SUPREME COURT OF INDIA ON LAW OF PREVENTIVE DETENTION 1950 TILL DATE

Introduction:

India became free in 1947 and the Constitution was adopted in 1950. It is extraordinary that the framers of the Indian Constitution, who suffered most because of the Preventive Detention Laws, did not hesitate to give Constitutional sanctity to the Preventive Detention Laws and that too in the Fundamental Rights chapter of the Constitution. Some parts of Article 22 are not Fundamental Rights but are Fundamental Dangers to the citizens of India for whom and allegedly by whom the Constitution was framed, to usher in a new society, with freedom of expression and freedom of association available to all.

In 1950 itself, a Prevention Detention Act was piloted by Sardar Patel, who said that he had several “sleepless nights” before he could decide that it was necessary to introduce such a Bill. And in 1950, under this Act, ordinary disturbers of order and peace were not arrested, but a political leader of A.K. Gopalan’s eminence was arrested. Even from that initial action, it was evident that these Acts were meant to curb political dissent, and that legacy has been and is being followed.

From the time the country secured its Independence till 1977, except for a period of nearly two years from 1969-1971, free India had the dubious distinction of having these extraordinary, mischievous and ‘unlawful’ laws throughout.

It is worth bearing in mind that no other civilized country, including Britain which brought Preventive Detention laws here, felt compelled to introduce such laws during peace time. Even during the last World War, most European countries and the USA, who were all directly involved in the war, had no such law. During the War, England introduced a Preventive Detention Law to the effect that a person could be detained only on the subjective satisfaction of the Home Minister of Great Britain and not on the subjective satisfaction of a puny magistrate, as it the case here. Further, only one person, Sir Oswald Mosley, a rabid Nazi, was detained under this Act. In 1971, because of tremendous political turmoil which resulted in assassinations and destruction all over Ireland, the British Government introduced PD Act for Ireland. But it immediately formed a committee headed by Lord Gardiner to probe and to find out if it was necessary to have such an Act even in Ireland. The Gardiner Committee Report reads: “Preventive Detention can only be tolerated in any democratic society.
in the most extreme circumstances. It must be used with the utmost restraint and retained only so long as it is strictly necessary”

Our Constitution, since its enactment, has had a peculiar feature; the fundamental rights guaranteed under it allow preventive detention without trial. Article 22 after providing that any person arrested must be produced before a court within 24 hours of arrest tenders this almost nugatory by permitting the state to preventively detain persons without any judicial scrutiny.

The debates in the Constituent Assembly shows that the need to provide for preventive detention was generally accepted, albeit reluctantly. The observations of Alladi Krishnaswamy Ayyar, a distinguished jurist, are typical: he described preventive detention a necessary evil because, in his view, there were people determined to undermine the sanctity of the Constitution, the security of the State and even individual liberty.

What the members tried to do was not to prohibit preventive detention but to incorporate safeguards against its abuse in the Constitution by limiting the period, by giving effective powers to the advisory board to review detention orders, etc. This they failed to get. It was left to Parliament to prescribe the period and even that limit was flouted in spirit by the device, often adopted, of serving a fresh detention order a few hours after releasing the detenu, advisory boards had no power to go into the merits of the detention.

The solution is simple; scrap all laws of preventive detention. It is, however, difficult to see that happening in the near future. I would suggest a first step which would remove some of the more undesirable features of preventive detention. The only justification for preventive detention is to safeguard society from persons who are out to destroy it. If that is the justification and that is the only justification officially given, let it be provided that all those detained under any detention law be kept either in the ordinary jails or in special detention centres run by the jail authorities.

Such a change does not require fresh legislation. Both the National Security Act and Cofeposa authorise the State to specify the place and conditions of detention. The state must be directed to ensure that detenus must be taken to ordinary jails within 24 hour of detention and be kept there. In the past that was the pattern of preventive detention. Thousands of nationalists rounded up by the British during the Indenendence movement were so detained.
NO order of detention can be passed to aid the police or other authorities to investigate crime or other offences; what justifies to investigate crime or other offences; what justifies a detention is the satisfaction of the appropriate authority that the detention of a particular person in necessary. Once a detention order is passed, that is the end of the matter as far as the detaining authorities are concerned. That being so, the detaining authority must have no access to the detenus.

Even after such a change since the laws will enable the detaining authorities to detain without trial persons believed to be indulging in grave anti-social activities the object, and ostensibly at least, the only object of such laws can still be achieved. The authorities should have no objection to such a change.

The state cannot have any rational objection to such a change. Both the National Security Act and Cofeposa merely authorise detention of persons who see. It is argued, a danger to society if free. If the state does object to such changes it will expose its true motive and also the manner in which detention laws are being abused, persons are detained so as to extract information from them.

**Statement and Objective of Problem:**

The researcher will endeavour to examine the role of the Supreme Court of India since 1950 till date in cases of Preventive Detention. The objective of the problem is to see where the Supreme Court misinterpreted the provisions of the Constitution of India and failed to serve as a custodian of a personal liberty of the citizens of India who created themselves the institution of Supreme Court for the protection of fundamental rights. The Supreme Court during emergency particularly has failed to come up with the expectation of the people of India and acted as an agency of the Central Government and delivered judgements for wining the favour of the Government of India and the usurpers of the power of the people in the garb of Law.

There is perhaps no authoritative definition of expression ‘Preventive Detention’ (PD). The expression traces its origins in the language used by the Lord Justices in England while examining the nature of detention under the war time provisions of the Defence of Realm Consolidation Act, 1914 which was enacted during the First World War. The key word in the expression is the adjective ‘Preventive’ which is used in contradistinction to ‘Punitive’, PD is thus not a punitive but a precautionary measure which has the rather pious object of not to punish a man for having done something wrong but to intercept him before he does it and to prevent him from doing it.
Protection against Arrest and Detention:

Article 22 of the Constitution of India is as below:

(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 Magistrate.

(3) Nothing in Cls. (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 two months unless and Advisory Board constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court has reported before the expiration of the period of two months that there is in its opinion sufficient cause for such detention:

Provided that an Advisory Board shall consist of a Chairman and not less than two other members and the Chairman shall be a serving Judge of the appropriate High Court and the other members shall be serving or retired Judges of any High Court.

Provided further, that nothing in this clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (a) of Cl. (7).

Explanation – In this clause “appropriate High Court” means –

(i) in the case of the detention of a person in pursuance of an order of detention made by the Government of India or an officer or authority subordinate to that Government, the High Court for the union territory of Delhi.

(ii) in the case of the detention of person in pursuance of an order of detention made by the Government of any State (other than a Union Territory) the High Court for that State; and

(iii) in case of detention made by the administrator of a union territory or an officer or authority subordinate to such administrator, such High Court as may be specified by or under any law made by Parliament in this behalf.
(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 Cl. (5) shall require the authority making 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 shall by law prescribe –

(a) 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

(b) the procedure to be followed by an Advisory Board in an inquiry under Cl. (4)

2. **Constitutional changes** - Clause (4) of this Article has been substituted for the original Cl. (4); and the original sub-clause (a) of Cl. (7) omitted, and the original sub-clauses (b) and (c) thereof re-lettered as (a) and (b); and the words Cl. (4)” occurring at end of sub-clause (b) thereof, have been substituted for the original words “sub-clause (a) of Cl. (4)” by Sec. 3 of the Constitution (Forty-Amendment) Act, 1978.

3. **Analogous Provisions** – Analogous to Article 22, are the following provisions in other Constitutions:

**DANZIN:** Article 74 (4) – The liberty of the person shall be inviolable. No limitation or deprivation of personal liberty may be imposed by the public authority, except by virtue of the law.

Persons who have been deprived of their liberty must be informed at the latest on the following day on what authority and on what grounds the deprivation of liberty has been ordered. Opportunity must immediately be given them to lodge objections against such deprivation of liberty.

**EIRE:** Section 40 - (1) The State guarantees in its law to respect, and as far as practicable by its laws to defend and vindicate the personal rights of the citizen.

(2) The State shall by its laws protect as best it may, from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.
WEIMER GERMANY: Article 114 – Personal Liberty is inviolable. No encroachment on or deprivation of personal liberty by any public authority is permissible except in virtue of a law.

Persons, who have been deprived, of their liberty shall be informed – at the latest on the following day – by what authority and on what grounds the deprivation of liberty has been ordered: Opportunity shall be given to them without delay to make legal complaint against such deprivation.

JAPAN: Article XXXIV – No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel.

YUGOSLAVIA: Article 5 – The liberty of the individual shall be guaranteed. No person may be subjected to any judicial interrogation, or placed under arrest, or be in any other way deprived of his liberty, save as provide by law.

No person may be placed under arrest for any crime or offence whatever save by order of a competent authority given in writing and stating the charge. This order must be communicated to the person arrested at the time of arrest or the latest within twenty four hours of the arrest. An appeal against the order for arrest may be lodged in the competent court within three days. If no appeal has been lodged within this period, the police authorities must as a matter of course communicate the order to the competent court within the twenty-four hours following. The Court shall be bound to confirm or annul the arrest within two days from the communication of the order, and its decision shall be given effect forthwith.

Public officials who infringe these provisions shall be permitted for illegal deprivation of liberty.

On examining these provisions of Article 22, we find that Clauses (1) and (2) give three very valuable rights to detenus (other than those detained under the law of PD), namely:

i. Right of being informed, as soon as may be, of the grounds of arrest;
ii. Right to consult and be defended by a legal practitioner of his choice;
iii. Production before the nearest magistrate within 24 hours of such arrest.
Clause (3) of Art. 22 however expressly take away the safeguards of clauses (1) and (2) of Article 22 in respect of a person arrested or detained under a law providing for PD. In its place the detenu under PD has the somewhat niggardly substitute protection as provided by clauses (4) and (5) of Article 22. Collectively these clauses provide that in case of PD:

(i) The detenu shall not be detained beyond 3 months unless the Advisory Board (duly constituted) reports prior to the expiration of 3 months that there is in its opinion sufficient cause for such detention (as against production within 24 hours before a magistrate).
(ii) The detenu is to be furnished, as soon as may be, the grounds for his detention.
(iii) The detenu is to be provided the earliest opportunity of making a presentation against the order of detention (as against the right of consulting and being defended by a legal practitioner).

As we pointed out earlier, the Preventive Detention Act, 1950 (PDA) continued to be on the statute book till 1970, being re-enacted seven times in the process. In 1971 the Maintenance of Internal Security Act, (MISA) began its reign, and gained considerable notoriety till it was finally repealed in 1977. During the period 1977 to 1980, for the first time there was no central law of PD in the Indian Republic. Once again in 1980 the National Security Ordinance was promulgated and the reign of PD laws was re-established over the Republic. In December, 1980, the NSA was enacted and consequently the ordinance was repealed.

Section 3 of NSA gives the Central Government the power to detain any person if the government is ‘satisfied’ that it is ‘necessary’ to do so with a view to prevent him from acting in any manner prejudicial to any one or more of the following interests of the State:

(i) Defence of the State
(ii) Relation of the State with foreign power
(iii) Security of the State
(iv) Public order; and
(v) Maintenance of supply of services essential to the community.

Since none of these concepts are capable of being defined with any great degree of certainty and definiteness, the scope of abuse is admittedly colossal. Section 8 of the NSA states that the grounds of detention must be communicated to the detenu, in no case later than ten days from his arrest. Section 9 deals with the
constitution of the Advisory Boards contemplated in Article 22. This also raises a question of some concern.

The Constitution (44th Amendment) Act, 1978, sought to amend clause (4) of Article 22 to provide that an Advisory Board shall be constituted, in accordance of the recommendations of the Chief Justice of the appropriate High Court. The Advisory Board was to consist of a Chairman, and two other members. The amendment proposed further that the Chairman shall be a serving judge of the appropriate High Court, and the other members may be either the serving or retired High Court Judges'. The amendment seeks to amend clause (4) of Article 22 and to reduce the period of detention without obtaining the approval of the Advisory Board, from the present three months to only two months. Though the amendment was passed on June 10, 1979 it remains un-notified and has not yet been brought into force.

Section 8 of the NSA which was enacted after this constitutional amendment was passed, contemplates a composition of the Advisory Board in which even those persons who were never appointed judges of the High Court may be members, and where the Chief Justice of the appropriate High Court has no role to play in constituting the Advisory Board. Section 8 is therefore clearly in disharmony with the Constitutional Amendment. Surely bringing into force the relevant provisions of the Constitutional Amendment will not weaken the hands of the State in its quest for maintaining security and public order. And, more importantly, it will prove to be a crucial check on the possibility of Executive lawlessness in applying the NSA.

Like the NSA itself, both the amendments made to the NSA have been made by promulgating ordinances, which were issued in April and June 1984. This again is cause for concern. To begin with, it is not contemplated under the scheme of our Constitution that ordinances should be used as a supplant for the legislative power of the Parliament. On the contrary, such an exercise of ordinance making power is quite opposed to the ideals and spirit of the Constitution. We believe that the President who promulgates ordinances as a supplant for the legislative power of the Parliament violates his ‘Oath of Office’ under Article 60 of the Constitution, by violating his solemn promise that he will endeavour to the best of (his) ability to preserve, protect and defend the Constitutions.

Equally, such a President also violates his Fundamental Duties as a citizen of the Republic under clause (a) of Article 51A of the Constitution, namely, the duty to abide by the Constitution and respect its ideals and institutions.
The new ordinance (No. 5 of 1984) was promulgated in April 1984 and sought to amend the NSA in its application to the State of Punjab and the Union Territory of Chandigarh. An Act along similar lines for amending the NSA in its application in those areas was passed by the Parliament in May, 1984 (May Amendment). This May Amendment amended section 8 of NSA, so that under exceptional circumstances a detenu may now remain in jail for fifteen days without knowing the grounds of detention. Similarly, under section 10 and 11 of the NSA, the period within which a detenu’s case had to be referred to the Advisory Board for obtaining the Board’s approval (for his detention beyond three months) was extended from three weeks from his arrest to four months and two weeks and, likewise, the period for the submission of the report by the Board was extended from seven weeks to five months and three weeks from the date of the detention of the detenu. This means that a detenu may now be made to undergo imprisonment for a period of nearly six months, even if his detention is ultimately found by the Advisory Board to be entirely unjustified and bad in law.

The May Amendment also provides that in the case of persons detained prior to April 3, 1985 they could be so detained for a maximum period of two years as opposed to one year in section 13 of the unamended Act. Therefore, we find that the May Amendment further whittled down the already niggardly protection or safeguard a person has under the Indian laws, when he is detained under the PD laws. The only saving feature of this Amendment, if there is one, is that its operation was specifically limited to Punjab and the Union Territory of Chandigarh, and that it was enacted at a time when violence had touched an all time high in Punjab. This may not justify the NSA Amendment, but it surely provides a background which cannot be wished away while discussing the May Amendment.

The next ordinance which sought to amend the NSA was promulgated in June 1984 (June Ordinance). It has two disquieting aspects:

(1) It was promulgated about 2 weeks after the successful culmination of Operation Bluestar at the Golden Temple, and

(2) It was not restricted to Punjab alone, but was operative throughout the territory of India (excluding Jammu and Kashmir to which even the NSA does not apply).

The main purpose of the June Ordinance seems to be to introduce in the NSA, amendments which are in pari material (or similar) to the amendments which had already been introduced in the Conservation of Foreign Exchange and Prevention of
Smuggling Activities Act, 1974 (COFEPOSA). These two amendments introduced by the June Ordinance need special mention.

**Preventive Detention in India is a Constitutional Tyranny**

India is one of the few countries in the world whose Constitution allows for preventive detention during peacetime without safeguards that elsewhere are understood to be basic requirements for protecting fundamental human rights. For example, the European Court of Human Rights has long held that preventive detention, as contemplated in the Indian Constitution, is illegal under the European Convention on Human Rights regardless of the safeguards embodied in the law. South Asia Human Rights Documentation Centre (SAHRDC), in its submission to the NCRWC in August 2000, recommended deleting those provisions of the Constitution of India that explicitly permit preventive detention.

Specifically, under Article 22, preventive detention may be implemented and infinitum – whether in peacetime, non-emergency situations or otherwise. The Constitution expressly allows an individual to be detained – without charge or trial – for up to three months and denies detainees the rights to legal representation, cross-examination, timely or periodic review, access to the courts or compensation for unlawful arrest or detention. In short, preventive detention as enshrined under Article 22 strikes a devastating blow to personal liberties.

It also runs afoul of international standards. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) – which India has ratified – admittedly permits derogation from guaranteeing certain personal liberties during a state of emergency. The Government, however, has not invoked this privilege, nor could it, as the current situation in India does not satisfy with standards set forth in Article 4.

If preventive detention is to remain a part of India’s Constitution, it is imperative that its use be confined to specified, limited circumstances and include adequate safeguards to protect the fundamental rights of detainees. Particular procedural protections are urgently needed (i) to reduce detainees’ vulnerability to torture and discriminatory treatment (ii) to prevent officials misusing preventive detention to punish dissent from Government or from majority practices; and (iii) to prevent overzealous government prosecutors from subverting the criminal process. In

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pursuit of these goals, SAHRDC made the following recommendations in its submission to the NCRWC.

First, Entry 3 of List III of the Constitution of India, which allows Parliament and state legislatures to pass preventive detention laws in times of peace for “the maintenance of public order or maintenance of supply and services essential to the community”, should be deleted. Assuming that preventive detention could be justified in the interest of national security as identified in Entry 9 of List I of the Constitution, there is still no compelling reason to allow this extraordinary measure in the circumstances identified in Entry 3 of List III.

Second, lacking clear guidance from the Constitution, courts have applied vague and toothless standards – such as the subjective “satisfaction” of the detaining authority test – to govern the implementation of preventive detention laws. If preventive detention is to remain in the Constitution, constitutional provisions must include well-defined criteria specifying limited circumstances in which preventive detention powers may be exercised – and these standards must be designed to allow meaningful judicial review of official’s actions.

Third, under Article 22 (2) every arrested person must be produced before a magistrate within 24 hours after arrest. However, Article 22 (3) (b) excepts preventive detention detainees from Clause (2) and, as a consequence, it should be repealed in the interest of human rights. At present, detainees held under preventive detention laws may be kept in detention without any form of review for up to three months, an unconscionably long period in custody especially given the real threat of torture. At the very least, the Government should finally bring Section 3 of the Forty-fourth Amendment Act, 1978 into effect, thereby reducing the permitted period of detention to two months. Though still a violation of international human rights law, this step would at least reduce the incidents of torture significantly.

Fourth, the Advisory Board review procedure prescribed by the Constitution involved executive review of executive decision-making. The absence of judicial involvement violates detainees’ right to appear before an “independent and impartial tribunal”, in direct contravention of international human rights law including the ICCPR (Article 14 (1) and the Universal Declaration of Human Rights (Article 10). The Constitution must be amended to include clear criteria for officials to follow, and subject compliance with those standards to judicial review.
Fifth, the Constitution provides that the detaining authority must refer to the Advisory Board where detention is intended to continue beyond three months. No provision exists for the consideration of a detainee's case by the Advisory Board more than once. Yet, periodic review is an indispensable protection to ensure that detention is “strictly required” and fairly administered. Hence, the Constitution should mandate periodic review of the conditions and terms of detention.

Sixth, detainees must receive detailed and prompt information about the grounds of their arrest. Currently, the detaining authority is required only to communicate the grounds of detention to the detainee “as soon as may be” after the arrest. Article 9 (2) of the ICCPR provides that “[a] Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him”. Detainees must be guaranteed a minimum period in which the grounds are promptly communicated to them, and be given information sufficient to permit the detainee to challenge the legality of his or her detention.

Seventh, individuals held under preventive detention must be given the right to legal counsel and other basic procedural rights provided by Articles 21 22 (1) and 22 (2) of the Constitution. Article 22 (1) of the Constitution, for example, guarantees the right to legal counsel, but Article 22 (3) (b) strips this right from persons arrested or detained under preventive detention law. Relying on these provisions, the Supreme Court stated, in A.K. Roy v. Union of India, that detainees do not have the right to legal representation or cross-examination in Advisory Board hearings. Contrary to India’s constitutional practice, the U.N. Human Rights Committee has stated, “all persons arrested must have immediate access to counsel”. Article 22 (3) (b) of the Constitution – denying detainees virtually all procedural rights during Advisory Board hearings – must be repealed.

Eighth, Article 9 (5) of the ICCPR provides the right to compensation for unlawful detention, except during public emergencies. A similar provision creating a right to compensation is included in section 38 of the Prevention of Terrorism Bill of 2000 (though the bill is otherwise effectively a reconstitution of the lapsed Terrorist and Disruptive Activities Prevention Act (TADA). The Law Commission charged with reshaping the antiterrorism legislation observed that Supreme Court orders have held that people are effectively entitled to compensation, in practice superseding India’s reservation to Article 9 (5) of the ICCPR. In this light, the Government of
India should promptly withdraw its reservation of Article 9 (5) of the ICCPR and include a Constitutional provision guaranteeing the right to compensation, at lest for unlawful detention during peacetime.

In keeping with the overriding spirit of the Constitution and with minimum standards of international human rights law, it is essential that the Constitutional reforms discussed above be adopted. The process set in motion by establishing the NCRWC provides a unique opportunity for such an important realignment of India’s Constitution with prevailing international human rights standards. The key will be political willpower and the commitment to seeing justice done.

Brief Facts of the Case were as under:

Consequent on the Pakistani aggression, the President issued a Proclamation of Emergency on 3.12.1971 on the ground that the security of India was threatened by external aggression. By an order dated 5.12.1971 issued u/Art. 359 (1) of the Constitution, the right of ‘foreigners’ to move any Court for the enforcement of rights conferred by Arts. 14, 21 & 22 was suspended.

In September 1974 the MISA was amended by Ordinance 11 of 1974 to include sub-section (c) in Sec. 3 (1) by which the right to detain was given as against smugglers and offenders under the Foreign Exchange Regulation Act, 1947. On 16.11.1974 the President issued a Declaration u/Art. 359 (1) suspending the right of persons detained u/s 3 (1) (c) of the MISA to move for enforcement of the rights conferred by Arts. 14, 21 and Cls. (4), (5), (6), (7) of Art. 22 of the Constitution.

On 25/6/1975 in exercise of powers conferred by Cl. (1) of Art. 359 the President declared that the right of any person including a foreigner to move any court for the enforcement of the rights conferred by Arts. 14, 21 & 22 and all proceedings pending in any Court for the enforcement of the above mentioned rights shall remain suspended for the period during which the Proclamations of Emergency made under Article 352 (1) on 3.12.1971 and on 25/6/1975 are both in force. The Presidential order of 27.6.1975 further stated that the same shall be in addition to and not in derogation of any order made before the date of the aforesaid order u/Article 359 (1).

The President promulgated the amending Ordinances No. 4 & 7 of 1975, were replaced by the Maintenance of Internal Security (Amending Act), 1975 introducing a new Sec. 16-A and giving a deemed effect to Sec. 7 of the Act was on 25.6.1975. A new Sec. 18 was also inserted w.e.f. 25.6.1975.
By the Constitution (Thirty-eighth Amendment) Act, 1975, Article 123, 213, 239 (b), 352, 356, 359 & 368 were amended. Cls. (4) & (5) were added in Article 352. The above Amendment renders the satisfaction of the President or the Governor in the relevant Articles final and conclusive and to be beyond any question in any Court on any ground. The Constitution (Thirty-ninth Amendment) Act was published on 10.8.1975, amending Arts. 71, 329 & 329 (A) and added Entries after Entry 86 in the 9th Schedule and also the Maintenance of Internal Security Act, 1971 as item 92 in the above Schedule. All the amendments made by the Ordinance were given retrospective effect for the purpose of validating all acts done previously. On 25.1.1976 the said Ordinances were published as the Maintenance of Internal Security (Amendment) Act 1976.

Various persons detained u/s 3 (1) of MISA filed petitions in different HCs for the issue of the writ of Habeas Corpus. Also challenged the vires of the Ordinance issued by the President on 27.6.1975, as unconstitutional and inoperative in law and prayed for setting aside of the order and for directing their release immediately. In some of the cases, the petitioners challenged the validity of the Thirty-eighth and Thirty-ninth Constitution Amendment Acts.

When those petitions came up for hearing, the Government raised a preliminary objection to their maintainability on the ground that in asking for release by issuance of a writ of habeas corpus the detenus were in substance claiming that they had been deprived of their personal liberty in violation of the procedure established by law, which plea was available to them u/Article 21 only. The right to move for enforcement of the right conferred by the Article having been suspended by the Presidential order dated 27.6.1975 the petitions, according to the Government were liable to be dismissed at the threshold.

The preliminary objections have been rejected for one reason or another by the HCs of Allahabad, Bombay, Delhi, Karnataka, M.P., Punjab and Rajasthan. Broadly, these HCs have taken the view that despite the Presidential order it is open to the detenus to challenge their detention on the ground that it is ultra vires, as e.g., by showing that the order on the face of it is passed by an authority not empowered to pass it, or it is in excess of the power delegated to the authority, or that the power has been exercised in breach of the conditions prescribed in that behalf by the Act. Some of these HCs have further held that the detenus can attack the order of detention on the ground that it is mala fide, as for example, by showing that the detaining authority
was influenced by irrelevant considerations, or that the authority was actuated by improper motives.

**Questions involved:**

1. Whether, in view of the Presidential order dated 27.6.1975, under Cl. (1) of Article 359, any writ petition is maintainable u/Article 226, before a HC for Habeas Corpus to enforce the right to personal liberty of a person detained under the MISA on the ground that the order of detention or the continued detentions, for any reason, not under or in compliance with MISA?

2. If such a petition is maintainable, what is the scope or extent of judicial scrutiny, particularly, in view of the aforesaid Presidential order which covers, *inter alia*, Cl. (5) of Article 22, and also in view of sub-section (9) of Section 16-A of the MISA?

**Per majority:** A.N. Ray, CJ., M.H. Beg., Y.V. Chandrachud and P.N. Bhagwati, JJ allowed the appeal of the ADM, Jabalpur with the following observations:

The jurisdiction of the Court in times of emergency in respect of detention under the Act is restricted by the Act because the Government is entrusted with the task of periodical review. Even if the generality of the words used in Section 3 (1) of the Act may not be taken to show an intention to depart from the principle in ordinary times that the Courts are not deprived of the jurisdiction where bad faith is involved, there are ample indications in the provisions of the Act, viz., Section 16-A (2), proviso to Section 16-A (3), Section 16-A (4), Sections 16-A (5), 16-A (7) (ii) & 16-A (9) of the Act to bar a challenge to the detention on the basis of *malafides*. This Court said that an action to decide the order on the grounds of *mala fides* does not lie because under the provisions no action is maintainable for the purpose. This Court also referred to the decision in the *Liversidge* case where the Court held that the jurisdiction of the Court was ousted in such way that even questions of bad faith could not be raised.

The production of the order which is duly authenticated constitutes a pre-emptory answer to the challenge. The onus of showing that the detaining authority was not acting in good faith is on the detenu. This burden cannot be discharged because of the difficulty of proving bad faith in the exercise of subjective discretionary power vested in the administration.

So long as the authority is empowered by law action taken to realise that purpose is not *mala fide*. When the order of detention is on the face of it within the power conferred, the order is legal.
The width and amplitude of the power of detention u/s 3 of the Act is to be adjudged in the context of the emergency proclaimed by the President. The Court cannot compel the detaining authority to give the particulars of the grounds on which he had reasonable, cause to believe that it was necessary to exercise this control. An investigation into facts or allegations of facts based on *mala fides* is not permissible because such a course will involve advertence to the grounds of detention and materials constituting those grounds which is not competent in the context of the emergency.

1. In view of the Presidential Order dated 27.6.1975 under Cl. (1) of Article 359 of our Constitution no person has *locus standi* to move any writ petition u/Article 226 before a HC for *Habeas corpus* or any other writ or order or direction to enforce any right to personal liberty of a person detained under the Act on the grounds that the order of detention or the continued detention is for any reason not under or in compliance with the Act or is illegal or *mala fide*.

2. Article 21 is the sole repository of rights to life and personal liberty against the State. Any claim to a writ of *habeas corpus* is enforcement of Article 21 and is therefore, barred by the Presidential order.

3. Section 16-A (9) of the Act is valid. It is a rule of evidence and it is not open either to the detenus or to the Court to ask for grounds of detention.

4. It is not competent for any Court to go into questions of *mala fides* of the order of detention or *ultra vires* character of the order of detention or that the order was not passed on the satisfaction of the detaining authority.

The appeals are accepted. The judgements of the High Courts are set aside.

**Justice Khann’s dissent:**

A dispassionate analysis of the habeas corpus case reveals that the quintessence of the case lies with the dissent of Khanna J. and the decisions of the nine High Courts. Certainly the dissenting opinions will serve to the posterity as beacon lights in their strides towards the search and maintenance of the rule of law *viz-a-vis* rule of men. Shri Jayaprakash Narain had commented that the judgment in the *habeas corpus* case had put out the last flickering candle of individual liberty. Shri M.C. Chagla characterised the decision as “*the worst in the history of Indian Supreme Court*”. Shri V.M. Tarkunde, a former judge of the Bombay High Court and a leading member of the Supreme Court Bar labelled it as “judicial suicide”. The majority could have taken a different view as was done by nine High Courts and the dissent of Shri Justice Khanna when they upheld the right of personal liberty and ruled that even in the absence of Fundamental Rights, “the state has got no power to deprive a person of his life and personal liberty without the authority of law. That is
the essential postulate and the basic assumption of the rule of law in every civilised society”. Justice Khanna’s dissent aroused international interest in view of its importance and far reaching impact on the biggest democracy of the world. The foreign press and jurists acclaimed his dissent. The New York Times commented that ‘it deserved to be engraved in letters of gold’. A typical view was expressed by the same Newspaper as follows:

“Indian democrats are likely to remember in infamy the four judges who obediently overturned the decisions of more than half a dozen lower (High) courts who had ruled in defiance of the Government that the writ of the habeas corpus could not be suspended even during emergency... But they will long cherish the lonely grounds, but it could have exposed in a limited way the procedural laxity, the arbitrary manner and the partisan motivations which appear by all accounts to have accompanied the mindless exercise of the draconian powers of detention”.

It should not be difficult to agree with the above views because in the absence of Article 21 in the Constitution, it would not mean that people of India have no right to live which is a natural right. Article 21 merely lays down that this right can be taken away by the State only according to law. If the State is allowed the arbitrary decision in this matter then the very purpose of incorporating it in the Constitution will stand self-defeated. Analysing and appreciating Justice Khanna’s Judgement, Professor Raghavan commented:

“the path breaking tone of the dissent is refreshing not only for the reason that it affirms the continuing validity of the Makhan Singh decision of the court inspite of the fact that the Presidential Order of June 1975 was in terms unconditional or absolute, but it sets our vision high enough to permit a wider and more informed perspective of the Constitutional commitment to defend basic freedoms.”

With this dissenting judgement, like Lord Atkin’s dissent in the famous English case, Justice Khanna has come to be placed in the galaxy of celebrated judges who had always held dear the rule of law as against the pressures and temptations of the Government. It is well known that this judgement cost him the Chief Justiceship of the country. It can, therefore, be correctly assumed that this dissent will serve as a trend-setter in the Indian Administrative law and democratic jurisprudence.

Nani A Palkhiwala – Opposes Emergency:

Nani A Palkhiwala was the Counsel of Mrs. Indira Gandhi and he argued her case Indira Gandhi v. Shri Raj Narain and obtained a conditional order from the

2. AIR 1976 SC 1241-1277
3. Dr. L.M. Singhvi, “The Times of India”, February 15, 1978
Supreme Court against the judgement and order of Allahabad High Court. Later he returned the brief of Mrs. Indira Gandhi and did not argue her appeal before the Supreme Court. He had written an article on the Proclamation of Emergency in this country which is being produced as under:

"The Allahabad High Court had, in the month of June 1975, decided that the election of Mrs. Indira Gandhi to Parliament should be set aside. This meant that she would cease to be a member of Lok Sabha. With a potential risk to her Prime Ministership, Mrs. Indira Gandhi filed an appeal in the Supreme Court.

Her application for interim relief was argued by me on June 23, 1975. Justice Krishna Iyer heard the application and passed the order of interim relief on the next day. The interim order was that pending the hearing and final disposal of the appeal. Mrs. Gandhi could continue to sit in the Lok Sabha and participate in the proceedings in that House like any other member, and could also continue to be the Prime Minister of India. The evening of that very day (June 24, 1975), I saw Mrs. Gandhi at her residence and told her that the interim order was very satisfactory and she should not worry about the case since the judgement of the trial court did not seem to be correct on the recorded evidence.

On the plane which I boarded to return to Bombay, I had a strange encounter which can be explained on the basis of preordination or precognition. You may call it clairvoyance or by any other name. I have related this meeting in the introduction to my book "We, the Nation".

To my great surprise, the Emergency was declared on the night of June 25, 1975 (It continued till the late hours of March 20, 1977). I would like to bring to the surface of my mind some of the recollections of those 21 months of suffocation, formally called the "Emergency", which are indelibly etched in my memory.

On the twentieth anniversary of the Emergency, let me, first of all, reiterate the nation’s gratitude to the men who suffered in diverse ways and whose sacrifices made the restoration of freedom possible.

The first name which springs to my mind is that of Jayaprakash Narayan. Not since the time of Gandhiji, has moral force-personified by a frail individual – triumphed so spectacularly over the forces of evil. He changed decisively the course of history. One life transformed the destiny of hundreds of millions.

It was Jayaprakash who talked of “total revolution”. He wanted to shake the people out of their apathy and lethargy and make them realise that they are the inheritors of resplendent heritage which holds them together, despite their differences in caste and creed, region and language. I had the good fortune to have a long chat with him in Delhi before he administered the pledge at Rajghat on March 24, 1977 to the Members of Parliament "to uphold the inalienable rights to life and liberty of the citizens of our Republic."

Unfortunately, Jayaprakash passed away in October, 1977 and India has remained without true leadership since then.

5. Indian Express, 25 June 1995
Only next to Jayaprakash, I would place Ramnath Goenka as the most feared opponent of the Emergency.

Most newspapers, like most people, capitulated. The two national English papers which stood up were the Indian Express and the Statesman.

Every newspaper had a Censor installed in the office who masqueraded as the editor and decided what should or should not be published. I vividly recall the day, early in the Emergency, when Mr. V.K. Narasimhan, the Editor of the Indian Express, had written an editorial which the Censor did not allow to be published. Mr. Narasimhan, with the concurrence and support of Ramnathji, published the paper with the space for the editorial left blank, so that the discerning reader might understand what was happening in the newspaper world.

During the Emergency, I used to meet Ramnathji off and on. And I can say quite truthfully that I have never met a proprietor of a newspaper who had the courage and the public spirit of Ramnathji. He was a dedicated citizen who used his enormous power, as the proprietor of a national newspaper, for what he believed to be the good of the country. He acted on his conviction that the press should never be a poodle of the establishment, but should act as the watchdog of democracy. He believed that a courageous and independent press is the noblest servant of society, along with a courageous and independent judiciary.

Ramnathji was against any form of tyranny by the state. He always adhered to the unshakable belief, which he shared with Bernard Levin, that barbed wires will rust, stone walls will crumble, and the tyrant's club will shatter in his first.

During the 21 months of the Emergency, when most papers and journals capitulated, Ramnathji asserted his independence at colossal personal cost. The Government launched innumerable criminal prosecutions against him and his companies in different courts of India; but he faced the onslaught with terror-like tenacity.

To the best of my memory, about 166,000 persons were detained without a trial in different parts of India for an indefinite period. Even their close relatives were not told about the place where they were detained. The people detained without a trial included prominent figures like Jayaprakhas Naraya, Morarji Desai and Kuldip Nayyar – and the humble and nameless who will never be known to the roll-call of honour. A hundred thousand petty tyrants mushroomed all over the country.

I come to the next question. What has happened before – can it happen again? The answer is – undoubtedly yes.

No period in the history of our Republic is of more educative value than 1975 to 1977. George Santayana said "Progress far from consisting in change, depends on retentiveness. Those who cannot remember the past are condemned to repeat it". If our basic freedoms are to survive, it is of vital importance that we remember the happenings during the Emergency when the freedoms were suspended.

Countries which were integral parts of India in the days gone by – Pakistan, Bangladesh and Burma (Myanmar) – have gone through periods of authoritarian rule; and so have highly advanced countries like Germany which had a Constitution which guaranteed freedoms of the type we still enjoy today. (Hitler amended the German Constitution just as Mrs. Gandhi did in India and deprived the people of their freedoms).
Self-knowledge would dictate that we recognise three defects in our national character – lack of discipline and public spirit, lack of sense of justice and fairness, and lack of a sense of moderation and tolerance. It is these three defects in our character which made a cultured Prime Minister like Rajiv Gandhi say publicly, more than once, that he would not hesitate to reimpose the Emergency if the circumstances demanded such a course of action, although it must be said to his credit that during the dark days of the Emergency, he kept himself totally aloof from the tyranny which stalked the land.

The danger of a re-imposition of the Emergency is greater for a country like India where the society is feudal and caste ridden. I do not think casteism was ever more pronounced in the history of our Republic than during the recent past.

Today, India presents a picture of a great nation in a state of moral decay. The noble processes of our Constitution have been trivialised by the power-holders, the power-brokers and the power-seekers. Elections have been reduced to a horse race by contesting politicians - the difference being that the horse is highly trained.

When we look around India today, we can hardly recognised it to be the same country in which a dozen different civilizations of incredible nobility flourished over the last 50 centuries. This is the only country known to history where men of knowledge and learning had precedence over kings. What a sad contrast between Sri Aurobindo’s vision (Mother India is not a piece of earth, she is a Power, a Godhead) and the cesspool of degradation to which professional politicians have reduced this country.

I should like to reaffirm my firm conviction that it is not the Constitution which has failed the people, but it is our chosen representatives who have failed the Constitution. Dr. B.R. Ambedkar poignantly remarked in the Constituent Assembly that, if the Constitution which was given by the people unto themselves in November 1949 did not work satisfactorily at any future time, we should have to say, not that the Constitution had failed, but that man was vile.

Kuldip Nayar, who to prison during Emergency, gave a description of tortures inflicted on political prisoners during Emergency. To quote from his book “The Judgment” –

“Tortures of various types were carried out – stamping on the bare body with heeled ‘ammunition’ boots; severe beating on the soles of feet; rolling of heavy police lathis over shinbones, with a constable sitting on the lathi; making the victim crouch for hours in a fixed position; beating on the spine slapping both ears till the victim lost consciousness; beating with the butt of rifle; inserting live electric wires in the crevices of the body; stripping and making satyagrahis lie on slabs of ice, burning the skin with cigarettes or wax candles; denying food, water and sleep, and making the victim drink his own urine; suspending him in the air with his wrists tied at the back and putting him up s an ‘aeroplane’. (The victim’s hands were tied behind the back with a rope which was taken over a pulley attached to the ceiling and the victim was pulled up a few feet

6. Mainstream, November 1979
above ground. He thus dangled in midair, hanging from his hands, tried at the back).

"All this was done systematically – a team of ten to twelve constables would encircle a detenu and try one type of torture or the other. If it left visible marks on the body or affected the prisoner's physical condition, the police did not produce him before a magistrate for fear of reprimand. If a search warrant was issued, the police would shift the victim from station to station. MISA came to the authorities rescue since no judicial relief was available to those arrested under it."

Paradoxically, the highest Court of the land hearing a habeas corpus petition gave an astounding judgment on April 28, 1976, declaring that habeas corpus was not available to citizens of this country during that period. The judges did not stop at that. In spite of affidavit after sworn affidavit brought before them by responsible counsel indicating brutal torture of detainees, Y.V. Chandrachud, the then Chief Justice of India, wrote in his judgment Counsel after counsel expressed the fear that during emergency, the executive may whip and strip and starve the detenu, and if this be our judgment, even shoot him down. Such misdeeds have not tarnished the record of free India and I have a diamond bright, diamond-hard hope that such things will never come to pass.

The Supreme Court realised the serious consequences of its pronouncements, particularly those of its denial of the writ of habeas corpus in Shivakant Shukla's case. The court began to rebuild its prestige and power. It created a wide “due process” jurisdiction which had been decisively rejected by the framers of the Indian Constitution. Besides, it endeavoured to show that it was still the protector of the Western System of law and justice and that the emergency had not really done a lasting damage to its powers. It prepared itself to demonstrate that any exercise of power by the government could be reviewed by the courts on jurisdictional and other grounds. It was in this context that the Supreme Court was motivated to give a liberal interpretation to Article 21 and, in several cases after the internal emergency, stood firmly on the side of civil liberties. "The withering Article 21 which had been mauled severally by Gopalan and almost totally by Shivakant Shukla, was thus rejuvenated" in Maneka’s case.

The decision of the Court in *Maneka Gandhi*’s case was one of immense constitutional significance, as it was the first major decision concerning personal liberty since the *Habeas Corpus* case. "Maneka vibrates with humanism and single-minded judicial dedication to the cause of human rights in India, still recovering from the trauma of the suspension of civil liberties in 1975-77". This case gave the court a good opportunity to show its partisanship for Civil liberties and to declare that the "reality of liberty is not to be drowned in the hysteria of the hour" and the "hubris of power". It confidently ruled: "Governments come and go, but the fundamental rights of the people cannot be subject to the wishful value-sets of political regimes of the passing day".

The seven-judge constitutional bench in *Maneka Gandhi v. Union of India* examined the concept of personal liberty in general and the right to travel abroad in particular. In the case, the petitioner’s (Mrs. Maneka Gandhi’s) passport was impounded under Section 10 (3) (c) of the Passport Act, 1967. Provision in the Act was violative of Article 21 of the Constitution since it did not prescribe “procedure” within the meaning of that article and if it was held that procedure had been prescribed, it was arbitrary and unreasonable; and the impounding provision in the Act was also violative of Article 19 (1) (a) and (g), since it permitted restrictions to be imposed on the rights guaranteed by those provisions even though the restrictions were such as could not be imposed under Article 19 (2) and (6).

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10. This was an evidence of the court’s affirmation of civil liberties in unambiguous terms.
11. Ibid. The seven judges’ constitutional bench consisted of Beg, C.J., Y.V. Chandrachud (as he then was), P.N. Bhagwati (as he then was), V.R. Krishna Iyer, N.L. Untawalia, S. Murtaza Fazal Ali and P.S. Kalisam, JJ.
12. Section 10 (3) reads:
   "The passport authority may impound or cause to be impounded or revoke a passport or travel document—
   a) .......
b) .......
c) If the passport authority deems it necessary so to do in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any other foreign country, or in the interests of general public”.
13. Article 19 of the Constitution of India reads: “Protection of Certain rights regarding freedom of speech, etc.
(1) All citizens shall have the right—
a) To freedom of speech and expression,
b) To practice any profession, or to carry on any occupation, trade or business.
14. Article 19 (2) of the Constitution of India reads: “Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the security of the state, friendly relations with
The Court examined these arguments and analysed the provisions in Part III of the Constitution, and discussed in detail earlier decisions on similar pleas.

The following cases determine now, the change attitude of the Supreme Court of India in the matter of preventive detention.

Object of Preventive Detention:

Preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it and to prevent him from so doing.\(^{15}\)

Object of Preventive Detention – Not punitive but precautionary:

A preventive detention “is not punitive but 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 is formulated; and the justification of such detention is suspicion or reasonable probability and there is no criminal conviction which can only be warranted by legal evidence. In this sense it is an anticipatory action. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. In case of punitive detention to person concerned is detained by way of punishment after being found guilty of wrongdoing where he has the fullest opportunity to defend himself, while preventive detention is not by way of punishment at all, but it is intended to prevent a person from indulging in any conduct injurious to the society.\(^{16}\)

Different from punitive detention:

Though the element of detention is a common factor in cases of preventive detention as well as punitive detention, there is a vast difference in their objective. Punitive detention follows a sentence awarded to an offender for proven charges in a trial by way of punishment and has in it the elements of retribution, deterrence, correctional factor and institutional treatment in varying degrees. On the contrary

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preventive detention is an extraordinary measure resorted to by the State on account of compulsive factors pertaining to maintenance of public order, safety of public life and the welfare of the economy of the country.\textsuperscript{17}

Punitive and preventive detention- Distinction

There is a vital distinction between these two kinds of detention. In case of ‘punitive detention’, the person concerned is detained by way of punishment after he is found guilty of wrongdoing as a result of a trial where he has the fullest opportunity to defend himself, while ‘preventive detention’ is not by way of punishment at all, but it is intended to pre-empt a person from indulging in any conduct injurious to the society. In case of preventive detention, he is detained merely on suspicion with a view to preventing him from doing harm in future and the opportunity that he has for contesting the action of the executive is very limited. Having regard to this distinctive character of preventive detention, the restrictions placed on a person preventively detained must, consistently with the effectiveness of detention, be minimal.\textsuperscript{18}

It has been said that the history of liberty has largely been the history of observance of procedural safeguards. The procedural sinews strengthening the substance of the right to move the court against executive invasion of personal liberty and the due dispatch of judicial business touching violations of this great right is stressed.

Personal liberty is by every reckoning, the greatest of human freedoms and the law of preventive definition are strictly construed and a meticulous compliance with the procedural safeguards, however technical, is strictly insisted upon by the courts. The law on the matter did not start on a clean slate. The power of courts against the harsh incongruities and unpredictability’s of preventive detention is not merely ‘a page of history’ but a whole volume. The compulsions of the primordial need to maintain order in society, without which the enjoyment of all rights, including the right to personal liberty, would lose all their meaning are the true justifications for the laws of preventive detention. The pressures of the day in regard to the imperatives of the security of State and of public order might, it is true, require the sacrifice of the personal liberty of individuals. Laws that provide for prevention detention posit that an individual’s conduct prejudicial to the maintenance of public order or to the


security of the State provides grounds for a satisfaction for a reasonable prognostication of a possible future manifestation of similar propensities on the part of the offender. This jurisdiction has been called a jurisdiction of suspicion; but the compulsions of the very preservation of the values of freedom, or democratic society and of social order might compel a curtailment of individual liberty. “To lose our country by a scrupulous adherence to the written law” said Thomas Jefferson “would be to lose the law itself, with life, liberty and all those who are enjoying with us, thus absurdly sacrificing the end to the means.” This is, no doubt, the theoretical justification for the law enabling prevention detention.

But the actual manner of administration of the law of prevention detention is of utmost importance. The law has to be justified by the genius of its administration so as to strike the right balance between individual liberties on the one hand and the needs of an orderly society on the other. But the realities of executive excesses in the actual enforcement of the law have put the courts on the alert, ever-ready to intervene and confine the power within strict limits of the law both substantive and procedural. The paradigms and value judgments of the maintenance of a right balance are not static but vary according as the “pressures of the day” and according as the intensity of the imperatives that justify both the need for and the extent of the curtailment of individual liberty. Adjustments and readjustments are constantly to be made and reviewed. No law is an end in itself.

The “inn that shelters for the night is not journey’s end and the law, like the traveler, must be ready for the morrow”.

As to the approach to such laws which deprive personal liberty without trial, the libertarian judicial faith has made its choice between the pragmatic view and the idealistic or doctrinaire view. The approach to the curtailment of personal liberty which is an axiom of democratic faith and of all civilized life is an idealistic one, for, loss of personal liberty deprives a man of all that is worth living for and builds up deep resentments. Liberty belongs to what correspond to man’s inmost self.

Under our Constitution also the mandate is clear and the envoy is left under no dilemma. The constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of State’s security, public order, disruption of
national economic discipline etc. being envisaged as a necessary evil to be administered under strict constitutional restrictions.\(^{19}\)

*Detenus* to e kept separate from convicts

> If any of the persons detained under NSA are at present housed in the same ward or cell where the convicts are housed, immediate steps must be taken to segregate them appropriately.\(^{20}\)

Interpretation of Prevention detention legislation

Per Venkataramiah, J.

> The law of prevention detention is a hard law and therefore it should be strictly construed. Care should be taken that the liberty of a person is not jeopardized unless his case falls squarely within the four corners of the relevant law.\(^ {21}\)

Preventive detention law, how to be construed

Prevention detention for the social protection of the community is a hard law but, it is a necessary evil in the modern society and must be pragmatically construed, so that it words, does not endanger social defence or the defence of the community and at the same time does not infringe the liberties of the citizens. A balance should always be struck.\(^ {22}\)

**Review of Literature:**

There is lot of literature available on this subject. The main literature is from United States of America and the judgements of the Supreme Court of India and the judgements of the US Supreme Court and also the debates of the Constituent Assembly which frame the Constitution of India.\(^ {23}\) The speeches delivered by eminent people during the framing of Indian Constitution are very important for writing this thesis. The following authors and books were also taken into consideration for writing this thesis:

(i) *Constituent Assembly Debates* (Delhi: Lok Sabha Secretariat, 1946-50), Vols. 12.

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The researcher believes that the “Preventive Detention Laws” are draconian and such laws are anti democratic and the arch enemy of the rights to person liberty. Preventive Detention envisages detention without trial which is against the basic canons of criminal jurisprudence. The following questions emerge for consideration:

(1) Whether Preventive Detention envisages detention without trial.

(2) Whether during the war, England introduced Preventive Detention Law to the effect that a person could be detained only on the subjective satisfaction of the Home Minister in Great Britain and not on the subjective satisfaction of a Magistrate as in India.

(3) Whether in absence of Preventive Detention Law the country during 1969-71 ran with the help of ordinary laws smoothly.

(4) Whether in India MISA was promulgated in the wake of Indo-Pakistan war and it continued during Emergency (1975-77) and was grossly misused against the Political adversaries?

(5) Whether the Preventive Detention Laws have been misused.

There is perhaps no authoritative definition of expression ‘Preventive Detention’ (PD). The expression traces its origins in the language used by the Lord Justices in England while examining the nature of detention under the war time provisions of the Defence of Realm Consolidation Act, 1914 which was enacted during the First World War. The key word in the expression is the adjective ‘Preventive’ which is used in contradistinction to ‘Punitive’, PD is thus not a punitive but a precautionary measure which has the rather pious object of not to punish a man for having done something wrong but to intercept him before he does it and to prevent him from doing it.
On examining these provisions of Article 22, we find that Clauses (1) and (2) give three very valuable rights to detenus (other than those detained under the law of PD), namely:

(i) Right of being informed, as soon as may be, of the grounds of arrest;
(ii) Right to consult and be defended by a legal practitioner of his choice;
(iii) Production before the nearest magistrate within 24 hours of such arrest.

Clause (3) of Art. 22 however expressly take away the safeguards of clauses (1) and (2) of Article 22 in respect of a person arrested or detained under a law providing for PD. In its place the detenu under PD has the somewhat niggardly substitute protection as provided by clauses (4) and (5) of Article 22. Collectively these clauses provide that in case of PD:

(i) The detenu shall not be detained beyond 3 months unless the Advisory Board (duly constituted) reports prior to the expiration of 3 months that there is in its opinion sufficient cause for such detention (as against production within 24 hours before a magistrate).
(ii) The detenu is to be furnished, as soon as may be, the grounds for his detention.
(iii) The detenu is to be provided the earliest opportunity of making a presentation against the order of detention (as against the right of consulting and being defended by a legal practitioner).

As we pointed out earlier, the Preventive Detention Act, 1950 (PDA) continued to be on the statute book till 1970, being re-enacted seven times in the process. In 1971 the Maintenance of Internal Security Act, (MISA) began its reign, and gained considerable notoriety till it was finally repealed in 1977. During the period 1977 to 1980, for the first time there was no central law of PD in the Indian Republic. Once again in 1980 the National Security Ordinance was promulgated and the reign of PD laws was re-established over the Republic. In December, 1980, the NSA was enacted and consequently the ordinance was repealed.

Section 3 of NSA gives the Central Government the power to detain any person if the government is ‘satisfied’ that it is ‘necessary’ to do so with a view to prevent him from acting in any manner prejudicial to any one or more of the following interests of the State:

(i) Defence of the State
(ii) Relation of the State with foreign power
(iii) Security of the State
(iv) Public order; and
(v) Maintenance of supply of services essential to the community.
Since none of these concepts are capable of being defined with any great degree of certainty and definiteness, the scope of abuse is admittedly colossal. Section 8 of the NSA states that the grounds of detention must be communicated to the detenu, in no case later than ten days from his arrest. Section 9 deals with the constitution of the Advisory Boards contemplated in Article 22. This also raises a question of some concern.

The Constitution (44th Amendment) Act, 1978, sought to amend clause (4) of Article 22 to provide that an Advisory Board shall be constituted, in accordance of the recommendations of the Chief Justice of the appropriate High Court. The Advisory Board was to consist of a Chairman, and two other members. The amendment proposed further that the Chairman shall be a serving judge of the appropriate High Court, and the other members may be either the serving or retired High Court Judges'. The amendment seeks to amend clause (4) of Article 22 and to reduce the period of detention without obtaining the approval of the Advisory Board, from the present three months to only two months. Though the amendment was passed on June 10, 1979 it remains un-notified and has not yet been brought into force.

Section 8 of the NSA which was enacted after this constitutional amendment was passed, contemplates a composition of the Advisory Board in which even those persons who were never appointed judges of the High Court may be members, and where the Chief Justice of the appropriate High Court has no role to play in constituting the Advisory Board. Section 8 is therefore clearly in disharmony with the Constitutional Amendment. Surely bringing into force the relevant provisions of the Constitutional Amendment will not weaken the hands of the State in its quest for maintaining security and public order. And, more importantly, it will prove to be a crucial check on the possibility of Executive lawlessness in applying the NSA.

Like the NSA itself, both the amendments made to the NSA have been made by promulgating ordinances, which were issued in April and June 1984. This again is cause for concern. To begin with, it is not contemplated under the scheme of our Constitution that ordinances should be used as a supplant for the legislative power of the Parliament. On the contrary, such an exercise of ordinance making power is quite opposed to the ideals and spirit of the Constitution. We believe that the President who promulgates ordinances as a supplant for the legislative power of the Parliament violates his 'Oath of Office' under Article 60 of the Constitution, by violating his
solemn promise that he will endeavour to the best of (his) ability to preserve, protect
and defend the Constitutions.

Equally, such a President also violates his Fundamental Duties as a citizen of
the Republic under clause (a) of Article 51A of the Constitution, namely, the duty to
abide by the Constitution and respect its ideals and institutions.

The new ordinance (No. 5 of 1984) was promulgated in April 1984 and sought
to amend the NSA in its application to the State of Punjab and the Union Territory of
Chandigarh. An Act along similar lines for amending the NSA in its application in
those areas was passed by the Parliament in May, 1984 (May Amendment). This May
Amendment amended section 8 of NSA, so that under exceptional circumstances a
detenu may now remain in jail for fifteen days without knowing the grounds of
detention. Similarly, under section 10 and 11 of the NSA, the period within which a
detenu’s case had to be referred to the Advisory Board for obtaining the Board’s
approval (for his detention beyond three months) was extended from three weeks
from his arrest to four months and two weeks and, likewise, the period for the
submission of the report by the Board was extended from seven weeks to five months
and three weeks from the date of the detention of the detenu. This means that a
detenu may now be made to undergo imprisonment for a period of nearly six months,
even if his detention is ultimately found by the Advisory Board to be entirely
unjustified and bad in law.

The May Amendment also provides that in the case of persons detained prior
to April 3, 1985 they could be so detained for a maximum period of two years as
opposed to one year in section 13 of the unamended Act. Therefore, we find that the
May Amendment further whittled down the already niggardly protection or safeguard
a person has under the Indian laws, when he is detained under the PD laws. The only
saving feature of this Amendment, if there is one, is that its operation was specifically
limited to Punjab and the Union Territory of Chandigarh, and that it was enacted at a
time when violence had touched an all time high in Punjab. This may not justify the
NSA Amendment, but it surely provides a background which cannot be wished away
while discussing the May Amendment.

The next ordinance which sought to amend the NSA was promulgated in June
1984 (June Ordinance). It has two disquieting aspects:

1) It was promulgated about 2 weeks after the successful culmination
of Operation Bluestar at the Golden Temple, and
2) It was not restricted to Punjab alone, but was operative throughout the territory of India (excluding Jammu and Kashmir to which even the NSA does not apply).

The main purpose of the June Ordinance seems to be to introduce in the NSA, amendments which are in pari material (or similar) to the amendments which had already been introduced in the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA). These two amendments introduced by the June Ordinance need special mention.

**Research Methodology:**

The researcher has adopted the Doctrinal Research Methodology and has read all the judgements of the Supreme Court of India from A.K. Gopalan vs. State of Madras and the Habeas Corpus judgement which was a shocking judgement during emergency and has also considered all the judgements after Habeas Corpus case after the withdrawal of emergency. The research is based on the law reports and other commentaries on the Constitution of India and other democratic countries. The research is from the books in the personal library of the researcher and the Supreme Court of India’s Library, Indian Law Institute and other important news papers and journals.

This study consist of six chapters, the **Chapter First – “Preventive Detention – Historical Perspective”** is a theoretical and defines the concept of civil liberty in general as well as in the Indian Constitution. It discusses the different aspects of civil liberty and preventive detention.

The **Chapter Second - “Habeas Corpus Suspension of the Fundamental Rights in emergency”** - deals with the brief period of internal emergency (1975-1977) had exposed the inadequacy of judicial review as a safeguard against the misuse of powers by the Executive, Evidently due to certain constraints. The Court gave shocking judgement in the writ of Habeas Corpus case, *ADM Jabalpur vs. Shivakant Shukla’s*.

The great jurist of India H.M. Seervai has met following comments on the judgement of Habeas Corpus Case –

"Anyone who reads and re-reads the four judgements – for they occupy 306 pages of the Sup. Ct. Reports – will be filled with amazement that the...

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24. AIR 1976 SC 1207 popularly known as Habeas Corpus case.
four judges should not have asked the central question raised by the Habeas Corpus Case and, even more, that they should have failed to realize the implications of the first question which the Att. Gen. formulated, and the concession which he made in answering that question. We will, therefore, consider the question raised by the Habeas Corpus Case independently of the discussion in the four judgments, and will refer to those judgments in the light of our independent discussion”.

The Chapter Third deals with the – “Personal Liberty and ‘Preventive Detention – Articles 21 & 22”, it establishes that Preventive Detention Laws are against the basic concept of Personal Liberty as enshrined under Article 21 of the Constitution of Indian.

The Chapter Fourth – deals with the “Emergency excesses and Violation of Human Rights” and the detention of innocent citizens in the garb of Preventive Detention Laws. This is a very sad commentary on the laws of Preventive Detention and therefore, it is expedient in the interest of democracy that such laws should be repeal without any loss of time.

The Fifth Chapter – deals with the “Role of Supreme Court of India after withdrawal of Internal Emergency – 1977 to date”. The Supreme Court realised its mistake which it committed during Emergency and later it gave judgements to indicate its impartiality, independence and restore its lost prestige and confidence of the people of India.

The Sixth Chapter – deals with the “Conclusion and Suggestions” and the suggestions of the researcher is that in view of the past experience there is every likelihood that some people in power may misuse preventive detention laws to perpetuate there anti-democratic rule.

To conclude it is submitted that the Preventive detention is the arch enemy of the right to personal liberty. It envisages detention without trial which is against the basic canons of criminal jurisprudents. At times when the liberty of the individuals crosses the limit and threatens the very existence of the State and at that point of time it fails to control the enjoyment of individual’s liberty, then the State uses the preventive detention measures. This measure is not unknown in the dictatorial and the democratic regimes; the capitalist, the socialist and the communist governments. However, there was a difference in the exercise of the said power; some countries tried to handle this measure carefully and cautiously. They adopted it casually and
only in grave situation affecting the very existence of the State. They used the measure indiscriminately in time of war and peace. And thus in such countries the right to personal liberty remained in eclipse.

Now coming to the Indian experience, before independence, the British regime in order to establish a strong foothold in India used the preventive detention measure for an indefinite period, when Indian got independence the provincial legislatures enacted laws relating to preventive detention. Though the freedom fighters were aiming towards securing better rights to the citizens of Free India, yet it was unfortunate that the preventive detention measure at the central level was put into force immediately after the commencement of the Constitution of India. Sardar Patel, who piloted the first Bill with respect to preventive detention, conceded that he had two sleepless nights before introducing such a Bill in Parliament. The Preventive Detention Act, 1950, was amended thrice to give some more protection to the person detained under the Act. In the beginning the Act was renewed every year; thereafter, every two years; and finally, every three years Parliament continued the operation of the Act. The Act of 1950 came to and ends in the year 1969. But thereafter no vacuum was created in the area of preventive detention. The state legislatures immediately passed laws relating to preventive detention. This state of affairs continued until the Maintenance of Internal Security Act, 1971, came into force. This Act was amended thrice so as to impose more restrictions on the persons detained under the Act and to allow the executive a free hand in matters of preventive detention. On June 27, 1975, the Presidential order gave blanks power to the executive authority to deal with persons preventively detained. It imposed a blanket ban on the detenue to claim any safeguard against the measure. This resulted in the 19 months emergency. During the period between 26-27 June, 1975 a large numbers of persons were put behind the bars without trial and without affording to them any basic safeguards. Brief survey of the Preventive Detention in this country shows that this law has been misused and innocent citizens oppose to be establishment were sent to Jail on flimsy ground. Therefore, this law should be escarped and repeal.

The Supreme Court of India during Emergency has failed to protect the rights of the citizens and has not been able to protect the citizens from torture and ill treatment. In Kashmir the Preventive Detention Laws have been blatantly misused and the arbitrary arrest and detention of those peacefully voicing dissent is continuing in Jammu and Kashmir, India, with the Public Security Act (PSA) increasingly being used to punish those who criticise the government, Amnesty International warned
today. Political activists were detained and beaten last week following public protests over the killing of six women. Amnesty International is calling for the immediate release of those who remain in detention and considers them to be prisoners of conscience, held solely for the peaceful exercise of their right to freedom of expression and association. On 8 June 2001 an unidentified attacker threw a hand grenade at a group of women picnicking at a shrine in Chara-e-Sharief. Four women were killed outright and two more died later of their injuries. Local observes believe that the attacker was a member of the Special Operations Group (SOG) which is a division of the police created to deal with militancy. Amnesty International urges the government of Jammu and Kashmir to immediately initiate an independent, impartial and transparent inquiry into this incident. Several associates of the Human Rights Front, including their patron Mr. Untoo, were taken from their homes at around 4:00 a.m. on the 9th June and held in detention until that evening. At the same time members of the Islamic Students League were also picked up and placed in preventive detention. A two year detention order was issued for Shakil Ahmad Bakhsi, a student leader under the Public Safety Act. Dr. Hubbi, a leader of the All Parties Hurriyet Conference (APHC) and Vice-Chairman of the Jammu and Kashmir People’s Conference, and his wife attended a demonstration on Saturday 9 June. At the demonstration the couple were beaten by police and Dr. Hubbi was taken into preventive detention. A two year detention order was issued against Dr. Hubbi’s who is now being held in Kotbalwal jail. There are reports that the home of Dr. Hubb’s brother, Abdul Kabir Hubbi, was also raided by the SOG on the night of 12 June. Dr. Hubbi, who has no connections with the armed opposition, has served earlier periods in preventive detention, including eight months in 1999-2000 along with 25 other leaders of the APHC. Other APHC leaders including Shahidul Islam and Javed Ahmad Mir were also arrested. Amnesty International has also seen reports that APHC leader Sheikh Abdul Aziz was stopped from attending the demonstration by the police at Awantipora and that, together with activists Mukhtar Waza, Zahoor Sheikh and Khalil Ahmad Khalil, he was beaten by Police. Amnesty International is concerned about the widespread use of excessive force by the police when detaining activists. In March 2001, Syed Shah Geelani, who is known to the authorities as having a serious heart disease, was pushed to the floor and beaten unconscious by police when he was being released from detention. Amnesty International is also concerned that the PSA continues to be abused in Jammu and Kashmir to detain opposition politicians. AI is aware of many cases of activist being held for years
without recourse to the judicial process. As most people detained under the PSA are denied access to lawyers and family members, they also run a high risk of being subjected to torture or ill-treatment. The Jammu and Kashmir Public Safety Act of 1978 is the main law relating to preventive detention in Jammu and Kashmir and permits administrative detention without trial for a period of up to one year if a person is deemed likely to act in a way “prejudicial to the maintenance of public order” or up to two years if their actions are likely to be “prejudicial to the safety of the state”.\(^{26}\)

Integrity and unity of the nation depends on the quality of the judiciary to a great extent. The Supreme Court performance in the last decades has not been up to the expectation of the people of India. I subscribe to the view of Mr. Rajiv Dhavan when he says in his book “Justice on Trial: The Supreme Court Today”, that the court has failed to fulfil its assigned role and that it is a “dying institution”.\(^{27}\) The standard of Supreme Court of India has fallen for the reason that the judges are appointed in the High Court from the panels of the State and the judiciary does not attract talented worthy lawyers for being appointed as Judge. A government panel advocate appointed in the High Court becomes a judge of the High Court then on the basis of seniority, he goes up to the Supreme Court. So, most of the judges are politically committed the people in power and therefore, they deliver such judgements which can guarantee them jobs even after retirement from the Supreme Court of India.

The existence of Supreme Court gives the people in general and the opposition groups in particular an easy feeling that there is an independent authority to check the arbitrary and extreme actions of the party in power and to uphold the constitution. An erosion of the authority of the court would deprive them of this sense of security and may entail political upheavals. By and large, the judiciary is still held in high esteem and its authority, impartiality and commitment to constitutional values is widely recognised. The judiciary being the guarantee of democracy, rule of law and human rights under our Constitution, any dilution of its authority or diminution of its status is bound to endanger the delicate balance of our republic.

In the beginning, the court denied freedom to Gopalan,\(^{28}\) but in the subsequent cases it stood firmly on the side of personal freedom and social progress and change. Even if one among the several grounds for detention was vague or irrelevant, it set the detenu at liberty. This progressive interpretation of law was virtually halted when,

\(^{28}\) A.K. Gopalan vs. State of Madras, 1950 1 SCR, 88
during the internal emergency, Shivakant Sukla's case,²⁹ the court rejected the writ of habeas corpus and shut its doors for such writs. This deviation from the unimpeachable standards of judicial review, for which there was a controlling authority in the Makhan Singh¹⁰ decision of the court, greatly damaged the credibility of the judicial system as a guardian of human rights and fundamental freedoms. However, the court soon asserted itself in the sphere of civil liberties and made full use of the principles of natural justice and procedural fairness in the subsequent cases. The principle of procedural fairness was first enunciated in Bank Nationalisation³¹ and culminated in Maneka Gandhi's³² case. The court consciously gave judicial review a creative and civil libertarian content, and its activism revived public confidence in the judicial process.

Independent of the Constitution, there is no sphere which is exclusively within the ambit of the executive and out of bound for the judicial branch. For practical purposes, there may be such a sphere but its boundaries can never be really drawn, and it varies from society to society, depending upon the circumstances. The recent judicial activism of the Supreme Court may be justified in view of the increasing inefficiency of administration, lack of political will and societal apathy towards the plight of the poor and the weak.

Those who operate the political system also play an important role in creating social harmony and promoting social justice. The success of a system largely depends on the human element that operates it. Even the best of systems fails to deliver the goods if it is operated by incompetent people, and even an archaic system can adapt itself to modern conditions and work satisfactorily if those in charge of it have a sense of urgency, dedication and awareness of responsibility.³³

The Preventive Detention Laws should not be used in a democracy and the submission of researches is all the acts and statutes which have been used for serving the interest of the people in power should be repeal, this will be in consciousness with the wishes of the founding father of the Constitution who believed in person liberty and a society established according to the rule of law.

Recently the Supreme Court of India has granted compensation for Illegal Detention without trial for months or years is bad, for it takes away a slice of the

²⁹. A. D.M. Jabalpur vs. Shivakant Shukla, AIR, 1976, SC 1207
³⁰. Makhan Singh vs. The State of Punjab, AIR, 1964, SC 381
³¹. Rustom Cavasjee Cooper vs. Union of India, 1970 3 SCR, 530
³². Maneka Gandhi vs. Union of India, AIR 1978 SC 597
detenu’s life; and the legal system which permits this outrage surely owes it to the detenu that he be compensated financially if his detention is declared illegal. Suits for damages for wrongful imprisonment offer no remedies because the statutes sanctioning preventive detention protect the erring officials and the government. A safer remedy is that, while releasing the detenu, the Court should have the power to determine damages and award compensation. However, the Supreme Court hesitated to recognise the principle of monetary compensation for violation of fundamental rights, even though it acknowledged the inadequacy of conventional judicial remedies in such situations.

Therefore, it is expedient in the interest of democracy that Preventive Detention Laws should be scarted and repealed forthwith in the interest of our Great Nation.