these two provisions, because they were now introduced in the Constitution itself. He was quite satisfied that the provisions contained were sufficient against illegal or arbitrary arrests.

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 present circumstances of 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 preventing detention in Article 15A, 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 the provisions of clause (3) 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 accused (sic) 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 such detention.

Pandit Thakur Das Bhargava desired Article 15A to be worded like this:

15A. No procedure within the meaning of the preceding section shall be deemed to be established by law if it is inconsistent with any of the following principles:

i) Every arrested person if he has not been released earlier shall be produced before a Magistrate within 24 hours of his arrest excluding the reasonable period of journey from the place of arrest to the Court of the Magistrate and informed of the nature of the accusation for his arrest and detained further only by the authority of the Magistrate for reasons recorded.

ii) Every person shall have the right of access to Courts to being defended by counsel in all proceedings and trials before courts.

iii) No person shall be subjected to unnecessary restraints or to unreasonable search of person or property.

iv) Every accused person is entitled to a speedy and public trial unless special law or public interests demand a trial in camera.

v) Every person shall have the right of cross-examining the witness produced against him and producing his defence.

vi) Every convicted person shall have the right of at least one appeal against his conviction.

15 B. No procedure within the meaning of Sec. 15 shall be deemed to be established by law in case of preventive detention if it is inconsistent with any of the following principles:

i) No person shall be detained without trial for a period longer than it is necessary.

ii) Every case of detention in case it exceeds the period of fifteen days shall be placed within a month of the date of arrest before an independent tribunal presided over by a judge of the High Court or a person possessed of qualification for High Court Judgeship armed with powers of summary inquiries including examinations of the person detained and of passing orders of further detention, conditional or absolute release and other incidental and necessary orders.
iii) No such detention shall continue unless it has been confirmed within a period of two months from the date of arrest by an order of further detention from such tribunal in which case quarterly reviews of such detentions by independent tribunal armed with powers of passing of orders of release conditional or otherwise and other necessary and incidental orders shall be made.

iv) Such detention shall in the total not exceed the period of one year from the date of arrest.

v) Such detained person shall not be subjected to hard labour or unnecessary restrictions otherwise than for wilful disobedience of lawful orders and violation of jail rules.

Bhargava was comprehensive in including additional rights in this Article e.g. right of the accused to cross-examine witnesses produced against him, the right of appeal in case of conviction, right to freedom from torture and unnecessary restraints and from unreasonable search of person and property, right to a speedy and public trial. He wanted to incorporate fully the provision of "due process" in Article 15 A. He was not satisfied with the rights covered by Article 15' A as proposed by Dr. B.R. Ambedkar. In his view, as even the highest courts in this land are not allowed to pronounce if any law is valid and just (in Article 15), at least some compensatory thing should be given and after arrest and detention, there is absolutely no sort of right which was sought to be given. He suggested amendment to the effect that when the remand is sought to be given, the Magistrate should be bound to record his reasons. This proposed amendment was on similar lines as Section 167(3) of Criminal Procedure Code. In short, he was desiring to give to this provision a status of fundamental right under the Constitution. He also was interested in elevating the right of cross-examination of witnesses produced against the accused as fundamental right. He severely criticised the draft of Article 15 A as introduced by Dr. B.R. Ambedkar as not giving adequate, fair and just compensation for dropping “Due Process” clause from Article 15 (now Article 21).
Relating to preventive detention, Bhargava was not satisfied that three months period is the right period which had been prescribed by Dr. B.R. Ambedkar. He proposed reduction of this period to two months. According to him before two months are over an order should be obtained from an impartial tribunal and not from a board. He wanted to provide in the Constitution that every person who has been detained shall be given an opportunity before a tribunal to explain his conduct and evidence against him and know the sources and the subject matter of evidence against him. With regard to maximum period of preventive detention, he thought that one year is proper period.

Dr. B.R. Ambedkar was prepared to accept only one of the amendments suggested by Bhargava which said that the accused shall have the right to be defended. So in clause (1) of Article 15 A after the word 'consult' the words 'and be defended by' were inserted.

Pandit Thakur Das Bhargava spoke with unique authority and he had ample experience as a criminal lawyer, of the vagaries of police; he looked on these questions with considerable amount of knowledge and detachment.

In the original clause (1) of Article 15 A the words were that when a man is arrested, he should be informed, as soon as may be, of the grounds of such arrest. Mr. Naziruddin Ahmad's amendment said that the grounds and the reasons for his arrest shall be given 'at the time of the arrest', or as soon as practicable thereafter. The point was that there should be no needless delay. The usual grounds for such arrests are that there is a credible or reasonable information against him that he has committed or concerned with a cognizable crime or the officer arresting him has reasonable suspicion that he is connected with a cognizable crime or he is about to commit such a crime. He also sought to delete sub-clause (b) of clause (3) and the proviso to clause (3). Sub-clause (b) is to this effect that nothing in this Article shall apply to any person who is arrested under any law providing for preventive detention. In
his opinion, if a man is to be detained, as a preventive measure, there is nothing lost, there would be no danger, nothing inconvenient in just letting the man know that he is being arrested for preventive purposes under the orders of the magistrate or the orders of a superior officer or that there are such and such reasons against him. With regard to proviso to clause (3), there are a large number of elaborate provisions and he submitted that they are going into too much details of administration. As to what should be done for a man, who is under preventive detention should be left to the legislature.

Shrimati Purnima Banerji moved with her maternal care that the following proviso should be added to clause (4) of the proposed new Article 15 A:

"Provided that if the earning member of a family is so detained his direct dependants shall be paid maintenance allowance".

She also felt that after being detained a detenu should have the right to appear before the Advisory Board in person before he is condemned or his detention is upheld. She also moved that maximum period of detention should not exceed six months after the Advisory Board reported in favour of continuing detention beyond three months.

Dr. P.S. Deshmukh moved that clause (3) of the proposed new Article 15 A should be deleted. In Section 61 of Cr. P.C.1898, it has been laid down that:

No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.
So the period of the detention, not to exceed beyond twenty-four hours is already provided for in the Criminal Procedure Code. So in his opinion this Article can be no remedy; it was a mere repetition of what exists in the Code of Criminal Procedure.

Shri H.V. Kamath would welcome the substitution of the words “as soon as may be” in clause (1) by the word “immediately”. But Dr. B.R. Ambedkar assured him that their intention was that the words “as soon as may be” really mean “immediately after arrest”. While emphasizing that a man is detained on suspicion only, he thought it fair that the Constitution should lay down specifically that no detenu will be subjected to physical or mental ill treatment. He gave an example of the Constitution of Western Germany. The Bonn Constitution which had adopted a clause on these very lines. He was anxious to know whether with regard to the person detained under the law of preventive detention, the jurisdiction of the High Courts and the Supreme Court, especially with regard to their right to issue a writ of *habeus corpus* will be ousted under this Article. Clause (4) of this Article lays down that Parliament will prescribe the maximum period for which any such person may be so detained. He was apprehensive that supposing Parliament decides to lay down that the period of preventive detention may last a man's lifetime, what stood in the way of Parliament doing so? He criticised that they were not having a long term plan or vision in framing these provisions in the Constitution. He cautioned to consider andvisualise how some other persons, possibly totally opposed to their ideals, to their conception of democracy, coming into power, might use this very Constitution against them and suppress their rights and liberties. He said that this Constitution which they were framing may act as a boomerang, may recoil upon them and it would be then too late for them to regret the day when they made such provision in the Constitution. He earnestly hoped that the members of the Constituent Assembly would be guided by wisdom and vision, not merely wisdom but the
vision for a long-term Constitution. His vision was prophetic as few of the members of Constituent Assembly were preventively detained later on.

Shri H.V. Pataskar suggested that in clause (1) of the Article 15 A for the words “as soon as may be”, “within twenty-four hours” be substituted. Regarding preventive detention he favoured for uniformity of laws throughout the Union. At that time public safety measures were passed by different provinces. There was one law in Bengal, another law in Madras and a third law in Bombay. They differed in their wording and in their content. His amendments proposed that it should be Union Government and the Union Parliament that alone should pass the legislation. As to the power to authorize detention of a person beyond twenty four hours, in his opinion, should vest only in a first-class magistrate and not in the nearest magistrate as mentioned in the draft article.

R.K. Sidhwa was anxious to provide that unless there was definite and ample evidence before the Advisory Board that the detenu was a source of continuous danger to the state and society, his total detention should not be allowed to exceed nine months. Article 15 A did not lay down any maximum period of detention and a person could be detained for an indefinite period. Sidhwa further felt that whatever the charges may be, whatever the evidence may be against the detenu, they should be supplied to him so that he may make a statement as to whether the charges are correct or not. Then it is for the judges to go into the matter. But it is not proper to give *ex parte* decisions by the judges on a mere statement from the C.I.D. and the detenu.

Dr. Bakshi Tek Chand moved an amendment to the effect that as soon as may be after the arrest of the person, the grounds on which the detenu has been arrested shall be communicated to him and he shall be informed that he may submit such explanation as he desires to make which shall be placed before the Advisory Board. The amendment was on the lines of what was
provided in the Public Safety Acts enacted by some of the Provincial Legislatures e.g. clause (3) of the Madras Maintenance of Public Order Act (I of 1947). Similar provisions were to be found in the Rules made under the Defence of India Act in 1942. The substance of the grounds on which they were detained were communicated to them and they were asked to make representations, if they chose to do so. Similar provisions existed even under the notorious Rowlatt Act passed in 1919. In England under the Regulations framed under the Defence of Realm Act, both in 1914 when the First World War broke out and the Defence of Realm Act was enacted and later again in the Regulations which were in force in 1939 when a state of grave emergency was declared, similar provisions existed. In similar Acts in other Provinces, for instance in Bombay, there was a provision to the limited extent that the substance of the grounds on which a person is arrested and detained shall be communicated to him and he will be asked to submit, if he likes, an explanation. Bakshi Tek Chand expressed the opinion that of what value will the opinion of this tribunal (Advisory Board) be, if the explanation of the person affected is not laid before it? It will be an ex parte opinion expressed by the members of the tribunal upon such papers as may be placed before them by the executive government... The whole object of constituting a tribunal will be rendered nugatory if the explanation of the person affected is not taken and placed before it. And no explanation can be given by that person unless he is informed of the nature of the charges against him. Suddenly changing his mind Bakshi Tek Chand asked the House to reject Article 15 A altogether and not allow it to form a part of the Constitution as he thought the Article as the most reactionary Article. He pointed out that in no written Constitution in the world there was provision for detention of persons without trial in that manner in normal times, peace times. It was not to be found even in the Japanese Constitution which the Drafting Committee purported to follow. Article XXXI of the Japanese Constitution has been taken verbatim in
our Draft Constitution. But in the Japanese Constitution there are other clauses which embody the substance of the "due process clause" and safeguard the rights of the subject, but which unfortunately, find no place in our draft Constitution. Similarly in the Draft Article 15 A placed before the House there is no provision that the person affected will be given an opportunity of being told what the grounds for his detention are. No doubt, there are judges of the High Court on this Board, but what can the judges do unless they hear the other side? They will only pass judgments ex parte.

While correctly appreciating the difference between a provision in the Criminal Procedure Code and same or similar provision in the Constitution Alladi Krishnaswami Ayyar observed that the first two clauses of Article 15 A are based upon the corresponding provisions of the criminal procedure and they are made into constitutional guarantees. The difference between that finding a place in the Criminal Procedure Code and that finding a place in a Constitutional statute is that whereas the Criminal Procedure Code is liable to alteration by the State Legislature or by the Central Legislature, when once it finds a place in the Constitution it cannot be changed excepting in the manner provided for the change of the Constitution. Therefore, certain very important provisions which go to the fundamental principles are taken into Article 15 A. As to the eligibility for the membership of Advisory Board he believed that there was sufficient number of people in this country who were fit to be in the tribunal other than Judges or people who are retired Judges. Under those circumstances they need not introduce a cast-iron provision to the effect that the members of Advisory Board shall be only judges. There was absolutely no reason to believe that the members would not give an opportunity to the person before being satisfied that there is a case for detention if it is more than three months. On the other hand he added:
If you say that in every case there shall be notice, there shall be a charge, there shall be a hearing, that there shall be examination and cross-examination, there shall be counsel, then this Board may convert itself into a magistrate's Court with all the paraphernalia of the Magistrate's court, and it will defeat the very purpose of the Article. This is the object of saying that you must have competent men with a fair sense of justice, trained in the law. It is such people that will be there in the Board.

There are other guarantees in the Criminal Procedure Code (other than the Constitutional guarantees above referred to). The Constitutional guarantees constitute a minimum with which the legislature itself cannot interfere. The question was which are the minimum rights that have got to be secured. There is no known Constitution which contains such detailed provisions, transferring all these provisions of the Criminal Procedure Code into their Constitution. And the care has been taken to put in what may be considered to be the fundamental principles into Article 15 A.

On Friday, the 16th September 1949, while taking part in the Debate Jaspat Roy Kapoor bitterly criticised Article 15 A on the ground that the emphasis seems to be not so much on rights of liberty as on restrictions and limitations thereof. In his view with regard to the persons arrested on a specific charge they are being given no new rights whatever under clause (1) and (2). And with regard to the persons who are to be detained for security purposes, they are being given no rights worth the name in this Article. Elementary right of not being detained beyond 24 hours except under the authority of a magistrate is being denied to the person detained. Then, the person detained may be continued in detention for any length of time, except that if it goes beyond three months the advice of an advisory board would be necessary. After the board has considered detenu's case he can continue to be detained for any length of time. Moreover, it is not obligatory on Parliament to prescribe any maximum limit on the period of detention. Clause (4) says that Parliament may, if it so chooses, enact such a law, but it does not impose any obligation on Parliament. The whole thing is being left to the good sense of
Parliament. Detenus would be detained without even reason for detention being told to him. Jaspat Roy Kapoor suggested to incorporate a provision of periodical review of detention of detenus. This periodical review may be after three months or six months.

Jaspat Roy Kapoor lastly warned that it should not be forgotten that though today they were in power, tomorrow someone else may be in power and they may be in the position in which the present detenus are! And his prophecy has come true.

M.Ananthasayanam Ayyangar also favoured such periodical review by Advisory Board, of preventive detention cases and pointed out that even during the 1942 “Quit India” movement cases of preventive detention were reviewed every six months. He also favoured giving to the detenu right to be defended by a lawyer.

Mahavir Tyagi vehemently pleaded for the withdrawal of this Article altogether. He questioned the relevancy of a detention provision in the Constitution which was meant to guarantee fundamental rights to the citizens. He was afraid that the introduction of a clause of this kind would change the chapter on fundamental rights into a penal code. He also predicted that there would come a day when the provision would recoil on themselves and they would be detained under the provisions of the very same clauses which they were making. Then they would realise their mistake. The preventive detention provisions may be used freely by a Government against its political opponents.

Dr. P.K. Sen said that it was the question of individual versus State and the extent to which the rights of either should be adjusted so that, not by destroying individual liberty but by circumscribing it to a certain extent, the welfare of the whole state may be secured. He supported the amendment
brought by Dr. Bakshi Tek Chand, in regard to informing the detenu, the person arrested, of the grounds on which he has been arrested. This is the minimum that can be done and should be done. He did not suggest that the whole of the evidence should be placed before the person arrested because in regard to these persons who are charged with subversive activities the evidence is very difficult to find. It may be that there are circumstances which the detenu can disclose from which it will be found that he was arrested on no ground at all.

Pandit Hirday Nath Kunzru supported Dr. P.K. Sen and brought to the notice of the House that under the various provincial Public Security Acts a man has to be informed almost as soon as he is arrested of the reasons for his arrest and detention. He thought that whether a detenu's case goes before the Advisory Board or not he should be informed of the grounds on which he is detained as soon after his arrest as possible and should be given an opportunity of submitting his explanation to the Government. When a case is placed before the Advisory Board, the detenu should be given an opportunity of submitting a further representation to the Board, should he so desire. Judicial review provided for in this Article relating to preventive detention cases will proceed only on the basis of written charges and replies. No witnesses will be produced, the detenu will not be represented by counsel and he will have no opportunity of cross-examining the prosecution witnesses. It is possible, therefore, that even the Advisory Board may arrive at a wrong decision. The materials placed before it by the Government justifying the detention of a person will consist of police reports and these reports may not always be correct. The Advisory Board will have to proceed only on the basis of police reports. Therefore, Pandit Hirday Nath Kunzru suggested to set a limit to the period for which a man can be detained. He thought it necessary that they should restrain the power of the executive to detain persons without
trial so as to ensure that the detenus are not kept in detention for an indefinite length of time.

Shri B.M. Gupte raised a question mark whether the provisions in Article 15 A guarantee sufficient safeguards against illegal and arbitrary arrest. In his opinion clauses (1) and (2) of the Article give no new right at all. They are old rights; only they are made more difficult of abrogation. He put his viewpoint like this:

On Occasion like this sympathies of most of us go out to the high principles which in the past we proclaimed from house tops. But there are other friends, who occupy seats of authority and responsibility throughout the country. They warn us that the aftermath of war and partition has unchained forces which if allowed to gain upper-hand will engulf the country in anarchy and ruin. They, therefore, advocate that Parliament must be able to pass laws arming the Executive with adequate powers to check these forces of violence, anarchy and disorder. There is a saying in Marathi that whether a thing is a poison or not cannot be tested by swallowing it; because if it is a poison the man dies. So in such matters there is no scope for experiment and we have therefore to heed to the warnings given by our leaders. This does not mean that these provisions could not be liberalised.

Saying that State is far superior, Shrimati G. Durgabai emphasized that when it comes to a question of shaking the very foundations of the State, which State stands not for the freedom of one individual, but of several individuals, first place should be given to the state. She justified the power of preventive detention as it was to be exercised only in cases when the individual tampers with the public order, as is mentioned in the Concurrent List or with the Defence Services of the country. She was satisfied at the compromise reached at in this Article 15 A. Showing sympathy towards the point raised by Shrimati Purnima Banerji, of paying maintenance to the dependants of the detenu, she was doubtful how it would be practicable. This would also be putting a premium on delinquency, if the detenu is assured of provision for his family he might go on committing crimes and challenging
the foundations of the State. She thought that this matter may be left to the Government.

A large number of amendments were moved to Article 15 A. There was a prolonged acrimonious, 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. There were not only critics but also adversaries of this Article in the House. In reply, Dr. B.R. Ambedkar dealt with the draft article and the criticism against it clause by clause. Commenting on the suggestion to the words “as soon as may be” in clause (1) to be replaced by “fifteen days” or “seven days” he said that the words “as soon as may be” are integrally connected with clause (2) and they are to be read with reference to the provisions contained in clause (2) which definitely say that no man arrested shall be detained in custody for more than 24 hours unless at the end of the 24 hours the police officer who arrests and detains him obtains an authority from the magistrate. Now it is obvious that if the police officer is required to obtain a judicial authority from a magistrate for the continued arrest of a person after 24 hours, then he shall have at least to inform the Magistrate of the charge under which that man has been arrested, which means that “as soon as” cannot extend beyond 24 hours. The second 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 makes 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. Personally 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 was prepared to add the words “and be defended by a legal practitioner” after the words “to consult”.
With regard to Pataskar's suggestion to replace the word "Magistrate" by the words "First Class Magistrate", Dr. B.R. Ambedkar observed that the original words "nearest magistrate" would be in the interest of the accused. Because otherwise it would enable a police officer to keep a man in custody for a longer period on the ground that a particular Magistrate to whom he wanted to take the accused, or the Magistrate who would be ultimately entitled to try the accused, was living at a distance far away and therefore he had a justifiable ground for detaining him for the longer period. Assuming addition of the words "the nearest First Class Magistrate", the position would be very difficult. There may be "the nearest Magistrate" who should be approached by the police in the interests of the accused himself in order that his case may be judicially considered. But he may not be a First Class Magistrate. Therefore, giving the accused the earliest opportunity to have his matter decided and looked into by the Magistrate near about would be preferable than going in search of a First Class Magistrate.

Under Section 167(3) of Criminal Procedure Code it is incumbent upon every Magistrate to whom arrested person is taken for remand to custody, to record the reasons if he allows the detention to continue. Dr. B.R. Ambedkar agreed that "for reasons recorded" is a salutary provision enabling the High Court to consider whether the discretion left in the Magistrate has been judicially exercised. But he was not in favour of accepting the suggestion given by Pandit Thakur Das Bhargava to give constitutional status for this provision.

Dealing with the criticism levelled by various members of the Constituent Assembly, Dr. B.R. Ambedkar explained the position thus:
We had before us the three Lists contained in the Seventh Schedule. In the three lists there were included two entries dealing with preventive detention, one in List I and another in List III. Supposing now, this part of the Article dealing with preventive detention was dropped. What would be the effect of it? The effect of it would be that the Provincial Legislatures as well as the Central Legislature would be at complete liberty to make any kind of law with preventive detention, because if this Constitution does not by a specific Article put a limitation upon the exercise of power making any law which we have now given both to the Centre and to the Provinces, there would be no liberty left, and the Parliament and the Legislatures of the States would be at complete liberty to make any kind of law dealing with preventive detention. Do the lawyer members of the House want that sort of liberty to be given to the Legislatures of the States and Parliament? My submission is that if their attitude was as expressed today, that we ought to have no such provision, then what they ought to have done was to have objected to those entries in List I and List III. We are trying to rescue the things. We have given power to the Legislatures of the State and Parliament to make laws regarding preventive detention. What I am trying to do is to curtail that power and put a limitation upon it.

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. And this omission was criticised by some members of the House. Dr. B.R. Ambedkar candidly agreed that this was a legitimate criticism and he showed his willingness to amend 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.

Regarding the question of three months detention without inquiry or trial, some members had said that it should not be more than 15 days and others had suggested some other period. Dr. B.R. Ambedkar defended this three months period as tolerable and necessary. The cases of detenu may be considerable. It would not be possible for the executive to prepare the cases,
say against one hundred people who may have been detained in custody, prepare the brief, collect all the information and submit the cases to the Advisory Board. At times, it would not be possible for the Advisory Board to dispose of so many cases within three months. If a person is to be detained beyond three months obtaining an order from the Advisory Board is a must. Keeping in mind these administrative difficulties in this matter, in the opinion of Dr. B.R. Ambedkar, the exigency of the situation would be met by putting a time limit of three months.

Sub-clause (a) of proviso in clause (3) was silent as to the procedure to be followed in an inquiry which is to be conducted by the Advisory Board. The pointed questions were asked whether the executive would be required to place before the Advisory Board all the papers connected with the case, whether the detenu would be entitled to appear before the Board, cross-examine the witnesses and make his own statements. With a view to satisfying the members, without making any specific provisions with regard to procedure to be followed in sub-clause (a), Dr. B.R. Ambedkar was ready to amend sub-clause (4) to the effect that the Parliament would be empowered to prescribe the procedure to be followed by an Advisory Board.

As to the maximum period of detention, answering the criticism of members expressing the possibility of indefinite detention of a person preventively detained, Dr. B.R. Ambedkar brought to the notice of the House the provisions of clause (4) where it was stated that in making such a law, Parliament will also fix the maximum period. Pandit Hirday Nath Kunzru pointed out that the word was 'may'. Dr. B.R. Ambedkar said that 'may' is to be interpreted as 'shall'. On this Kunzru expressed the doubt that Parliament may or may not do that. Dr. B.R. Ambedkar then made it clear that though Kunzru was right, but if Parliament makes a law of preventive detention it will have to fix the maximum period of detention.
With regard to periodical reviews of preventive detention cases, Dr. B.R. Ambedkar thought that it was a purely administrative matter and can be regulated by law either Parliamentary or provincial and so it was not necessary to be included in the Constitution as such. Similarly the provision for maintenance of the dependants of detenu, if found proper could be made under a law made by the Parliament. A man digging into the foundations of the State and arrested for that, in Dr. Ambedkar's opinion may have the right to be fed when he is in prison but he has no right to ask for maintenance of his family.

As to Kamath's doubt whether it was possible for the High Courts to issue writs for the benefit of the detenu, in cases of preventive detention, Dr. Ambedkar made the position clear that once the High Court is satisfied that the man is arrested under some law, *habeus corpus* must come to an end, but if he is not arrested under any law, obviously the party affected may ask for any other writ which may be necessary and appropriate for redressing the wrong.

After this elaborate explanation of Dr. B.R. Ambedkar, the following amendments were moved and adopted by the House on 16th Sept. 1949:

1) That in clause (1) of Article 15 A after the word 'consult' the words 'and be defended by' be inserted.

2) That in clause (3) of Article 15 A for the words 'Nothing in this Article', the words, brackets and figures 'Nothing in clauses (1) and (2) of the Article' be substituted.

3) That after clause (3) of Article 15A, the following clauses be inserted:

   3 (a) Where an order is made in respect of any person under sub-clause (b) of clause (3) of this Article the authority making an order shall as soon as may be communicate to him the grounds on which the order has been made and afford him the earliest opportunity of making a representation against the order.

   3 (b) Nothing in clause 3(a) of this Article shall require the authority making any order under sub-clause (b) of clause (3) of this Article to disclose the facts which such authority considers to be against the public interest to disclose.
4) That at the end of clause (4) of Article 15 A the following be added:

'and Parliament may also prescribe by law the procedure to be followed by an Advisory Board in an inquiry under clause (a) of the proviso to clause (3) of this Article'.

All other amendments to Article 15 A were negatived by the House.

The new draft Article 15 A, as amended in above respects was adopted by the Constituent Assembly, which read:  

1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall be denied the right to consult and be defended by a legal practitioner of his choice.

2) Every person who is arrested and detained in custody shall 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 the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.

3) Nothing in clauses (1) and (2) of this Article shall apply:-

   a) to any person who for the time being is an enemy alien; or
   b) to any person who is arrested under any law providing for preventive detention:

Provided that nothing in sub-clause (b) of clause (3) of this Article shall permit the detention of a person for a longer period than three months unless:

   a) 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 three months that there is in its opinion sufficient cause for such detention; or
   b) such person is detained in accordance with the provisions of any law made by Parliament under clause (4) of this Article.

3-a) Where an order is made in respect of any person under sub-clause (b) of clause (3) of this Article, the authority making an order shall, as soon as may be, communicate to him the grounds on which the order has been made and afford him the earliest opportunity of making a representation against the order.

3-b) Nothing in clause (3-a) of this Article shall require the authority making any order under sub-clause (b) of clause (3) of this Article to disclose facts which such authority considers to be against the public interest to disclose.
4) 'Parliament may by law prescribe the circumstances under which and the class or classes of cases in which a person who is arrested under any law providing for preventive detention may be detained for a period longer than three months and also the maximum period for which any such person may be so detained, and Parliament may also prescribe by law the procedure to be followed by an Advisory Board in an enquiry, under clause (a) of the proviso to clause (3) of this Article.'

In the course of revision, the Drafting Committee renumbered draft Articles 15 and 15 A as Articles 21 and 22 respectively. The other changes were: the proviso to clause (3) of draft Article 15 A was converted into an independent clause (4) in the renumbered Article 22 and clauses (3-a), (3-b) and (4) were redrafted and renumbered as clauses (5), (6) and (7) respectively. These changes were all of a drafting nature.

The Draft Constitution as revised by the Drafting Committee and submitted to the President of the Constituent Assembly on 3rd November, 1949 contained Article 22 (corresponding to earlier Article 15 A) as follows:

**Protection against arrest and detention in certain cases.**

22. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall 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 the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply -
   a) to any person who for the time being is an enemy alien; or
   b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless -
   a) 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 three months that there is in its opinion sufficient cause for such detention; or
   b) such person is detained in accordance with the provisions of any law made by Parliament under clause (7).
(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe 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 under any law providing for preventive detention, and also the maximum period for which any person may be detained under such law, and Parliament may further prescribe by law the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

The Drafting Committee also included a new Article 373 among the temporary and transitional provisions. Explaining it's purpose, the Committee observed:

We have felt that clauses (4) and (7) of this Article as revised may create some difficulty as there would not be any law made by Parliament in force immediately on the commencement of the Constitution in accordance with which persons may be kept under detention for a period longer than three months. We have therefore proposed a new Article 373 whereby power has been given to the President to issue an order in terms of clause (7) of Article 22 which will have effect until the expiration of one year from the commencement of the Constitution or until Parliament takes action under the said clause, whichever is earlier.

Revised Draft Constitution was considered by the Constituent Assembly on 14th, 15th and 16th November, 1949. Several further amendments were moved to Article 22.

Prof. Shibban Lal Saksena wanted to improve the phraseology of clause (4) in order to make it clear that the Parliament can make law for less than three months detention period or more than three months detention period and Parliament's power should not be restricted only to periods above three months. He did not want the Executive to use the power.
T.T.Krishnamachari moved two amendments which sought further to redraft clauses (4) and (7). He pointed out that there was a lacuna in clause 4 (a) as there was no maximum period prescribed or could possibly be prescribed by Parliament or any authority for the period of detention of any person whom the Advisory Board considered to be a person who should be detained. Clause 4(a) has to be closely related to clause (7) which was the operative clause under which Parliament might act. So, it was better to split up the original clause (7) into three parts and clearly indicate that there will be a maximum period for which any person or any class or classes of persons can be detained by any law providing for such detention. He was anxious to make the provision clear that would really make any indefinite detention impossible.

H.V.Kamath observed that if Parliament laid down in a class of cases the maximum period of preventive detention, then even without recourse to the machinery of the Advisory Board, a person could be detained upto that maximum period. He moved amendments to make it obligatory on the executive to refer to the Advisory Board every case of preventive detention where the detention was proposed to be prolonged beyond three months. He desired the distinction sought to be made in clause (7) between the class of cases which should be referred to the Advisory Board and the other class where persons are detained without reference to the Advisory Board to go. He wanted to mitigate the harshness and the injustice that might result from the abuse of power and so he expressed that that was his last attempt to safeguard the liberty of the individual to possible extent, in so far as it was not inconsistent with or did not jeopardise the security of the State.

Replying to the debate on November 16, 1949, Dr. B.R. Ambedkar explained the scope of the Article as it was sought to be amended by the Drafting Committee:
First, every case of preventive detention must be authorised by law. It cannot be at the will of the executive.

Secondly, every case of preventive detention for a period longer than three months must be placed before a judicial board, unless it is one of those cases in which Parliament, acting under clause (7), sub-clause (a) has, by law, prescribed that it need not be placed before a judicial board for authority to detain beyond three months.

Thirdly, in every case, whether it is a case which is required to be placed before the judicial board or not, Parliament shall prescribe the maximum period of detention so that no person who is detained under any law relating to preventive detention can be detained indefinitely. There shall always be a maximum period of detention which Parliament is required to prescribe by law.

Fourthly, in cases which are required by Article 22 to go before the Judicial Board, the procedure to be followed by the Board shall be laid down by Parliament.

Original Article 15 A was open to two criticisms. One was that clause (4) (a) did not appear to be subject to maximum period of detention prescribed under clause (7). Clause (4) (a) appeared to stand by itself, independent of clause (7). The second defect was that the requirements as to the communications of the grounds of detention did not apply to persons detained under clause (4) (a). These defects as they existed in the original draft of Article 15 A were removed in clause (4) of the redrafted, corresponding, Article 22.

Replying to Mrs. Purnima Banerji, Dr. B.R. Ambedkar said that while he agreed that Article 22 excepted certain cases from the purview of the Advisory Board, he felt that it was necessary to make such a distinction because there might be particular cases of detention in which the circumstances were so severe and the consequences so dangerous to the very existence of the State that it would not even be desirable to permit the members of the Advisory Board to know the facts regarding the detention of any particular individual. Even in regard to this category of cases where a person may be detained beyond three months, without the intervention of the Advisory Board, Dr. Ambedkar added, there are two mitigating circumstance; (i) such cases were to be defined by Parliament and not by the executive
arbitrarily, and (ii) in every case, whether it is a case which is required to go before the Advisory Board or whether it is a case which is not required to go before the Advisory Board, the maximum period of detention would have to be prescribed by law.

When put to vote, the Drafting Committee's following two amendments were adopted:

(1) That for clause (4) of Article 22 the following clause be substituted:

"(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless -

a) 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 three months that there is in its opinion sufficient cause for such detention;

Provided that nothing in this sub-clause 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); or

b) Such person is detained in accordance with the provisions of any law made by Parliament under sub-clause (a) and (b) of clause (7)."

(2) That for clause (7) of Article 22, the following clause be substituted:

"(7) Parliament may by law prescribe -

a) 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 under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."
Article 22 as adopted assumed the present form. It reads:

22. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall 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 the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply-
   (a) to any person who for the time being is an enemy alien; or
   (b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-
   (a) 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 three months that there is in its opinion sufficient cause for such detention.

Provided that, nothing in this sub-clause 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); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe-
   (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a longer period than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);
   (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and
   (c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).
Thus completed the journey of drafting of Article 22 in our Constitution. In the opinion of renowned jurist H.M. Seervai, Article 21 and 22 should have been taken up together in the Constituent Assembly and Article 21 redrafted in the light of Article 22. If clauses (1) and (2) of Article 22 were meant to introduce the substance of "due process" then those clauses ought to have been put in Article 21 from which "due process" had been removed. In Seervai's view, there would have been following advantages in re-numbering Article 21 as Article 21(1) and transferring to it, as sub-Articles (2) and (3), sub-Articles (1) and (2) of Article 22 and renumbering the sub-Articles of Article 22 accordingly and by inserting a new marginal note:

(i) More precise draftsmanship because the appropriate place for the two sub-Articles which "gave the substance of due process" was in Article 21 from which "due process" had been removed; (ii) as Article 21 stands and "law" was interpreted in Gopalan, Article 21 taken by itself, appears at first blush open to the objection that it does not confer a fundamental right. For, if "law" in Article 21 means a law enacted by a Legislature, as rightly held in Gopalan, then Article 21, as it stands, appears to confer no fundamental right, for fundamental rights are limitations on legislative power, and Article 21 contains no such limitation since it only requires the authority of "law". The inclusion of sub-Articles (2) and (3) would have removed this objection, because the law referred to in Article 21(1) must at least, conform to the requirements of sub-Articles (2) and (3) which clearly impose limitations on legislative power.

Though many members of the Constituent Assembly who framed the Constitution had been victims of preventive detention during the second world war, they agreed to include the provisions relating to preventive detention in the Constitution and authorise both the Parliament and the State legislatures to pass a law providing for preventive detention. This appears strange to T.K. Tope especially when it is realised that a large number of members of the Constituent Assembly were products of Indian and English universities, had imbibed the liberal traditions and had espoused the cause of civil liberty.
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. There stood the problem of national unification which led to certain undesirable situations as in Hyderabad. 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. To crown all, Mahatma Gandhi was murdered by a fanatic. These conditions were perhaps responsible for the inclusion of provisions with respect to preventive detentions in the Constitution.

2.3 **CORRELATION OF ARTICLE 22 WITH ARTICLES - 14, 19, 20 and 21**:

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 20-22 are not restricted to citizens but apply to all persons. Article 19 does not deal with the right to life whereas Article 21 deals with right to life and personal liberty. Articles 19 to 22 which appear under the heading "Right to Freedom" fall into two parts - Article 19 on the one hand and Articles 20 to 22 on the other. Article 19 mentions the word "freedom" and provides for the freedom which a citizen has 'to do things'. Articles 20 to 22 do not mention the word "Freedom" but they secure the freedom of a person by providing that certain things 'shall not be done to him'. Article 22 itself falls into two parts, namely, Article 22(1) and (2) and Article 22 (3) to (7). Article 22 (1) and (2) contain valuable safeguards against arbitrary punitive detention whereas Article 22 (3) to (7) contain valuable safeguards against arbitrary preventive detention. 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 and Article 22 (1) and (2) is expressly excluded. 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 v. State of Madras a large number of questions were considered by the Judges. However, as different views were expressed by different Judges, no common pattern is discernible from the judgements which can be said to fix authoritatively the correlation of Article 22 to Articles 19, 20, 21. The argument that preventive detention infringed the rights specified in Article 19 (1)(a) to (e) and (g) was met by Kania C.J. by saying that if it were accepted in the case of preventive detention it must equally be accepted in the case of punitive detention for offences under the Penal Code, in which case punitive detention would be illegal in respect of several offences. Such a conclusion must be avoided if possible. Laying down the test of 'directness of legislation', Kania C.J. explained that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression or his right to assemble peaceably and without arms etc. the question whether that legislation is saved by the relevant saving clause of Article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life. Article 19 specifies rights which a free citizen in a democratic
country ordinarily has. Article 19 (5) cannot apply to a substantive law depriving a citizen of personal liberty. 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. Article 22 (1) and (2) prescribe limitations on the right given by Article 21. If the procedure mentioned in those Articles is followed, the arrest and detention contemplated by Article 22 (1) and (2), although they infringe personal liberty of the individual, will be legal, because that becomes the established legal procedure in respect of arrest and detention. Kania C.J. did not accept the contention that Article 22 is a complete code. He observed that in respect of arrest and detention Article 22 (1) and (2) provide safeguards. These safeguards are excluded in the case of preventive detention by Article 22 (3) but safeguards in connection with such detention are provided by clauses (4) to (7) of the same Article. It is, therefore, clear that Article 21 has to be read as supplemented by Article 22. Reading in that way the proper mode of construction would be that 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, Mukherjea J.J. were in complete agreement with Kania C.J. on the point of correlation of Article 22 to Articles 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 or controlled either by the provisions of Article 21 or by the provisions of Article 19 (5).

Fazl Ali J. (minority opinion) said that in his opinion the scheme of fundamental rights does not contemplate that each Article is a code by itself
and is independent of others. 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 Art. 19 (1) (d). Preventive detention is a direct infringement of the right guaranteed in Article 19 (1) (d). He was strongly of the view that Article 19 (1) (d) guarantees the right of freedom of movement in its widest sense, that freedom of movement being the essence of personal liberty, the right guaranteed under the Article is really a right to personal liberty and that preventive detention is deprivation of that right. Therefore, the law of preventive detention is subject to such limited judicial review as is permitted under Article 19 (5). The scope of the review is simply to see whether any particular law imposes any unreasonable restrictions. Article 22 dealing with preventive detention does not exclude the operation of Articles 19 and 21. The correct position is that Article 22 must prevail in so far as there are specific provisions therein regarding preventive detention, but where there are no such provisions in that Article, the operation of Article 19 and 21 cannot be excluded.

In *Ram Singh v. State of Delhi*\(^3\) which followed *Gopalan*’s ‘directness of the legislation’ test, it was reiterated that a law which authorises deprivation of personal liberty does not fall within the purview of Article 19 and its validity is not to be judged by the criteria indicated in that Article but depends on it’s compliance with the requirements of Articles 21 and 22. The order of detention under S. 3 of the Preventive Detention Act, 1950, preventing certain persons from making speeches prejudicial to the maintenance of the public order was held valid even though it had the result of abridging his right under Article 19 (1) (a) by such detention.
In *R.C. Cooper v. Union of India* (The Bank Nationalization Case), a Bench of 11 Judges, by a majority of 10 : 1 reconsidered *Gopalan* because, according to the Court, it's main premise namely that Article 22 was a complete code was wrong. The questions for consideration in the Bank Nationalization Case related to the acquisition of business and property, that is, to the civil rights of parties, to which the correlation between Article 19 (1) (f) and Article 31 (2) was relevant. The questions decided in *Gopalan* did not relate to civil rights or property; they related to preventive detention and involved a consideration of the correlation of Article 19 (1) or in the alternative of Article 19 (1) (d) to Article 20, 21 and 22, which three Articles deal with criminal law and procedure. This reconsideration and purported overruling of *Gopalan* was without inviting a full argument *pro* and *contra* about the correctness of the majority decision in *Gopalan*. A question was decided which did not arise for decision and a carefully considered judgment of *Gopalan* was overruled. Shah J. in this case said:

The majority of the Court (Kania C.J., Patanjali Sastri, Mukherjea and Das JJ.) held that Article 22 being a complete code relating to preventive detention, the validity of an order of detention must be determined strictly according to the terms and within the four corners of that Article.

The renowned constitutional jurist H.M. Seervai rightly points out that Mahajan J. was the only judge who held that Article 22 was a complete code; Mukherjea J. found it unnecessary to decide whether Article 22 was a complete code; and Kania C.J., Patanjali Sastri and Das JJ. held that Article 22 was *not* a complete code. Three errors packed in one sentence, the third of which attributed to the majority in *Gopalan* a view precisely the opposite of that which they had expressed was to be a fertile source of error in later decisions.

It was wholly inappropriate in the Bank Nationalization Case to purport to overrule *Gopalan* in which the principal constitutional question was the
effect of the deprivation of 'personal liberty' by preventive detention. The
position is firmly established in the field of constitutional adjudication that the
Court will decide no more than needs to be decided in any particular case. It
seems that the judges were oblivious to this principle while deciding Bank
Nationalization Case. The decision of the Bank Nationalization Case in so far
as it relates to Article 19 (1) and Article 21 may be characterized as obiter
dicta as the Court had not applied it's mind and as it is in the nature of general
casual observation on a point not calling for decision. The case cannot be
taken as an authority on the point. The case laid down no law within the
meaning of Article 141 on the correlation of Articles 19 and 22 as no occasion
arose for it to consider and decide the said question. H.M. Seervai goes to the
extent of commenting that the observation of the judges who decided the Bank
Nationalization case are not "considered obiter dicta" but are "unconsidered
casual observations".16

If the observations of the Court in the Bank Nationalization Case
would have been "The majority of the Court in Gopalan held that Articles 21
and 22 taken together being a complete code relating to preventive detention .
. ." the proposition would be correct as Kania C.J., Patanjali Sastri and Das JJ.
in fact had held that way. Perhaps the Court could not express it properly
though it intended so.

Following Coopers 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). These cases are, State of Rajasthan v. Shamsher Singh17 Prakash Chandra

The Drafting Committee of the Constituent Assembly, during the
argument, recommended that the word liberty should be qualified by the
insertion of the word 'personal' before it, for otherwise it might be construed
very widely so as to include even the freedoms already dealt with in Article 13
(now Article 19). The acceptance of this suggestion shows that whatever may be the generally accepted connotation of the expression 'personal liberty' it was used in Article 21 in a sense which excludes the freedoms dealt with in Article 19.

*S.N.Sarkar v. State of W.B.*²⁰, a seven judge bench followed Bank Nationalization Case and Shelat A.C.J. declined to undertake a reconsideration of Gopalan. The Supreme Court in this case observed that in Cooper's case the premise of the majority in Gopalan that Article 22 was a self contained code and that therefore the provisions of a law permitted by that Article would not have to be considered in the light of the provisions of Article 19 was disapproved and therefore it no longer holds the field. Though Cooper's case dealt with the inter-relationship of Article 19 and Article 31, the basic approach to construing the fundamental rights guaranteed in the different provisions of the Constitution adopted in this case held the major premise of the majority in Gopalan to be incorrect.

In *H.Saha v. State of W.B.*²¹ the constitutional validity of MISA was challenged on the ground that the Act violated Articles 19, 21, 22 and 14. Following passage of the judgment shows that the Court was of the opinion that Article 19 and 22 are mutually exclusive:

It is not possible to think that a person who is detained will yet be free to move or assemble or form associations or unions or have the right to reside in any part of India or have the freedom of speech or expression. Suppose a person is prosecuted for an offence of cheating and convicted after trial, it is not open to him to say that the imprisonment should be tested with reference to Article 19 for its reasonableness. A law which attracts Article 19, therefore, must be such as capable of being tested to be reasonable under clauses (2) to (5) of Article 19.

However, in view of the observations made on Gopalan in the Bank Nationalization Case, Ray C.J. proceeded on the assumption that the Act
which is for preventive detention may be tested with regard to its reasonableness with reference to Article 19.

In *Khudiram Das v. State of W.B.* the Supreme Court held that the law of preventive detention, which falls within Article 22, has also to meet the requirement of Article 14 or Article 19. The Court observed that this question stands concluded and final seal is put on this controversy and in view of the decisions of *R.C.Cooper, S.N.Sarkar* and *H.Saha*, it is not open to any one now to contend that a law of preventive detention which falls within Article 22 does not have to meet the requirements of Article 14 or 19.

*Maneka Gandhi v. Union of India* was heard by a Bench of seven judges. Five separate judgments were delivered. The case raised no question of preventive detention which would require a reconsideration of *Gopalan* on the correlation of Article 19 to 21 in the context of preventive detention. The Supreme Court for the first time opened up a new dimension of Article 21. The new interpretation of Article 21 now requires that no one shall be deprived of his life or personal liberty except by procedure established by law and this procedure must be reasonable, fair and just and not arbitrary, whimsical or fanciful and it is for the Court to decide in the exercise of its constitutional power of judicial review whether the deprivation of life or personal liberty in a given case is by procedure, which is reasonable fair and just or it is otherwise. The widening of the dimension of Article 21 in this case extends also to cases of preventive detention under Article 22. Consequently, the procedure prescribed by a law of preventive detention as well as the conditions of detention thereunder must be reasonable, fair and just.

Article 22 was initially taken to be the only safeguard against the legislature in respect of laws relating to deprivation of life and liberty protected by Article 21. That position is clearly changed since *Maneka Gandhi's* decision. Now Article 21 itself has become an almost inexhaustible
source of restraint upon the legislature. Consequently, the relationship between Article 21 and 22 has drastically changed, rather reversed. Earlier 'the procedure established by law' for depriving a person of his life and liberty under Article 21 drew its minimum contents from Article 22. But Article 21 had nothing to offer to Article 22. Now, Article 21 also contributes to Article 22. The matters on which Article 22 is silent now draw their content from Article 21.24

It is generally understood that the opinion of Shah J. in Cooper's 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 seems to suggest that some of the views attributed to majority judges in Gopalan's case were never held by them, and others which formed the core of the holdings cannot truly be said to have been successfully overruled. Majority view in Gopalan's case is not rightly appreciated. The majority opinion in Gopalan's case needs to be perused more painstakingly, more objectively and perhaps more reverentially than has been done so far.

A guiding principle in this regard is suggested by P.K. Tripathi25 : Sedition attracts Article 19 (1)(a) because of its relation to free speech, which relation theft does not claim. If a law authorises the detention of a person to prevent him from speaking or writing, i.e. an activity protected by Article 19 (1)(a) then the law, or the order of detention authorised by that law will have to be examined on the touchstone of Article 19 (1)(a); but if the law authorises the detention in order to prevent him from committing murder, then Article 19(1)(a) will be irrelevant and will not be applicable. The governing factor should be the nature of the law and the kind of activity it inhibits.

A recent case A.K. Roy v. Union of India26 echoed the principle in Bank Nationalization Case holding that fundamental rights conferred by the
different Articles of Part III of the Constitution are not mutually exclusive and therefore, a law of preventive detention which falls within Article 22 must also meet the requirements of Articles 14, 19 and 21.

Though the ratio in Gopalan's Case that Article 19 can have no application where a person is deprived of his personal liberty under Article 21 or 22 has not yet been expressly overruled, in several cases the 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 situation is unclear and obscure on this point.
REFERENCES

2. Ibid. at 1000-1001.
4. Ibid. at 1498.
5. Ibid. at 1559.
6. Ibid. at 1570.
16. Ibid. at 1007.