CHAPTER VII

LEGAL CONTROL OF ADMINISTRATIVE DISCRETION IN THE AREA
OF PREVENTIVE DETENTION

7.1 INTRODUCTION:

A general view of the legal control of administrative discretion has been given in Chapters II to VI. Broadly speaking, the study presented in these chapters reveals that the legal control at the stages of conferment and exercise of discretion tries to protect the individual against illegal, unwarranted, arbitrary, unreasonable and unfair infringement of his rights and interests by the administration. This has been achieved by the Indian Supreme Court and the High Courts through the constitutional safeguards provided in certain fundamental rights; and the doctrine of ultra vires, enforcing express and implied statutory limits during normal times and during emergency. However, it may be interesting to study the application of various principles of legal control in a particular area of administrative discretion by way of an illustration. Therefore, in this Chapter an attempt has been made to illustrate as to how the legal control has operated at the stages of conferment and exercise of discretion in the important area of preventive detention where administration enjoys very drastic power to detain a person.
a person on subjective satisfaction.

Preventive detention is unknown in America. It was resorted to in England only during war times\(^1\), but in India inspite of all the emphasis on individual liberty, it has been found necessary to resort to preventive detention during peace-time because of unstable law and order situation in the country\(^2\).

The topic of preventive detention was discussed in the Constituent Assembly against the background of violence which had erupted on the partition of India and of a revolutionary movement in Telangana. Therefore in spite of grave misgivings, the provisions relating to preventive detention were passed, all the more so because leaders of the stature of Jawaharlal Nehru and Sardar Patel thought them necessary\(^3\).

In Gopalan’s case, Mukherjea J. gave the following succinct and accurate account of "preventive detention", its nature and history:

"There is no authoritative definition of the term 'Preventive Detention' in Indian law, though as description of a topic of legislation it occurred in the Legislative Lists of the Government of India Act, 1935, and has been used in Item 9 of List I and Item 3 of
List III in Sch. 7 to the Constitution. The expression has its origin in the language used by Judges or the Law Lords in England while explaining the nature of detention under Regulation 14(B), Defence of Realm Consolidation Act, 1914, passed on the out break of the First World War; and the same language was repeated in connection with the emergency Regulations made during the last World War. The word 'Preventive' is used in contradistinction to the word 'punitive'. To quote the words of Lord Finlay in Rex v. Halliday, 'it is not a punitive but a precautionary measure'. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence: vide Lord Macmillan in Liversidge v. Anderson (1942) A.C. 206 at p. 254⁴.

Thus in India even during peace-time a law for preventive detention can be enacted by Parliament exclusively under entry 9, List I for reasons connected with defence, foreign affairs, or the security of India. Further, under entry 3, List III, Parliament and the State legislatures can concurrently make a law for preventive detention for reasons connected with
security of State, maintenance of public order, or mainte-
nance of supplies and services essential to the community.
Parliament, therefore, has a wide legislative jurisdiction
in the matter of preventive detention as it can enact a
law providing for preventive detention for reasons connected
with all the six heads mentioned in List I & III. Besides,
Parliament can enact, in the exercise of its residuary
powers, a law providing for preventive detention on any other
ground. In pursuance of these powers Parliament has passed
various enactments, from time to time, empowering the
administration to detain a person preventively on subjec-
tive satisfaction. Thus in 1950, Preventive Detention Act,
1950 was passed. It lapsed in 1969. Then in 1971, Mainte-
nance of Internal Security Act, 1971 was passed which was
repealed after Janata Government came in power in March 1977.
Besides MISA, another enactment, namely Conservation of
Foreign Exchange and Prevention of Smuggling Activities
(COFEPESA) was passed in 1974, empowering the administra-
tion to detain a person in order to prevent smuggling acti-
vities. This Act remained in force inspite of repeal of
MISA and is still in force. In addition, in 1980 National
Security Act, 1980 (N.S.A.) was passed after congress(I)
came into power again; and this act still continues. Besides
N.S.A., 1980, the Prevention of Blackmarketing and maintenance
of supplies of Essential Commodities Act, 1980 has also been
passed in 1980. These enactments show that preventive detention has been operative in India, continuously since 1950, barring a brief respite between the lapsing of preventive detention Act in 1969 and the enactment of MISA in 1971. In addition to these Central enactments there have been preventive detention enactments passed by various States. However, the present discussion mainly relates to Central statutes because various legal principles of control operating at the stage of conferment and at the stage of exercise of discretion, have been laid down by the Supreme Court with respect to these enactments.

Above laws related to the power of preventive detention during peace-time or normal times, however, in addition to these peace-time measures, Indian Parliament also passed, the Defence of India Act, 1962, Defence of India Act 1971 and S.16-A of MISA (a 1975 Amendment). These enactments conferred very drastic powers of preventive detention to deal with the emergencies arising out of war with China in 1962 and with Pakistan in 1965 and 1971; and with the emergency arising out of internal disturbances in 1975. Under these provisions any person could be detained on subjective satisfaction without supplying ground of detention and without referring his case to Advisory Board. As the protection of Articles 14, 19, 21 and 22 was not available during emer-
gencies, these enactments could not be challenged at the stage of conferment of discretion; and only the legality of the exercise of discretion could be questioned before the courts.

The question arises, as to how the legal control has operated during normal times, at both the stages, namely the conferment and exercise; and also, how has it operated during emergency? An attempt, has therefore, been made to deal with this question and also to make suggestions for further improvement.

As there has been a difference in the extent of legal control during normal times, and during emergency, the discussion on this topic has been divided into two main parts, namely, control during normal times; and control during emergency.

7.2 CONTROL DURING NORMAL TIME:

During normal time the fundamental right to personal liberty under Article 21 and other important fundamental rights under Articles 22, 14 and 19 are available to an individual, therefore, he can challenge the constitutionality of conferment of the power of preventive detention. Besides this, he can also challenge exercise of discretion under the Constitutional limit of fundamental rights; in addition, he
can avail the doctrine of ultra vires enforcing express and implied statutory limits. For the purpose of a better understanding of these sources of legal control the discussion under this topic has been sub-divided into two parts;

(i) Control at the stage of conferment

(ii) Control at the stage of exercise of discretion in the light of constitutional and statutory limits.

7.2.1 Control at the Stage of Conferment of Discretion:

The Indian Constitution, while empowering the Parliament or the State legislatures to pass preventive detention laws, also provides for certain minimum safeguards in Article 22(4) to 22(7). These are: (i) grounds of detention must be provided to detenu as soon as possible in order to enable him to make effective representation; (ii) detenu has a right to make an effective representation to Government in all cases of detention; detenu's case must be reviewed by the Advisory Board, in the cases where detention is for more than three months. All the preventive detention laws, passed during peace time have included these minimum safeguards. However, beyond this nothing has generally been provided to confine and control the discretion. There has been a general tendency of the Parliament to confer discretion in very broad and general terms. The administrative
authorities have been empowered to detain a person on any ground coming within the ambit of very broad criteria, namely, 'security of India', 'security of the State', the relations of India with foreign states', 'maintenance of public order', and 'maintenance of supplies and services essential to the community.' These criteria are virtually lifted from the legislative entries in the Seventh Schedule of the Constitution and have been planted in the legislation relating to preventive detention. Further, these powers are vested not only in the Central or State Government, but also in District Magistrates and Police Commissioners. Besides this, no right to be represented by a lawyer or to cross-examine witnesses, or to produce evidence in rebuttal, in a proceeding before Advisory Board have been provided. Also Advisory Board and the Government are not required to give reasoned decision for rejecting representation of detenu. These drawbacks in the preventive detention laws, make them a potential danger to personal liberty of an individual against an abuse or misuse of this power by administration. Therefore, the preventive detention laws have been challenged in various cases, at the stage of conferment, from time to time, on the ground that these laws confer unguided and uncontrolled discretion. It has been generally argued in these cases that as the impugned statute provides no clear guidelines and important procedural safeguards, it is violative of Articles
21, 19 & 14 of the Constitution.

Some land-mark cases have been decided by the Supreme Court which dealt with the above contentions with respect to the Preventive detention Act, 1950; Maintenance of Internal Security Act, 1971; and the National Security Act 1980. These cases are: A.K. Gopalan v. State of Madras\(^7\) (1950), Hardhan Saha v. State of West Bengal\(^8\) (1974) and A.K. Roy v. Union of India\(^9\) (1982). Besides these main cases, important contributions have also been made in Sambhu Nath Sarkar v. State of West Bengal\(^10\), and Francis Coralie Mullin v. The Administrator\(^11\). These cases clearly show a step by step improvement in the approach of the Supreme Court towards the question of control at the stage of conferment. Although these cases and the details about change in the approach of the Supreme Court have already been discussed in Ch.III and II, the main contributions of these cases and the trend shown by them has been pointed out in the following paras.

In the beginning, i.e. immediately after the commencement of the Constitution the Supreme Court adopted the approach of complete non-interference. Thus in A.K. Gopalan it was held that in order to be a valid preventive detention law, the legislation should only comply with the requirement of Articles 21 & 22 (4) to (7) and it need not satisfy the
requirement of reasonableness under Article 19, since it is not applicable in this area. The court also held that as the words 'procedure established by law' in Article 21 mean any procedure established by statutory law, no additional requirement of fair procedure could be insisted upon under Article 21\textsuperscript{12}.

About substantive guidelines, it was held that as the power was to be exercised on subjective satisfaction of the authority, the broad criteria provided in the Act were enough, because no objective standard or test could be provided for exercise of these powers\textsuperscript{13}.

Subsequently in 
\textit{Hardhan Saha}, (1974) while dealing with the Constitutional validity of M.I.S.A., the Supreme Court shifted from the basic premises of A.K. Gopalan; and held that a preventive detention law must also satisfy the requirement of Articles 19 & 14 in order to be a valid law under Article 21. However, in fact this change also did not emphasise the need for any substantive or procedural safeguard in the statute. It was held in this case that once all the minimum procedural requirements of Article 22 (4) to (7) are provided in the statute, the requirement of Article 19 are also satisfied\textsuperscript{14}. Also, conferment of discretion in terms of broad substantive guidelines was not held as violative of Article 14, on the ground that it is not possible to provide clear guidance for exercise
of power under them. In the recent case of A.K. Roy v. Union of India (commonly known as the National Security Case), while deciding upon the Constitutional validity of N.S.A., 1980 under Articles 21, 19 & 14, the Supreme Court has gone ahead of Hardhan Saha by insisting upon certain procedural and substantive safeguards. The decision on this point was given by Chandracud, C.J. (speaking for himself, Bhagwati and Desai, JJ.) with whom Gupta and Tulzapurkar, JJ. also concurred. Thus it was held in this case that the "maintenance of services and supplies essential to the community" constituted a vague criterion, because clear guidelines could be provided with respect to this criterion and yet they were not provided. In pursuance of this holding the Court directed that no person shall be detained under this heading, unless it is made clear as to what are essential services and supplies, either by law, order or a notification under the Act, published well in advance, before the Government acts on this criterion. It may, however, be pointed out that with respect to other criteria, namely, 'defence of India', 'security of India', 'security of the State', 'relations of India with foreign powers', the Court held that they, by their nature, are not capable of being defined clearly, and the Court omitted to mention anything about the criterion of
'maintenance of public order' which is also one of the purpose for which power of preventive detention under N.S.A. can be exercised.

Besides insisting for clear guidelines for detention under the heading of 'maintenance of supplies & services essential to the community', the Supreme Court in the National Security case, made an important contribution in the direction of control at the stage of conferment, by cutting down the unlimited discretion of the Government under S.5 of N.S.A., 1980, to keep a detenu under such condition and at such place as it pleased. It laid down some important rules, governing the exercise of discretion under this section, these are: (i) normally detenu must be kept in a place which is within the environs of his or her ordinary place of residence, because detention in a far off place may generally amount to a punishment; (ii) immediately after a person is detained, the members of his house hold, preferably the parent, the child or the spouse must be informed in writing about passing of the order of detention and the fact that he has been taken into custody; (iii) intimation must also be given of the place of detention including the place of transfer; (iv) detenu must be treated with human dignity and civilized norms of behaviour since he does not forfeit his other fundamental rights by reason of his arrest; (v) and whatever smacks
of punishment must scrupulously be avoided in the matter of preventive detention.\textsuperscript{18}

Some procedural safeguards, in addition to the bare minimum provided under Article 22 (4) to (7) have also been added in the National Security case. These are: (i) if Government is allowed to appear with the aid of legal practitioner before the Advisory Board, then the detenu should also be allowed to appear through a legal practitioner because denial of this right to detenu in such cases would be violative of Article 14; (ii) the detenu is entitled to be assisted by a friend, who is not a legal practitioner, in the proceeding before the Advisory Board; and if he asks for such facility he should be given the same; (iii) though the detenu does not have right to cross-examine witnesses, he can present evidence in rebuttal of allegations made against him and may offer oral and documentary evidence before the Advisory Board. However, that will have to be done within the time fixed by the Advisory Board, and there will be no obligation on the Advisory Board to summon witnesses, therefore, if detenu desires to examine any persons for the purpose of presenting his side of evidence he will have to keep them ready on his own\textsuperscript{19}.

In addition to the above procedural safeguards, one more important procedural safeguard had been recognised by
the recent decision of the Supreme Court in Francis Coralie Mullin v. The Administrator, Union Territory of Delhi.\(^{20}\) In this case Bhagwati, J. speaking for the Court (consisting of himself and S.M. Fazal Ali, J.) held that the detenu has a right under Article 21 to consult the legal adviser of his choice, not only for the purpose of defending him in criminal proceeding, but also for securing release from preventive detention or filing a writ petition; and as sub-clause(3)(b) of the conditions of Detention formulated by the Delhi Administration placed unreasonable restriction on this right, it was unconstitutional. Thus it may be said that the detenu has a right to consult a lawyer of his choice for the purpose of preparing his representation, for purpose of getting his advice on the question, as to how he should defend himself before the Advisory Board and for preparing and filing a habeas corpus petition or other proceedings for securing his release.

While referring to the above case, in the National Security Case, Chandrachud, C.J. pointed out that although a detenu may be said to have a right to consult lawyer of his choice, but this does not entitle him a right to be represented by a lawyer before the Advisory Board.\(^{21}\)

Above cases relate to the general legislative provisions, conferring power of preventive detention on the
authorities. However, in addition to power to make general provisions, exceptional power has also been vested in Parliament under Article 22(7)(a) which empowers it to pass a law to deal with exceptional situations, under which the safeguard of Advisory Board can be dispensed with even during normal times. The decision of the Supreme Court in *Sambhu Nath Sarkar v. State of West Bengal*\(^{22}\) constitutes an important authority on the question of conserment of this exceptional power. In this case while interpreting Article 22(7)(a), seven judge bench of the Supreme Court (consisting of J.M. Shelat, Acting C.J., K.S. Heyde, A.N. Ray, P. Jagannathan Reddy, A.K. Mukherjea, H.R. Khanna and Y.B. Chandrachud, JJ.) held that the Parliament must strictly follow the requirement of this Article and must clearly specify circumstances, and class or classes of cases in which only the safeguard of Advisory Board can be dispensed with. The Court pointed out that Article 22(7)(a) provides for very exceptional situations, therefore the law made under it must clearly specify what are those situations. In this case the Court expressly overruled the lenient view taken in *A.K. Gopalan* on this point\(^{23}\).

Thus, as far as the special law under Article 22(7)(a) is concerned, it has been settled finally that while conferring power under this provision the Parliament must provide clear guidance for the exercise of power. However, with
respect to the law dealing with general situations, although some improvements have been made, but much remains to be done still. This is evident from the recent decision of the Supreme Court in the National Security case, wherein, in spite of the fact that the Court moved ahead in the direction of control by insisting upon few substantive and procedural safeguards, mentioned above, some important points were answered in the negative. The following discussion, attempts to point out the important shortcomings of the legal control at the stage of conferment, as it has operated so far.

No clear guidelines have been required with respect to the general and broad criteria of 'defence of India', 'security of India', 'security of State' and 'relations of India with foreign powers' and the 'maintenance of public order'. Commenting upon this lacuna of the judgement in the National Security Case, C.M. Jariwala points out that even with respect to these criteria the court could have insisted upon the Government to indicate by definition as to what type of cases, need to be dealt with under these headings. Speaking particularly with respect to the criterion of 'public order', he rightly points out that the case of 'public order' is no better than 'maintenance of essential supplies and services'. It may include in it activities which might come on the border line of the security of State
at one end and 'law and order' at the other. In such a vast area no body can safely say whether his conduct would be covered by the statute or not. In these circumstances the court should have treated both the grounds on par\textsuperscript{24}. In a yet another important writing on preventive detention, while emphasising need for having clear substantive safeguards, particularly in view of abuse of powers during internal emergency, V.S. Rekhi has demonstrated that 'maintenance of public order' has been the most widely used criterion for preventive detention. He found that out of 224 reported cases studied by him 191 instances of detention related to 'maintenance of public order' alone, and this heading covered such widely different and diametrically opposed situations as Satya Narayan Puja and recourse to armed violence\textsuperscript{25}. Also, while using this against political opponent generally no attempt was made to distinguish between constitutional protests against governmental policies and unconstitutional protests\textsuperscript{26}. In view of this, it is submitted that the court should insist upon clear guidelines with respect to other broad criteria also; and particularly with respect to the criterion of 'public order' there is an urgent need to insist upon clear guidelines for the exercise of power, so that the power may not be misused or abused.

Another drawback of the National Security Case is: that it upheld vesting of power of preventive detention in
District Magistrates and Commissioners of Police. This may result in a wide spread use of this power, giving rise to a risk of increase in cases of abuse or misuse of power. In a recent article, emphasising the need for substantive and procedural safeguards with respect to the power of preventive detention in LAW ASIA region, F.S. Nariman, points out the drawback of the system, vesting this drastic power in various District Magistrates and the Police Commissioners. He illustrates his point by pointing out to some instances which he witnessed personally. In one such instance, a law student of Vishakhapatnam was detained under MISA in August 1975, by the District Magistrate, just because he did not agree with the proposal of his lecturer that the class should march in support of 20 point programme, instead of attending the lecture, on that day. Commenting upon this instance, Shri Nariman points out that 'no one in Delhi instructed the District Magistrate to act, in fact South Block would have been aghast at such irresponsibility. But if you pass laws which encourage officials to act irresponsibly, in our country they will - with hob nailed boots'27. Thus while concluding he suggested that the power to preventively detain should always be in high ranking officials of Government preferably the minister himself or the Head of Department, as this is one way to ensure that power may not be abused28. Also, while emphasising the need for substantive
safeguards he made following weighty observations:

"If preventive detention laws are not to be scrapped altogether they must be drafted with precision to deal with the exact situation necessitating the immediate use of drastic powers. It is no answer to the tyrannical laws that they are not implemented tyrannically. When they are not, Government officials empowered to detain take undeserved credit for their tolerance. 'See what we can do, but we don't'. Plenitude of power, whether exercised or not, inevitably breeds spirit of patronage and intolerance. It also breeds flunkeys".29

Writing in 1978, about the attitude of the Supreme Court towards the need for providing the substantive guidance in the preventive detention laws, V.S. Rekhi pointed out that the main reason for not insisting upon it was the Court's rejection of the doctrine of void for vagueness30. However, it seems that in the National Security case, decided in 1982 the Supreme Court has shifted from its above stand.

This may be evident from the fact that while speaking for the Court Chandrachud, C.J. agreed in principle with the argument of Shri Jethmalani and Dr. Singhvi, that a preventive detention statute, if it provides vague criteria, is liable to be struck down as void; and then he proceeded to examine whether the criteria of 'defence of India', 'Security of India', 'Security of State' or 'relation with foreign
powers', 'maintenance of supplies and services essential to community' were capable of being defined. On this question he concluded that except the criterion of 'maintenance of supplies and services essential to community', all other criteria were incapable of being defined clearly. It is submitted that while Chandrachud C.J. was right in accepting the principle of 'void for vagueness', he was not on so much sound footing in refusing to insist upon clear guidelines under most of the criteria of preventive detention under this principle. While considering the question of defining various criteria of preventive detention he should have distinguished between the need to give guidance, indicating the type of cases which are intended to be covered under the statute, from the question of giving a clear and certain meaning to a word or concept. A word or concept may be defined in the statute for the purpose of indicating what type of situations are intended to be covered under it; and not for the purpose of giving a definite, clear or universal meaning to it. Thus for instance, the criterion of 'defence of India', is capable of being defined in a statute by including within it acts like 'inciting armed forces to rebellion', 'damaging or destroying defence installations' or 'disclosing defence secrets'. The benefit of such a definition is that it indicates as to what type of acts are intended to be covered under this criterion. In the National Security case,
the Court seems to have confused the question of defining
the broad criteria or object of preventive detention with
the question of giving a certain, clear and definite mean-
ing to these criteria which question did not arise in fact
in this case.

In order to soften the rigour of preventive deten-
tion, only the substantive safeguards are not enough, but
the procedural safeguards are also needed. Speaking on this
point in 1978 Dr. M.P. Jain suggested that; (i) The detention
cases should be reviewed periodically, say at an interval
of three months, so that those whose detention no longer
appears to be necessary may be released; (ii) The order
passed by the Advisory Board and the Government should
be speaking orders; (iii) The detenu should be provided with
legal assistance in preparing his representation, for it
may be quite difficult for an inarticulate detenu to draft
his representation and properly marshal the facts and evidence
in his favour; (iv) Lawyers should be permitted to appear
before the advisory board to represent the detenu; (v) The
detenu should have a right to lead evidence before the Advi-
sory Board in his defence and to controvert the facts and
evidence which the administration may have collected against
him.

Recently the Supreme Court has started insisting upon
the principle that the detenu should have legal assistance
and that he should be allowed to adduce his evidence before the Advisory Board in rebuttal of allegations against him. Although the right to be represented by a lawyer before Advisory Board has not been conceded to him, but a right to be represented by a friend has been given to him. However, the principle that the Government or the Advisory Board should give speaking order has not been recognised so far. Probably the courts do not want to introduce the formal procedural safeguards of representation through lawyer and giving of reasoned decision in the area of preventive detention because they are aware of the limited time within which the Advisory Board has to complete its proceedings and give report to the Government. It is, however, submitted that even though the requirement of passing a speaking order may not be insisted in this area, but a lesser requirement that the Government and Advisory Board should record findings and reasons for rejecting the detenu's representation in brief may be insisted upon.

As the Advisory Board can go into each and every aspect of detention, it has been regarded a very important safeguard; and it has been suggested by eminent jurists and writers from time to time that it should be strengthened or that it should be more independent of the executive in the matter of its composition and appointment of its members and chairman so that the interest of the detenu in getting
unbiased and independent opinion on his case may be safe-
guarded. Thus it has been suggested that Article 22(4)(a) 
should be amended suitably to provide that only serving or 
retired High Court Judges should be appointed to it; and the 
words empowering the appointment of 'persons who are or have 
been qualified to be appointed as High Court Judges' should 
be deleted; and that the Board should be constituted in 
accordance with the recommendation of the chief justice of 
the concerned High Court. In addition, it has been suggested 
that the provision doing away with the Advisory Board in 
certain situation must be removed, for that Article 22(7)(a) 
should be scrapped.

The improvements suggested above have been incorpo-
rated in S.3 of the Constitution (Forty-fourth Amendment) Act, 
1978 (hereafter referred to as 44th Amendment Act). This Act 
received the President's assent on April 30, 1979. However, 
this salutary provision has not come into force so far; and 
has been practically rendered as non-existent because of the 
factors mentioned below.

44th Amendment Act, 1978 which introduced various 
important changes in the Constitution provided a condition 
for coming into force of these changes. Thus S.1(2) of the 
44th Amendment Act, provided that the "Act shall come into 
force on such date as the Central Government may, by
notification in the Official Gazette, appoint and different
dates may be appointed for different provisions of this Act".
Most of the amendments were brought into force with effect
from June 20, 1979 by a Notification issued a day earlier.
The rest of the amendments, except that made in Article
22(4) to (7) were brought into force with effect from August 1,
1979. For reasons difficult to understand and which reflect
no credit on the Janata Government - which sponsored the
Amending Act - S.3 was not brought into force. And the
Congress (I) Government which succeeded the Janata Government
in 1980, did nothing to repair this omission.\(^{35}\)

The National Security Act, 1980, which replaced the
National Security Ordinance, 1980, did not provide for the
composition of the Advisory Board and mode of its appointment
in accordance with the 44th Amendment, but followed the old
Article 22(4), in spite of the fact that the National Security
Ordinance, which it replaced provided for the constitution
and appointments to Advisory Board in accordance with the
amended Article 22. This was challenged in the National
Security case, inter alia, on the ground that under S.1(2)
of the 44th Amendment Act, the Central Government could not
override the will of the Parliament acting under Article 368;
and could not disregarde the Amendment brought about in
accordance with the provision of the Constitution by not
bringing it in force within a reasonable time. Therefore S.9 of the National Security Act which was not in accordance with S.3 of the 44th Amendment constituted an unreasonable restriction. A Mandamus was also sought from the Court directing the Government to bring into force the amended Article 22. The Five judge bench of the Supreme Court was divided on this issue. While Chandrachud C.J., speaking for the majority (consisting of himself, Bhagwati & Desai, JJ.) held that the Central Government could not be directed to bring into force S.3 of the 44th Amendment in spite of the fact that there was apparently no practical difficulty in bringing it into force; and S.9 of the National Security Act is not unreasonable, because it complied with the unamended Article 22(4) which still finds place in the Constitution.

The greatest fallacy in the majority view, as rightly pointed by Shri H.M. Seervai\(^3\), is that it confused the constituent power of the Parliament under Art. 368(2) with the ordinary legislative powers and applied the principles which are applicable to delegation of ordinary legislative powers. The difference in the two types of functions, namely the constituent function and the ordinary legislative function has been well appreciated by Gupta, J. with whom Tulzapurkar J. also concurred. Gupta, J. rightly addressed himself to the question namely "whether.....the Central Government had
the freedom to bring into force any of the provision of the Amendment Act at any time it liked" ?; and answered this in negative by holding that Section 1 (2) of the 44th Amendment Act cannot be construed to mean that Parliament left it to the unfettered discretion or judgement of the Central Government when to bring into force any provision of the Amendment Act. Keeping in mind the distinctive nature of the constituent power exercised under Art. 368, he pointed out that after the amendment act received the President's assent, the Central Government was under an obligation to bring into operation the provisions of the Act within a reasonable time. Pointing out the reason for leaving it to the Central Government to bring into force the Amendment, at a later time he stated that Parliament must have taken into consideration the practical difficulties in the way of the executive in bringing into operation all the provisions of the Amendment Act immediately, and thus by enacting Section 1(2) it relied on the Central Government to give effect to them. Now when more than two & half years have passed since the 44th Amendment Act, 1978 received the assent of the President, it seems impossible that any such difficulty should still persist preventing the Government from giving effect to Section 3 of the Amendment Act. He has also pointed out that the fact that clause 9 of the National Security Ordinance 1980
provided for the Constitution of Advisory Boards in conformity with Article 22 as amended by Sections 3 make it clear that the non-implementation of the provision of S.3 was not due to any practical difficulty. Thus he held that provisions like S.1(2) of the 44th Amendment Act cannot be construed to empower the executive to scotch on Constitution Amendment passed by Parliament and assented to by the President. Therefore the action of the Government in not bringing into force and not following the provisions of Section 3 is not lawful. In view of this, Gupta and Tulzapurkar, JJ. were of the opinion that Mandamus could be issued, directing the Central Govt. to bring into force S.3 of the 44th Amendment and to follow it. Commenting critically upon this aspect of the National Security Case, Shri H.M. Seervai rightly observes

"On the question whether a mandamus ought to have been issued to the Central Government, the judgement of the majority is contrary to reason, principle and authority; it is clearly wrong and productive of grave public mischief and ought to be overruled."

So far, neither this part of the decision has been overruled, nor the Central Government has thought it proper to bring into force S.3 of 44th Amendment Act. Therefore, the old provisions relating to composition and appointment
of Advisory Board continues in the Constitution and the National Security Act.

Above discussion reveals that not till very recently the Supreme Court had thought of introducing substantive and procedural safeguards at the stage of conferment of discretionary power in this area. Even recently the clear guidelines have been insisted only with respect to the object of 'maintenance of supplies and services essential to community', and no such need has been insisted upon with respect to other criteria. Similarly, the important procedural safeguards of making speaking order and representation by lawyer has not been required. Also safeguard with respect to composition and appointment of Advisory Board has not been insisted upon. This shows that while controlling conferment of discretion the Supreme Court generally prefers to follow a non-interventionistic approach. It moves cautiously in order to avoid striking down of an enactment as unconstitutional. This probably seems to be the reason behind upholding the conferment of discretion generally in very broad and wide terms. However, while controlling the exercise of discretion, the attitude of the Supreme Court and the High Courts have been very much different; generally they have been very particular in seeing to it that whatever safeguards are available to the
detenu, they have been followed strictly and scrupulously by the administration. This aspect of the control has been discussed below.

7.2.2 Control over Exercise of Discretion in the light of Constitutional and Statutory Limits:

While controlling exercise of discretion in the area of preventive detention, during normal time or peace time the courts have applied both the limits, namely constitutional limits and the statutory limits. The leading cases under these headings have already been discussed in detail in Chapters IV and V respectively, however the main legal requirements relating to exercise of discretion are worth mentioning here. These are:

1. Although the satisfaction to be arrived at in the preventive detention cases is subjective satisfaction, yet it must be arrived at by proper application of mind by the detaining authority, and must be based upon relevant considerations and must not be based upon irrelevant considerations.

2. The detention must be for the authorised purpose and not for improper purpose.

3. The authority must not act malafide, i.e. with ill will or bad motive while ordering detention of a person.
4. Clear grounds for the detention must be supplied to the detenu, they must not be vague, because vague grounds defeats his right to make an effective representation under Article 22(5)\textsuperscript{41}.

5. The right to make effective representation under Article 22(5) also requires that the detenu must be supplied with all the documents and materials, mentioned in the grounds\textsuperscript{42}.

6. Right to make an effective representation also requires that the Government must consider the representation of the detenu, independently of the Advisory Board\textsuperscript{43}.

7. Representation must be considered as soon as possible and delay on the part of Government in considering detenu's representation must be explained by disclosing reasons to the court\textsuperscript{44}.

8. Generally grounds must be supplied immediately within the normal statutory time limit and in cases where there has been delay, the reasons must be recorded in writing and must be disclosed to the court\textsuperscript{45}.

9. Although details of facts and documents or other material may be supplied later within a reasonable time all the grounds of detention must be supplied immediately after the detention and no ground of detention can be
added afterwards. The reason is that Art. 22(5) requires that all the grounds which operated to create the subjective satisfaction of the detaining authority must be communicated to the detenu, and nothing should be held back. Therefore, if the 'additional grounds were non-existent at the time of detention order then these were not the elements to bring about subjective satisfaction and hence they are irrelevant. On the other hand if they were existent then their non-communication amounted to breach of Article 22(5)\textsuperscript{46}.

10. Under Article 22(6), although the Government may refuse to disclose the detailed facts in public interest, but grounds cannot be withheld and all the grounds must be communicated\textsuperscript{47}.

Besides striking down a detention order on any of the above grounds strict compliance with the statutory provisions has also been required by the courts and any action of the administration which does not comply strictly with the express provision of the statute has been struck down. For example in the recent case of Ibrahim Bachu Bafan v. State of Gujarat\textsuperscript{48} (1985) the Supreme Court struck down a detention order made by the Government under S.11(2) of the COPEPOSA. In this case the detention order was quashed by the High Court as illegal. However, on the same grounds another detention order was passed under Section 11(2), which
empowered the Government to pass another order even after revocation of the previous order. In a challenge to this repeated order Ranganath Misra, J., speaking for the Court, (consisting of himself, A. Vardarajan and S.M. Fazal Ali, JJ.) held that where an order is quashed by a court in the exercise of its extraordinary jurisdiction, the power of making fresh order cannot be exercised because quashing of an order cannot be equated with its revocation by the Government.

Section 11(1) of COFEPOSA and S.14 of N.S.A. vest the power of revocation in the Central and State Government. It has been held by the Supreme Court in some recent cases that this power entitles the detenu to make a representation to the appropriate Government for revocation; and failure on the part either of jail Superintendent or the other administrative authorities to forward his petition to the Government to whom it is made is violative of detenu's right arising from these sections and thus the continued detention in such cases is violative of these sections.

Disclosure of reasons or grounds and material to the court is necessary for effectively controlling the exercise of discretion under some of the important principles mentioned above. Therefore, the very first attempt of the executive prohibiting disclosure of grounds to the court was
struck a decisive blow in **A.K. Gopalan**, wherein S.14 of the Preventive Detention Act, which sought to prohibit disclosure of grounds of detention and other communication to court was struck down by all the seven judges constituting the bench.

The following observation of Mukherjea, J. in **A.K. Gopalan** illustrates the point very clearly:

"In my opinion it would not be possible for the court to decide whether the provisions of Art. 22(5) have been duly complied with and the fundamental right guaranteed by it has been made available to the detenu unless the grounds communicated to him under the provisions of this article are actually produced before the court. Apart from this, it is also open to the person detained to contend that the detention order has been a *mala fide* exercise of power by the detaining authority and that the grounds upon which it is based, are not proper or relevant grounds which would justify detention under the provisions of the law itself. These rights of the detenu would for all practical purposes be rendered unenforceable if the court is precluded from looking into the grounds which have been supplied to him under Section 7."

Thus in the beginning itself the way was cleared by the Supreme Court for control over exercise and subsequently
this control was strengthened by holding that in case of a challenge to the exercise of discretion on the ground of non application of mind, irrelevant grounds or improper purpose or vagueness of grounds of detention, the administration is bound to disclose to the court the reasons or material or document on which its subjective satisfaction was based. Also, in case of a challenge on the ground of non supply of documents and other material, it has been held that the question whether particular document or material affected the subjective satisfaction of the authority, cannot be decided conclusively by the concerned authority; but the document or the material in question has to be disclosed to the court, which alone can finally decide this question by going into the document and the facts and circumstances of the case. As a result of the above approach of the Supreme Court and High Courts, towards the question of disclosure of reasons or material to the court, many detenus have been given relief under one or more principles, mentioned above. Thus, the role of the Supreme Court and the High Courts in controlling the exercise of discretion in the area of preventive detention, in normal times, has been rightly commended by eminent jurists. Speaking in this behalf Dr. M.P. Jain observes:

"....the courts have been conscious of the fact that preventive detention affects one of the
most cherished rights of a human being, namely
the freedom of his person and have therefore
gradually evolved a few principles to control
administrative discretion in the area in order
to safeguard the individual freedom from undue
exercise of power. The courts have achieved
this by construing relevant provisions of Art. 22
Liberally, by insisting that provisions of the
law be observed scrupulously and by applying
vigorously and creatively some of the principles
of administrative law controlling administrative
discretion. The courts adopted not a mechanical
view of their role but a purposeful approach to
draw a fine balance between individual freedom
and social control."\(^5\).

While controlling the exercise of discretion the
courts have struck down the detention order in various cases
even if one of the grounds was either vague or irrelevant.
In these cases the courts have rejected the contention of
the Government that the detention order should be upheld
on the remaining ground. The rationale behind this approach
was explained as far back as in 1954 by B.K. Mukherjea, J.
in \textit{Shibbanlal Saksena v. State of U.P.}\(^5\). In this case
speaking for the Supreme Court he observed:

"To say that the other ground, which still
remains is quite sufficient to sustain the
order would be to substitute an objective
judicial test for the subjective decision
of the executive,...which is against
the legislative policy underlying the
Statute\textsuperscript{56}.

The result of this ruling was that once even one of
the grounds was found to be vague or irrelevant the deten-
tion order could be struck down; and in order to get relief
it was not necessary for the detenu to establish that all the
grounds of detention were irrelevant and/or vague.

However, recently new section namely S. 5A has been
added to the COFEPOSA, 1974 and the N.S.A. 1980. According
to this section even if one of the grounds is vague or
irrelevant or non-existent, the detaining authority shall
be deemed to have made its order on the remaining grounds
and such a detention order will not be liable to be struck
down.

Even after introduction of this section, some High
Courts struck\textsuperscript{57} down an order of preventive detention under
COFEPOSA, by holding that the ground of detention may be
sought to be sustained by several instances; and even if
one of such instance is vague or irrelevant the ground of
detention is void. Such a situation is not covered by
Section 5A. Evidently, in these cases a distinction was
made by the High Courts between the ground and instances of
detention in order to give relief to the detenu. In these
cases the word grounds of detention were equated with the
statutory object of detention. However, this view has not found favour with the Supreme Court, which is evident from its decision in State of Gujarat v. Chamanlal. In this case while interpreting S. 5A S.M. Fazal Ali, J. (speaking for a bench consisting of himself and A. Varadrajan, J.) held that where there are a number of grounds of detention covering various activities of the detenu spreading over a period or periods, each activity is a separate ground by itself and if one of the grounds is irrelevant, vague or unspecific it will not vitiate the order of detention. He pointed out that the section was introduced to remedy the situation created by previous decisions which struck down the detention even if only one ground was vague or irrelevant; explaining the distinction between grounds and the object of detention he pointed out that whenever the allegation of smuggling are made against a person who is sought to be detained by way of preventing further smuggling, there is bound to be one act or several acts with the common object of smuggling goods which is sought to be prevented by the Act which constitute various grounds of detention and it would not be correct to say that the object of the Act constitutes the grounds for detention. If this is so, then in no case there could be any other ground for detention except the one which relates to smuggling under COFEPOSA.
Thus, the effect of section 5A is that now, before a detention order can be held invalid court has to go into each and every ground of detention, and if all the grounds are vague or irrelevant then only it can quash the detention.\(^59\)

It is submitted that S. 5A could have been challenged as violative of Art. 22(5). The right to make an effective representation requires that the detenu must be supplied with clear grounds, material and documents of detention. However, since no such question has been raised, so far, it remains to be seen as to what will be the attitude of the Supreme Court on this point.

The above discussion reveals that generally the courts have adopted a balanced approach while controlling exercise of discretion during normal times or peace time. Thus while on one hand they protect the individual interest in personal liberty against unreasonable and unfair exercise of power; on the other hand they recognise the power of the administration to detain in the interest of Society. The question arises as to how the legal control has operated during emergency? This has been discussed below:

7.3 CONTROL DURING EMERGENCY :

As already noted, during emergency, the legal control at the stage of conferment of discretion has not been available in view of suspension of right to enforce Articles 21, 22, 19
and 14. As a result very drastic statutes vesting power of preventive detention could be passed. How this drastic power has to be exercised? This question has been dealt with in some of the leading decisions of the Supreme Court. As these cases have already been discussed in detail in the previous chapter, which dealt with the general operation of legal control during emergency, it is not proposed to discuss them in detail here. However, the law laid down in these cases and the main trends have been mentioned. Also, an attempt has been made to point out the main legal factors which affected the control in this area.

India witnessed three emergencies. While the first two emergencies, namely, the emergency of 1962 and the emergency of 1971 were declared due to war with China and Pakistan respectively, the third one, namely the emergency of June 1975 was declared due to 'internal disturbances'.

During the existence of emergencies of 1962 and 1971, arising out of external aggression in 1962, 1965 and 1971, the legal control over exercise of discretion, even under drastic emergency laws, did not stop to function. This was because of the Supreme Court's ruling in *Makhan Singh v. State of Punjab* 60, wherein the seven judges bench of the Court laid down the law correctly and held that the challenge to a detention order on the ground of *malafide* was available.
even during emergency, and the emergency provision in Article 359 could not affect or take away this safeguard, because this safeguard did not arise out of any fundamental right. Following this ruling relief was given to the detenu even under the drastic preventive detention laws, namely, Defence of India Act, & Rules, on the ground of malafide, improper purpose, violation of statutory provisions etc. 61. However, as the administration was not bound to provide grounds to detenu under these drastic laws, the detenu had a heavy burden to establish his case. Although this made it difficult for the detenu to have his detention order quashed generally, but the legal remedy against the exercise of discretion was nevertheless open to the detenu; and thus, it was not completely foreclosed.

An additional, aspect of emergency, during this period was that the Presidential order under Article 359, did not suspend enforcement of Articles 21, 22, 14 generally but only with respect to certain specifically mentioned statutes or statutory provisions. Thus an order of preventive detention not coming under any of the specified statute could be challenged on all the grounds on which legal control operates normally. The Presidential order operating during this period was termed as conditional.
Taking benefit of the conditional Presidential order in some cases the Supreme Court allowed the petitioner to challenge even the detention order under the Defence of India Act, on the ground that it violated Article 21 also. The purpose of this approach was to enable the petitioner to come to the Supreme Court under Article 32, against any illegal exercise of power even under the drastic emergency law, namely, the Defence of India Act. The basis of this was - that when detention was not in accordance with the Defence of India Act or Rules, it did not come within the scope of President's order and thus could be challenged as violative of Article 21 also\(^{62}\).

However, the fact that violation of the emergency statute (Defence of India Act or Rules) could be challenged even under Art. 21, because of conditional Presidential order seems to have created confusion about the clear ratio of \textit{Makhan Singh} which had nothing to do with the conditional nature of Presidential order; and had clearly held that power under Article 359 was itself limited in scope, therefore the Presidential order, irrespective of its width, could not take away the ordinary statutory remedy. Thus, in the subsequent emergency which arose out of 'internal disturbances'; and during which the Presidential order suspended Articles 21, 22, 14 & 19, generally, an argument based on this confusion
was advanced in A.D.M. Jabalpur v. Shivkant Shukla\(^63\) (known as the Habeas Corpus case or Shukla's case or MISA case). It was argued in this case that as there was unconditional suspension of Article 21, the detenu could not challenge an order of preventive detention, even on the ground of violation of statute, or malafide, or extraneous considerations etc., because Article 21 covered under it even the rights arising out of statute and nothing of personal liberty existed beyond this Article; and ratio of Makhan Singh was not applicable, because it only related to conditional Presidential order. This argument found favour with the 4 judges constituting majority of the five judges bench. Thus, it was held in this case that the detenu has no locus standi to challenge legality of detention order on any of the grounds of statutory ultra vires, during emergency. As a result of majority ruling in Shukla's case, during the period of internal emergency from June 25, 1975 to March 1977 legal control completely gave way to administrative anarchy or tyranny in this area\(^64\). During this period the scope of power of preventive detention was extended to the extent never imagined by the Constitution makers, and never intended by Article 359\(^65\).

It is submitted that the Supreme Court's ruling in Shukla's case was the result of confusion between the two modes
of legal control over exercise of discretion, viz.
(1) Control in the light of constitutional limits,
(2) Control in the light of statutory limits, which,
though exist side by side and operate simultaneously during normal time, have independent theoretical basis.
While control in the light of constitutional limits is based on the fundamental rights, the control in the light of statutory limits is independent of any fundamental rights. It is based upon the doctrine of statutory ultra vires which arise from the concept of rule of law and separation of power which require that the administrative or executive authorities must remain within the limits of their power. These concepts have been recognised as the basic principles upon which our Constitution, which opted for the system of Parliamentary democracy, is based.

Another major shortcoming of the majority judgements in Shukla's case, which set the Supreme Court on the path of deviation from its correct stand in Makhan Singh has been very well elaborated by Shri H.M. Seervai. He rightly points out that the majority judgements cited the famous decisions of House of Lords in Liversidge v. Anderson and R.V. Halliday to derive support for their view, by pointing out that even in a country whose constitution is based on rule of law and which prizes and effectively protects personal
liberty, preventive detention ordered on subjective satisfaction has been upheld. However, these majority judgements were remarkably silent about the various safeguards pointed out in those cases which led the House of Lords to uphold preventive detention at a time of mortal peril. The safeguards of free press, free Parliamentary discussions; vesting of power in the higher authority, namely, the Home Secretary; availability of review by advisory committee consisting of persons of unquestionable repute; and above all availability of grounds of malafide to challenge the illegal detention, were relied upon by the House of Lords in the above cases. As these safeguards were totally absent in India during internal emergency, even the case of Liversidge and the case of Halliday did not really support the decision of the majority in Shukla's case. Shri Seervai points out that in absence of these safeguards which could have struck any judge, the majority should have followed the ratio of Makhan Singh and the defendant's right arising out of statute should have been upheld.

Thus it may be said that till the decision of the Supreme Court in Shukla's case, i.e., till 1976, the legal control over exercise of discretion in the area of preventive detention was not suspended even under drastic emergency laws passed during the emergencies arising out of war with China.
and Pakistan. During this period detenu was entitled to challenge the legality of a detention order on any of the grounds of statutory ultra vires. But subsequently, i.e. in 1976, the failure to distinguish between the legal control under statutory limits and legal control under fundamental rights, on the part of majority in Shukla's case changed this position; and there was a complete suspension of legal control during internal emergency, and an order of preventive detention under the drastic provisions of MISA, namely, S.16-A, could not be challenged on any ground.

The drastic effect of the majority decision in Shukla's case has been undone by the 44th Constitution Amendment Act, 1978 which prohibits suspension of Article 21 even during emergency. As a result of this, during emergency detenu will be entitled to challenge the legality of a preventive detention order. However, the Shukla's case and the experience of internal emergency, still serve as reminder to the need that the theoretical basis of legal control under the statutory limits and the constitutional limits should always be kept in mind.

It may, however, be important to note that the approach of the court during emergency, has not at all affected their approach in normal times or peace times, during which
they have always been watchful about strict compliance with constitutional and statutory limits. This is evident from the numerous cases decided after emergency, wherein relief has been given to detenu against illegal detention.

7.4 CONCLUDING REMARKS:

The above discussion reveals that during normal times or peace times the legal control of administrative discretion, in the drastic area of preventive detention, operates at two stages namely, at the stage of conferment and at the stage of exercise of discretion.

At the stage of conferment of discretion, the Supreme Court used to allow vesting of discretion in very wide terms without insisting upon clear substantive guidelines and procedural safeguards, besides the bare minimum required under Article 22(4) to (7). This trend continued till the decision of the Supreme Court in the National Security case. However, recently in the National Security case, a visible shift from the above stand of the Court has been witnessed which shows that the Court has started attaching significance to the legal control at the stage of conferment also. Thus, clear guidelines have been required at least with respect to the criterion of 'maintenance of supplies and services essential to community'. Also the procedural safeguard of representation through a friend who is not a legal practitioner, and a right to produce
the evidence in rebuttal of allegation, in a proceeding before the Advisory Board has been implied in s. 9 at the stage of conferment. Also, under Article 14 detenu is entitled to be represented by a lawyer before the Advisory Board. In addition, a right to consult a lawyer of his choice, for the purpose of getting relief against preventive detention, has also been conceded to a detenu.

The power of the Government to place a detenu at such place and in such circumstances, as it pleased, has also been cut down by the Supreme Court by laying down certain governing rules.

However considering inherent drastic nature of the power of preventive detention, the above safeguards have not been considered enough by eminent jurists and it has been rightly suggested by them that more needs to be done in this area at the stage of conferment. Thus, there is a need to require clear guidelines with respect to the other broad and general object or criteria of preventive detention; particularly with respect to criterion of 'public order' the court should require clear guidelines as soon as possible. Also the power of preventive detention should not be vested in many officers and at such a low level as District Magistrate or Commissioner of Police, and it should preferably be vested in Minister or Home Secretary. At least the
procedural safeguard of recording the brief reasons for rejecting the representation of detenu should be insisted upon, as it may ensure application of mind by the authorities to his case.

In addition, the safeguards about composition and appointment of members of Advisory Board provided in S.3 of 44th Amendment must be insisted upon at the stage of conferment.

While controlling the exercise of discretion, in normal times the attitude of the Supreme Court and High courts have been more scrutinising; and strict compliance with the constitutional requirement of Art. 22(5), and of the statute has been insisted upon. As a result, in many cases the illegal exercise of power, either due to violation of constitutional limits or statutory limits, or both, has been struck down.

During emergency, as the fundamental rights under Articles 21, 22, 14 & 19 have been suspended, the conferment of the drastic power or preventive detention, even without the minimum safeguards of Art. 22(4) to (7) could not be challenged. However, the exercise of discretionary power could be challenged under the doctrine of ultra vires enforcing express and implied statutory limits. This was due to
the ratio of *Makhan Singh*, which rightly said that an order under Article 359, suspending fundamental rights could not take away the ordinary statutory remedy of the detenu. This position continued till the decision of the Supreme Court in *Shukla's case* (1976). However, after *Shukla's case* the legal control was completely suspended, and detenu could not enforce even statutory limits which are independent of fundamental rights. *Shukla's case* is a clear instance of the effect of confusing the two modes of control over exercise of discretion, namely the control in the light of constitutional limits of fundamental rights, and the control in the light of statutory limits. Therefore, it is submitted that these modes of control though operate side by side during normal times, must be distinguished. It must always be kept in mind that these two modes of legal control over exercise of discretion are independent of each other. Therefore, even if some important fundamental rights may be suspended during emergency, the control under statutory limits may still be available.

**FOOT NOTES**

3. 1 H.M. Seervai, Constitutional Law of India, p.1049
at pp.91-92.
6. M.P. Jain, op.cit. at p. 522
7. A.I.R. 1950 S.C. 27
8. A.I.R. 1974 S.C. 2154
12. For details see supra, Ch.III (3.4.1)
13. For details see supra, Ch.III (3.4.2.3)
14. For details, see supra, Ch.III (3.4.2.2)
15. For details, see supra, Ch.III (3.4.2.3)
17. For details, see supra, Ch.III (3.4.2.3)
18. For details see, supra, Ch.II (2.3.1)
19. For details, see supra Ch.III (3.4.2.2)
22. A.I.R. 1973 S.C. 1425
23. For details, see supra, Ch.III (3.6)
25. V.S. Rokhi, 'Preventive Detention : Need for Substantive
Restraints, in Indian Constitution Trends and Issues (Ed)
by Rajeev Dhawan & Alice Jacob, p.219 (N.M. Tripathi,
27. See F.S. Nariman, Preventive Detention and Persecution
Political Opponents, X Indian Bar Review (1983) p.630,
at p.640.
28. Ibid, at p. 641
29. Ibid
30. See supra n. 28 at p. 229. In addition to this main reason, he points out that so far the courts themsel-
ves have been enamoured of procedural, rather than
substantive safeguards; they have yet to jettison
the exclusionary construction of Articles 19 and 22
(the development since 1978 show that infact exclu-
sionary construction approach has been jettisoned
completely in Maneka Gandhi); the requirement of rea-
sonableness of Article 19 itself is by and large
procedural in character. In this article while
concluding the author suggests an amendment to Article
22 itself, adding the substantive requirement in
following words "No person shall be preventively detained
save in the interests of security of State, friendly
relations with foreign States, maintenance of democratic
institutions or adequate performance of judicial func-
tions". It is submitted that this change is hardly going
to make any difference, unless the administration is
required to define clearly the situations, intended
to be covered under these broad criteria. It does not
make any difference, whether they find place in legis-
lative entries or in Article 22. A significant feature
of his reformulation of broad head of detention may,
however, be noted, and that is, the omission of much
often used criteria of 'maintenance of public order' an
and 'maintenance of supplies and services essential to
communities'. This probably shows the anxiety of the
author to restrict the criteria of preventive detention
to more serious acts.
31. See the argument of Shri Jethmalani in A.K. Roy v. Union
32. In his recent article, F.S. Nariman also suggests that
an independent administrative body should be set up
in order to review the preventive detention cases,
immediately after they are made. See supra, n.27

33. M.P. Jain op.cit. at p.523.
34. See M.P. Jain, op.cit. p.523, C.M. Jariwala, 'Preven-
tive Detention in India, Experience and some suggested
Reforms, in Indian Constitution Trends & Issues op.cit.
p.203.
35. H.M. Seervai, op.cit. p.820
36. Ibid at pp.829-832.
37. Ibid at p. 837-838.
38. For details, Supra, Ch.V (5.2.2.2)
39. For details, see Supra, Ch.V (5.2.2.1)
40. For details, see Supra, Ch.V (5.2.2.8)
41. For details, see Supra, Ch.IV (4.6.1)
42. For details, see supra, Ch.IV (4.6.1)
43. For details, see supra, Ch.IV (4.6.2)
44. For details, see supra, Ch.IV (4.6.2)
45. For details, see supra, Ch.IV (4.6.1)
46. For details, see supra, Ch.IV (4.6.1)
47. For details, see supra, Ch.IV (4.6.1)
50. A.I.R. 1950 S.C. 27 at p. 105
51. For details, see supra, Ch.V & Ch.IV (5.2.1.4)(4.6.1)
52. For details, see supra, Ch.IV (4.5.1)
53. See M.P. Jain, op.cit. p.514; H.M. Seervai, op.cit. pp.1057-
1058; C.M. Jariwala, Microfine Judicial Approach in
54. Ibid.
56. Ibid at p. 181
57. See for example, Mrz. Swaran Singh Ahuja v. State of Karnataka, (1978) Cri L.J. 1229; also see decision of the Gujrat High Court in Chamanlal v. State of Gujarat, which has been reversed by the Supreme Court.
59. See for example recent case of the Supreme Court in Ajay Dixit v. State of U.P., A.I.R. 1985 S.C. 18. In this case the court went to each ground of detention and found them irrelevant and therefore struck down the detention order.
61. For details see supra Ch.VI (6.3.1)
62. For detail see supra, Ch.VI (6.3.1)
63. A.I.R. 1976 S.C. 1207;
64. For a thought provoking critical commentary on the situation created by the Shukla's case see, H.M. Seervai, op.cit., pp.1016-1063;
67. H.M. Seervai, op.cit. at pp.1060-1062
68. (1942) A.C. 206
69. (1917) A.C. 260
70. See for example various suggestions made in this respect by Dr. M.P. Jain, op.cit., pp.522-523; F.S. Nariman & Jariwala, see supra notes 27, 32 & 24 respectively.