Chapter-I

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It is beyond controversy that civil liberties are essential for the development of human personality as for the establishment of the democratic polity. Therefore, civil liberties should not be suppressed for they promote the common good of society. John Rawle vehemently states that liberty of an individual can be curtailed only for securing the equal liberty of others, and not for any other social or economic good. He says: “Liberty can be restricted only for the sake of liberty.” For him, the basic liberties are so important that greater economic advantage can never justify their abridgement: they are the first condition of justice and all ameliorative measures have to be subordinated to them.

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.

3. Ibid, pp. 303-03
One gets the feeling that the object is to save the detenu from punitive detention, because, if left free, the detenu might well commit an offence. What makes the power of PD awesome and offensive to the spirit of libertarian democracies is that it is meant to be used to detain a person even though no offence as yet has been proved against him, and in most cases even a charge has also not been formulated against him. The sole basis of such detention is that a suspicion or reasonable probability of such suspicion is entertained by the Executive to the effect that the detenu if let off would probably commit a specified kind of offence. It is interesting to note that the British House of Lords in one of its judgements on PD was of the view that the Executive may be trusted to exercise this 'discretion' with discretion.

In the quest for harmonizing the individual rights and liberties on the one hand, and the security of the State and public order on the other, PD laws have a tendency to load the dice heavily against the individual's liberty. But then, perhaps, we may not be able to do away with these laws altogether, particularly in a heterogeneous and obviously fragile polity like ours. But we should always remind ourselves of the dictum of Charles Kempton Allen while dealing with PD laws: Throughout history the most terrible form of tyranny has been forcing on one's fellow creatures what one believes to be good for them.

In our country the erroneous belief that America does not have any PD laws is held in high esteem. This belief however is not totally misleading. Title II of the Internal Security Act, 1950 (the so called McCarran Act) which is the American counterpart to our National Security Act has been seldom, if
ever, used against American Courts in a somewhat different garb of the American – Japanese cases during the Second World War. In the exercise of war powers, the Japanese-Americans residing in the U.S. West Coast were incarcerated, dispossessed and despatched to detention camps. This overtly racial discrimination (no such orders were issued against Americans of Italian or Germ descent) was a backlash to the Pearl Harbour fiasco.

The American Supreme Court in *Korematsu v. U.S. (1944)* upheld the constitutionality of the relocation and detention programme, over a bitter dissent of Justice Murphy who characterised the governmental action as going over the ‘brink of constitutional power’. What is really enlightening in this otherwise ‘justly infamous episode’ is the raison d’être of the Executive for relocating and detaining the American-Japanese in the first place. The argument was that ‘the subversive threat posed by the Americans of Japanese descent on the West Coast was confirmed (sic) by the sinister absence of any overtly subversive activities in that area’. This is a truly classic example of how an Executive can behave when under pressures of the moment.

The British experience with PD in the 20th century has been largely limited to the exercise of war powers during the two world wars. Without doubt the most well known of British cases on PD has been the cases of *Liversidge v. Anderson*.

Under the applicable law, the Secretary of State was given the power to detain any person in respect of ‘whom the secretary ‘had a reasonable cause

to believe' that the person, loosely speaking, had committed in the past or was committing acts against public safety. The majority of the Law Lords held that it was not open to the Court to examine whether there was in fact a reasonable cause to believe'. The fact that the Secretary thought that there was such a cause was enough for him to pass an order of detention.

If this were all, Liversidge would never have achieved immortality. Liversidge was made immortal by the devastating dissent of Lord Atkin. A Professor R.F.V. Hueston has said 'what seized the imagination of lawyer and layman alike was the passionate, almost wild rhetoric of the three concluding paragraphs' of that dissent. In one of these concluding paragraphs Lord Atkin 'confessed' that he knew of only one authority that might justify the method of interpretation which found favour with the majority of the House of Lords. He stated that authority thus: "When I use a word, Humpty Dumpty said in a rather scornful tone, it means just what I choose it to mean, neither more nor less".

Both these dissents of Mr. Justice Murphy and Lord Atkin have a thread in common: they are stated in scathing language and exhibit an emotion of deep anguish which at times gives way to bitterness and sarcasm. This highlights the inherent suspicion that the Justices have felt against draconian measures like the PD laws.

There is perhaps an added dimension to such dissent which is sometimes overlooked. At times, the dissenting justices, secure in the knowledge that the majority judgement has already 'safeguarded' whatever 'public or national security aspect' there was to the case, find themselves in a
position to give expression to the judiciary's generally held aversion to PD laws. These dissents are really directed and targeted at the Executive or the administrators of the PD laws, and, we suspect, also reflect the apprehensions of those justices who on the final weighing and balancing of competing interests have found the scale to tip in favour of the PD laws.

The PD was introduced in the statute books of British India by amending the Defence of India Ct, 1858 during the first world war. Thereafter, the Rowlatt Act (popularly referred to as the ‘No vakil, no appeal, no daleel’ Act) was introduced. And, finally, came the Government of India Act, 1935, under this Act, the State was given the power of exercising PD for the reasons, loosely, of defence and external affairs.

Then on November 26, 1949, we gave to ourselves our Constitution which came into force on January 26, 1950. In our Constitution itself, certain express provisions confer upon our Parliament exclusive legislative competence to make laws with respect to ‘preventive detention for reasons connected with defence, foreign affairs or the security of India’ (Item 9, List-I of the Seventh Schedule) and also concurrently with the State Legislatures with respect to ‘Preventive detention for reasons connected with the security of state, maintenance of public order or the maintenance of supplies and services essential to the community. (Item 3, List III of the Seventh Schedule).

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 provided 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).

By virtue of clause (6), the authority while communicating the grounds of detention may not disclose such facts, the disclosure of which the authority may consider prejudicial to the public interest. While on Article 22, we may point out that the denial to such detenus of the right to consult and be defended by a legal practitioner of their choice, is an unnecessarily harsh provision which does not serve the interests of the State to any great extent. In our country, with the limited awareness of the ordinary citizen of his legal rights, it seems too much to expect that a detenu will be able adequately to exercise his right of representation granted under clause (5) of Article 22 without the help of a legal practitioner.
One way to remedy the situation could be, as pointed out way back in 1960 by a noted constitutional pundit, by suitably amending the PD laws to provide such detenus expressly with the right of adequate representation by a legal practitioner. In the alternative, the Indian courts, as they have often done in the past, can strike a blow for justice, by reading into 'representation' in clause (5), the detenu’s right of being represented by a legal practitioner of his choice.

In 1950, the Preventive Detention Act, (PDA) was enacted which was to be re-enacted seven times till 1970, for the duration of three years at a time. Almost immediately, the various provisions of the PDA were challenged before the Supreme Court in the leading case of A.K. Gopalan v. State of Madras, Gopalan, the petitioner had been detained under the PDA on grounds which the Court would not know, because section 14 of the Act forbade him from disclosing them to any Court. The entire argument on Gopalan’s behalf had therefore to be directed against the constitutionality of the Act in abstracto.

In a judgement which had a far reaching impact on Indian constitutional development, the majority upheld the validity of the PDA (with the sole exception of Section 14 of the Act). The majority in the Gopalan Court held that substantive freedom from imprisonment was guaranteed in Article 21 of the Constitution which says that ‘no person shall be deprived of his life or personal liberty except in accordance with procedure established by law’.

6. AIR 1950 SC 27.
The majority then went on to hold that Article 21 did not leave it for the Court to enquire whether the 'procedure laid down' by the Legislature was just and proper. The judicial scrutiny under Article 21 was restricted to examining whether the procedure as laid down by the Legislature was properly observed by the Executive. We call this the *Proposition I of Gopalan*.

The *Gopalan* majority also rejected the argument that in the laws of PD, Article 19 (1) (d) (which enshrined the 'freedom of movement throughout the territory of India) had any application. By analogy, the same would seem to hold good for all the other freedoms enshrined in Art. 19 (1). (These so called six lamps of liberty are the rights of freedom of speech, peaceable assembly without arms, formation of associations or unions, moving freely throughout the territory of India and residing in any part of India. Loosely speaking, reasonable restrictions may be placed by the State by law on these freedoms. The seventh lamp of liberty, namely the right to property was extinguished with great fanfare by the Constitution (44th Amendment) Act, 1978).

We may point out that at the time of drafting the Constitution, when the Constituent Assembly decided not to incorporate the 'Due Process Clause' in Article 21, Dr. B.R. Ambedkar introduced the draft form of the present Article 22 for the purposes of, as he said 'making, if I may say so compensation for what was done in passing Article 15' (present Article 21 of our Constitution'). Dr. Ambedkar stated that while Article 22 might not satisfy those who believed in the absolute personal freedom of the individual, nonetheless, he claimed that it did contain the substance of the law of 'Due

7. Constituent Assembly, Vol. 12 (1946-50)
Thus the traditions of 'Due Process' were to have emanated from Article 22, to compensate for the exclusion of 'Due Process' in Article 21. *Maneka* turns this upside down, as it seeks to identify the source of the emanation of this 'Due Process' in Article 21 itself, and to that extent *Maneka* tends to make the entire exercise of incorporating Article 22 in the Constitution somewhat futile.

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.

There is yet another objection to the use of ordinances for the purpose of promulgating laws like the PD laws, which seek to ‘deprive’ people of their ‘life and personal liberty’ within the meaning of Article 21. This objection is based on the argument that the procedure established by law by which such deprivation can constitutionally be permitted can only be law as enacted by the legislature and not through ordinances. It is unfortunate that this
contention which was raised in A.K. Roy did not get the attention it so richly
deserved from the Court. By promulgating such laws by ordinances, which
impose restrictions on Fundamental Rights (even if these restrictions are
ultimately held on judicial scrutiny to be of the reasonable variety) the entire
process of law making gets subverted.

It is contemplated in the Constitution that before such laws are
enacted, they will be debated on the floor of the House, and some kind of a
national debate of sorts will be generated, thereby throwing up numerous
points of view of various interest groups, whose interests are likely to be
affected by such laws. The President or the Executive, howsoever wise or
states manly they may be, cannot in vacuum get the benefit of these diverse
points of view of various interest groups.

Once an ordinance is already promulgated, and is then introduced
before the Parliament for its adoption and enactment by Parliament, much of
the interest and debate which would have been generated if the Parliament
had itself initiated the law may well be lost. Besides, since enacting such an
ordinance can be expected to become a question of ‘prestige’ for the
government, as a consequence, the flexibility in the accommodation of the
various competing interests is unduly hampered. There is in other words an
unnecessary pressure on the treasury benches to enact the ordinance into a
legislative act without any substantial alteration, for to do otherwise may be
taken to mean a loss of face for the government.

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 materia (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.

First, a new section 5-A has been added to the NSA. This section 5-A
introduces a legal-fiction to the effect that even if an order of detention is
based on several grounds, it shall be assumed to have been made separately
on each one of those grounds. The intention obviously is to overrule the
settled law on the point, (reiterated from time to time by the Supreme Court)
namely, that the constitutional requirement of clause (5) of Article 22 must be
satisfied in respect of each one of the grounds communicated to the detenu.

In other words, the Court had held in case after case, that if any of the
grounds that led to the satisfaction of the Executive for passing the order of
detention is found to be ‘irrelevant’, ‘non-existent’ or ‘vague’, the entire order
of detention would be invalid, even if there may be other relevant grounds which were mentioned in that order. This is so on the basis of the salutary principle that one can never be certain to what extent the bad grounds operated on the mind of the Executive.

Putting it differently, the principle says that one can never be sure whether the detention order would have been made at all, if only some of the grounds referred to in the detention order were present before the Executive. This new section 5-A in the words of an Indian jurist attributes to the detaining authority an intention which he may not have entertained, and makes it virtually impossible for the detenu to challenge his detention by pointing out (that each one) of the grounds on which he is detained (is) invalid for one reason or another.

The second aspect of the June Ordinance which is disquieting is its amendment of Section 14 (2) of the NSA. The amended section 14 (2) now lays down that even after the expiry or revocation of a detention order, a fresh order of detention may be issued, even if no new facts may have arisen. The section also states that the total period of detention, pursuant to the fresh order of detention will not exceed twelve months. V.M. Tarkunde, the noted jurist, has interpreted this to mean that 'even if a detention order is held invalid by a court of law, the detaining authority can revoke the said order and can make another detention order on the same grounds.

It appears to us that the amended section 14 (2) is meant to apply only to those cases where either the period of detention specified in the original order has expired, or where it has been revoked suo oto (on its own) by the
detaining authority. If on the other hand a detention order is struck down as invalid by a ruling of a Court of Law, then the effect of the order of the Court would be as if the order of detention was never passed in the first place. It follows, therefore, that the question of the detaining authority revoking such an order will not arise. For ex hypothesi (by definition) only that may be revoked which is in existence?

But what the amended section 14 (2) does say is that a person who is detained for a maximum period of one year under NSA, may once again be detained on the same facts for another year. This amendment of section 14 (2) also runs counter to the interpretation placed on clause (5) of Article 22 of the Constitution placed on clause (5) of Article 22 of the Constitution by the Supreme Court, namely, that the expression 'grounds' in case of a person who is being detained a second time cannot mean the same grounds based on the same facts which were the basis of passing the first detention order against him.

There is yet another aspect to these two amendments introduced by the June Ordinance. They both seek to overrule settled judicial interpretations of constitutional provisions. In other words, they seek to introduce a constitutional amendment of clause (5) of Article 22. It goes without saying that such an amendment cannot be made, save and except in accordance with the procedure laid down in Article 368 for amending the Constitution. We therefore submit that on this ground alone these amendments sought to be introduced in the NSA by the June Ordinance are void and non-est.

In any event there does not seem to be much justification in applying the June Ordinance throughout the territory of the Republic. If at all, the June Ordinance like the May Amendment should have been restricted in its
territorial applicability to those areas like Punjab, which are in the grip of communal tension and acute public disorder. Indeed, even in the post Operation-Blue star Punjab such an amendment may not be really necessary.

But, be that as it may, surely it cannot be seriously contended that the security forces of the Republic are being unduly hampered in their quest for maintaining national unity, peace and communal harmony by reason of any unduly expansive freedoms of civil liberties and individuals rights. The reasons for the inability to contain this rising communal tension and acute public disorder which is being witnessed in some parts of the Republic are to be found elsewhere.

It is true that with the enactment of NSA and the subsequent amendments brought in it, the position of the detenue has become quite vulnerable. And this obviously cannot but be a source of considerable concern and disquiet to any civil libertarian. However we would fail in our duty of an impartial assessment if we were to neglect the milieu in which these NSA provisions have been made.

The NSA and subsequent amendments made in that Act were introduced against a backdrop of rising communal tension, terrorist violence and secessionist tendencies. Before passing a final verdict on the PD laws, there is also need for an appraisal of these provisions in terms of the long-term perspective of Indian democracy. It may at times be necessary to tolerate laws which seem to be in disharmony with the constitutional ideals of human dignity, so that in the longer run the sensitive and fragile institutions of democracy may take roots. This need for tolerance may be all the more
acute in a third world democracy, with its peculiar third world problems. And, therefore, a mindless comparison with the PD laws of the Anglo-American democracies may not prove to be particularly apposite.

But, on the other hand, unbridled executive discretion is not quite conducive to the development, or for that matter, the survival of democratic values and ideals. And that this unbridled discretionary power may have been granted for purposes which the grantees of the power (Parliament, in the case of PD laws) may honestly believe to be good may not help much. Professor Allen expresses this 'encroaching' natured of such power quite well:

"... (Nobody) on earth can be trusted with power without restraint. (Such power) ... Is of all encroaching nature, and its encroachments, more often than not, are for the sake of what are sincerely believed to be good and indeed necessary objects."

Scope and Applicability:

- Article 22 (1) The enforcement of the fundamental right under Article 22 can be suspended by the Presidential order under Article 359, sub-clause 1 during period while a Proclamation of Emergency is in operation. Yet, however, when the rights guaranteed under Article 22 are, to any extent, referred in another provision of a statute, for example, the Preventive Detention Act, 1950 not included in the Presidential Order as referring to detention under Defence of India Act, or Sec. 8 of the Maintenance of Internal Security Act, 1971, the Presidential Order would not bar the enforcement of that statutory right, because even if Article 22 (5) were

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deleted from the Constitution, the said statutory provision would still 
remain on the statute book until repealed.\(^{10}\)

The protection of Article 22 are not available against Regulations 
governing entry into and departure from India as also the presence in 
India of Pakistani infiltrators from across that cease fire line in Jammu & 
Kashmir border.\(^{11}\)

The soul of Article 22 is the fair chance to be heard on all 
particulars relied on to condemn the detenu to preventive confinement.\(^{12}\)

The protection of Article 22 extends to arrests made by executive or 
other non-judicial authority.\(^{13}\)

Person detained by customs authorities for interrogation and produced 
before Magistrate within 24 hours of his arrest, cannot complain of violation 
of Article 22 (1)\(^{14}\)

Clause (1) - (a) General - Article 22 (1) embodies a rule which has 
always been regarded as vital and fundamental for safeguarding personal 
liberty in a system government by rule of law.\(^{15}\)

Article 22 (1) - Right of arrested person to be defended by legal 
practitioner of his choice. In this regard Hidayatullah J. observed:

> "When our Constitution lays down in absolute terms and right to be 
defended by one's own Counsel, it cannot be taken away by ordinary law 
and it is not sufficient to say that the accused who was so deprived of this 
right, did not stand in danger of losing his personal liberty. If he was

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exposed to penalty he had a right to be defended by Counsel. If this were not so then instead of providing for punishment of imprisonment, penal laws might provide for unlimited fines and it would be easy to leave the man free but a pauper. And to this end without a right to be defended by Counsel. If this proposition were accepted as true we might be in the Middle Ages". 16

Right to consult a legal practitioner can be availed of at the state of Police interrogation and test the police should incur a censure of conducting the interrogation in secrecy by physical torture. It is prudent on the part of the police to allow a lawyer to the person arrested. If he so wants at the time of interrogation. The accused has a right to consult his lawyer even at the stage of custodial interrogation. Articles 20 (3) and 22 (1) may, in a way, be telescoped by making it prudent for the police to permit the Advocate of the accused, if there be one, to be present at the time when the accused is examined. 17

Article 22 (2) Officers who are the custodians of law and order should have the greatest respect for the personal liberty of citizens and should not flout the laws by stopping to such bizarre acts of lawlessness. Custodians of law and order should not become depredators of civil liberties. Their duty is to protect and not to abduct.

Article 22 clauses (1) & (2) arrest of person – procedure to be followed. Justice Das observed:

"Clauses (1) and (2) of Article 22 lay down the procedure that has to be followed when a man is arrested. They ensure four things; (a) right to be consult and to be defended by, a legal practitioner of his choice, (c) right to be produced before a Magistrate within 24 hours, and (d) freedom from detention beyond the said period except by order of the Magistrate". 18

Right to be informed of grounds of arrest:

Article 22 (1) - Arrested people to be informed about grounds of his arrest - Petitioner at time of arrest by Police informed that arrest was under S. 151, Criminal P.C. - Warrants also showing that petitioner was being remanded to jail custody for offences under Ss. 143 and 447 I.P.C. - Held there was no violation of Article 22 (1).\(^\text{19}\)

Clause (3) - Clause (3) operates as an exception or proviso to both Cls. (1) and (2) of Article 22 by enacting that Cl. (1) and (2) do not apply to person who for the time being is an enemy alien or to any person who is arrested or detained under any law providing for preventive detention.

Thus, no person who is detained under any law, which provides for preventive detention, can claim the right to consult a legal practitioner of his choice or to be defended by him.\(^\text{20}\)

Clause (4) - (a) Law providing for preventive detention - Preventive detention is resorted to thwart future action,\(^\text{21}\) and a law providing for preventive detention must satisfy the two tests, namely (i) that the protection offered under Cl. (5) is complied with and (ii) that the procedure is just and reasonable\(^\text{22}\) and then such a law must satisfy the requirements of both Articles 19 and 22.\(^\text{23}\)

\(^{19}\) Pranab Chatterjee v. State of Bihar, 1970, 3 SSC 926
\(^{20}\) A. K. Roy v. Union of India, AIR 1982 SC 710
\(^{22}\) Kamla Kanyalal v. State of Maharashtra, 1981 1 SCC 748.
Preventive detention is a necessary evil in the modern restless society. But simply because it is an evil, it cannot be so interpreted as to be inoperative in any practical manner.  

**Preventive Detention – Legislative Competency:**

Bearing in mind the provisions of Art. 22 read with Art. 245 and Sch. 7, List I, Entry 9 and List III, Entry 3, it is clear that the Parliament is empowered to enact a law of preventive detention (a) for reasons connected with defence (b) for reasons connected with foreign affairs, (c) for reasons connected with the security of India, and (under List III), (d) for reasons connected with the maintenance of public order, or (f) for reasons connected with the maintenance of supplies and services essential to the community.

**Validity of Preventive Detention Act, 1950, MISA and other Acts:**

On a plain reading of the language of sub-sections (1) and (2) of S. 3 of the MIS Act 1971 the exercise of the power of detention is made dependent on the subjective satisfaction of the detaining authority that with a view to preventing a person from acting in a prejudicial manner as set out in sub-clauses (i), (ii) and (iii) of Cl. (a) of sub-section (1), it is necessary to detain such person.

The subjective satisfaction of the detaining authority is not wholly immune from judicial reviewability. The basic postulate is that the subjective satisfaction being a condition precedent for the exercise of the power

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conferred on the executive, the court can always examine whether the
requisite satisfaction is arrived at by the authority.

A law of preventive detention, which falls within Art. 22, has also to
meet the requirement opportunity to defend himself by engaging a civil
lawyer through their help - No request made by accused to the Court
material for being defended by lawyer of his and no such request turned
down by the Court. Held there had been no denial of the right guaranteed by
the Article.26

Articles 22 and 136 - Arrest and detention of foreigner
for purpose of deportation:

Protection under Art. 22, if available - Non-production of detenu
within 24 hours of his arrest before nearest Magistrate - Legality of detention
- Order of High Court under S. 491, Criminal P.C. Declaring interim
injunction against State from executing order of deportation pending disposal
of his suit - Interference by Supreme Court.

The two respondents, husband and wife, were arrested for
non-compliance with an order of deportation passed against them. On the
petition for habeas corpus filed by the respondents, the Judges of the High
Court confined their attention to the period viz from 1 p.m. on 25th July, 1960
to 2 p.m. on 27th July 1960 and holding that during this period there had been
a violation of the requirements of Art. 22 (2) of the Constitution, in that the
respondents had not been produced before a Magistrate within 24 hours of
the commencement of the custody, expressed their opinion that the detention
was illegal and directed the release of the respondents. The State of Uttar

26. Ram Sarup v. Union of India, AIR 1965 SC 247
Pradesh preferred the appeal by special leave against the said order of the High Court. Subsequent to the filing of the appeal, the respondents filed a suit and obtained an injunction against the State from deporting them to Pakistan pending the disposal of the suit.

Held (Per P.B. Sinha, C.J Ayyangar, Mudholkar and Venkatarama Aiyer, JJ, Subba Rao, J. Dissenting): That without pronouncing on the precise scope of Article 22 (1) or (2) in relation to an arrest and detention for the purpose of executing a lawful order of deportation, it could not be said in the circumstances of the case that during the period commencing from 1 p.m. on 25-7-1960 the respondents were illegally detained 1960 the respondents were illegally detained for more than 24 hours without production before a judicial authority as required by Art. 22 (2). Even if Art. 22 (2) were constructed to require that a person arrested and detained has to be produced before a Magistrate every 24 hours during his detention, in this case as the respondents were during “the second stage” produced before the High Court itself for suitable orders on the 25th and again on the 27th, the requirement was satisfied. Hence there was no justification whatsoever for the finding on the basis of which the High Court directed the release of the respondents.

Per Subba Rao, J : - The case is not a fit one for exercising the extraordinary jurisdiction, under Art. 136 of the Constitution. The appeal has become anfractuous, for even if the State succeeds it cannot arrest the respondents till the disposal of the suit. Nor has the High Court decided any such important question of law as to cause some irreparable injury to the appellant unless the Supreme Court sets the matter right. An arrest and
detention for the purpose of deportation is not outside the scope of the Constitutional protection under Art. 22 (2). It is not permissible to read into that provision exceptions other than the two specific exceptions in Cl. (3). As the respondents were not produced before the nearest Magistrate within 24 hours of their arrest for the purpose of deportation, the arrest and detention were in contravention of Art. 22 (2) and illegal.\textsuperscript{27}

\textbf{Grounds of detention:}

Communication, contents, validity and purpose of grounds - Whereas non-communication of grounds amounts to a denial of opportunity of making representation. In the grounds of detention, it is also essential to furnish the material particulars as to the date and time of activities regarding the basic acts as alleged. The grounds furnished to the detenu cannot be said to be complete unless the documents, statements or other materials relied on in the grounds of detention and forming part of such grounds are also supplied to the detenu. What is meant is that grounds of detention must be furnished in their entirety, with all the basic facts and material relied upon in those grounds. There is, however, no charm or magic in the words referred to 'relied on' based on, etc. and all such words only indicate that certain documents have gone to make up the satisfaction of the detaining authority; and therefore, even the documents which though not relied upon, but are simply referred to, have to be invariably supplied to the detenu. In \textit{Munna Tian v. District Magistrate}, Lucknow, an inquiry report whereon reliance was placed by the detaining authority was set aside. In \textit{Lachit Bardoli v. State of}

\textsuperscript{27} State of Utrar Pradesh v. Abdul Samad, AIR 1962, SC 1506.
Assam, the alleged statement made by detenu by admitting his guilt before police, was not communicated to him. This was held to have infringed detenu’s fundamental right under Article 22.

**Supply of Documents relied upon:**

The law as to supply of documents as relied on the order of detention has been summarised in *Mohd. Hussin v. Secretary to Government of Maharashtra* as follows:

(a) The copies of all the documents which are relied upon in or which form the basis of the grounds of detention must be supplied along with grounds of detention;

(b) The documents which are not relied upon or do not form the basis of the detention order but which are merely referred to casually or incidentally as and by way of narration of facts in the grounds of detention need not be supplied to the detenu.

(c) However, even such document, if the detenu requests for the same, have to be supplied to him for whether they are relevant to his defence or not, is for the detenu to decide and not for the detaining authority to judge.

It is well settled that even if a document is not expressly referred to in the grounds of detention, the same has to be supplied when an express demand for the same has been made by the detenu and the same, in the opinion of the Court, is not irrelevant.

However, as regards documents relied on or referred to in the order of detention *puri passu*, it is the constitutional mandate obliging the detaining authority to supply such documents to the detenu so as to enable him to make an effective representation immediately instead of waiting for the documents to be supplied with. In such a case, the question of demanding the documents

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28. AIR
is manifestly and wholly irrelevant and the infirmity in this regard will be violative of the constitutional safeguard, under Article 22 (5). Thus, where a list of smuggled goods as recovered from the detenu has been relied on in the grounds of detention, the non-supply thereof to the detenu will invalidate the detention.

Formulation, framing and signing of the grounds by the detaining authority at about the time of making of the order of detention, is an important assurance and a safeguard inter alia on the question that there was material; that the said material was scanned and sifted; that the irrelevant. If any, was rejected, and the relevant alone relied upon that thereafter conclusions were drawn and grounds formulated there from; and that there was, thus, at the relevant time, a case for detention made out, although under the subjective but bonafide satisfaction of the detaining authority. Moreover, the grounds of detention have to be firm and affirmative without leaving anything to speculation. The again, the copies of documents and material in support of grounds of detention, must be supplied along with grounds of detention, otherwise the detention will become illegal.

When in a case of detention, under Sec. 12-A of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, the grounds of detention were formulated contemporaneously and concurrently by the detaining authority at the time of passing the detention order and the basic facts or grounds did exist in formulated form at the time of detention and declaration, under Sec. 124 of the Act, was also made, it was held that there was compliance with the requirements of law.
The fact that the order of detention suffers from vagueness may although render an order of detention illegal, yet vague grounds have to be distinguished from the grounds being insufficient in particulars. In the latter case, the detenu will be entitled to claim further and better particulars. The grounds of detention must, therefore, specify not only the bare conclusions of facts but must contain also the basic facts and materials on which such conclusions are based, though the right of the detenu to be supplied with copies of statements or documents does not go to the same extent as in an ordinary criminal trial.

Grounds of detention are all those allegations of fact which have led to the passing of the order of detention. In case such allegations vague or irrelevant, the detenu earns his release, and a division or dissection of the grounds of detention into introduction, background and the grounds is not at all warranted. The contents of grounds have to be self-sufficient and self-explanatory. However, the non-mention of names of associates of the detenu does not render the grounds as vague.

The inclusion even of one irrelevant or non-existent ground among other relevant grounds will be in infringement of the right of the detenu to be informed as soon as may be of the ground on which the order of detention is based, the reason being that the inclusion of even a single irrelevant or obscure ground among several relevant and clear grounds will preclude, the Court which cannot substitute its objective decision for the subjective satisfaction of the detaining authority, from adjudicating upon the sufficiency of grounds.
A ground is said to be irrelevant when it has no connection with the satisfaction of the authority making the order of detention under the appropriate law. An order of detention cannot be sustained if the grounds of detention are vague or irrelevant.

It is obvious that the word "ground" under Article 22 (5) of the Constitution means clear revelation of all basic facts and other materials which are taken into consideration by the detaining authority for coming to the conclusion that the detenu was likely to act in a manner prejudicial to the maintenance of public order.

Everything mentioned in the grounds for detention may not necessarily be the basis or the grounds for the satisfaction of the detaining authority that the detenu was likely to act in a manner prejudicial to maintenance of public order. It will, as pointed out by the Supreme Court, depend upon the circumstances and facts of each case as to whether a particular recital contained in grounds served on the petitioner was or was not a ground on the basis of which the requisite satisfaction of the detaining authority was based.

Speaking on the point of vagueness, Jaswant Singh, J. said that vagueness is a relative term and the real test is to see whether the grounds are capable of being intelligently understood and sufficiently definite to enable the detenu to make an effective representation. If the grounds are self-contradictory, the detenu would not be in a position to say anything beyond denying them, when there are no details or specific instances or description of the acts alleged.
Thumb-impression of detenu in token of his having received the ground of detention is not sufficient.

During the period of Emergency, when a Presidential order under Article 359 (I) is in operation, there arises no question of furnishing any ground under Article 22 (5) to a detenu detained under Defence of India Act, 1962 or the Rules thereunder.

Vague grounds are invalid grounds; but a vague ground is only that grounds which is "incapable of being understood or defined with sufficient certainty. Grounds when vague, will spell non-compliance with law. The test that grounds must not be vague applies to each ground, but the concept of vagueness is itself subject to clause (6) of Article 22.

When an order of detention is based upon speeches made by the person sought to be detained, the detaining authority need not communicate to the person the offending passages or even the gist of such passages on pain of order quashed if it did not. If the time and place at which the speeches were alleged to have been made are specified and their general nature and effect is also stated the same would constitute sufficient particulars to enable the person to make his representation. Omission to mention date and place as to the commission of an alleged activity on the part of the detenu will render the grounds as vague.

Speeches referred to in ground No. 1 are mentioned as a part of the continuous course of conduct brought at by the remaining grounds.

It may be that the detaining authority may have more particulars than the grounds, but the grounds must be the essential basis upon which the
detaining authority arrives at its satisfaction and makes the order of detention.

Non-compliance with the constitutional and the statutory provisions will invalidate the detention. In case of conflict between statutory and constitutional provisions, it is the latter which shall prevail. It is incumbent upon the detaining authority under Article 22 (5) to disclose all facts which would enable the detenu to make a representation, against the order which has been passed depriving him of his liberty, and it would be for the Court to determine whether the facts disclosed are sufficient or not sufficient to give the detenu the necessary opportunity to make the representation under Article 22 (5). Vagueness of grounds is, therefore not an abstract notion, but is always to be examined by the test whether the grounds permit the detenu to make an effective representation.

A detention without furnishing grounds is not lawful. But all this simply means that when the grounds served do not show or suggest that there are other grounds which led to the passing of the order of detention, the detention cannot be challenged as invalid because some grounds have been withheld from him. The grounds furnished will be sufficient if they attain the object to meet the charges in the grounds. Therefore, the right to receive the grounds is although independent, it is yet bound up and connected with the right to make the representation. The grounds must, therefore, the communicated with sufficient clarity and precision, and the detenu will have right to obtain further details in case the particulars furnished are insufficient. The clarity and precision simply mean that the detaining authority should
make his meaning clear beyond doubt, without leaving the person detained to his own resources for interpreting them.

A distinction must, however, be drawn between grounds and facts. The grounds are the basis of the allegation and the facts are the evidence on which the basis of the allegations is to be established. The grounds are based on and arise out of the facts. Even singly, far more collectively, the grounds are conclusions drawn from available fact showing that the suspected activities of the detenu fall within the category of prejudicial acts.

The grounds furnished to the detenu, consistently with the privilege not to disclose facts which are not desirable to disclose in public interest, should be as full and adequate as the circumstances permit and a departure from this desideratum will amount to a violation of Article 22 (5).

A person detained by District Magistrate is entitled to claim fresh grounds of detention when his period of detention has been extended by the State Government.

The copies of documents pertaining to the prior activities of the petitioner were not furnished to him to enable him to make any effective representation. This case then assumes the aspect of non-disclosure of all the grounds on consideration of which the detention order was passed. This would be violative of the constitutional provisions of Article 22 (5).

Vagueness is, however, a relative term, because what may be vague in one case may not be so in another. The question of vagueness has therefore, to be ultimately a question that has to be determined on a consideration of the circumstances of each case.
The requirement as to sufficiency of grounds so as to enable the detenu to make a representation has to be satisfied with respect to each of the grounds communicated to him subject of course to the privilege under Article 22 (6). Failure to satisfy this requirement even in respect of one ground will render detention unconstitutional.

It is not correct to say that what clause (6) of Article 22 entitles the detaining authority is only to refrain from disclosing the detenu the evidence of the allegations. Grounds of detention cannot be said to be vague or indefinite merely because they do not contain the basis of these grounds.

Vague ground does not stand on the same footing as an irrelevant ground. Therefore, merely because a ground is vague, it cannot be said that it is no ground at all. There can be no infringement of constitutional provisions if the detenu has been supplied with sufficient particulars as he raises an objection as to the ground being vague.

Where in withdrawing certain particular from the detenu, the State takes recourse to clause (6) of Article 22, it is for the State to prove that the detaining authority was satisfied that it was not in the public interest to disclose same.

It is not necessary to mention in the grounds the particulars in the same way as they are mentioned in a charge of a criminal offence. Therefore, even if there is a challenge on ground of vagueness because of absence of certain particulars and facts which in the view of the Government could not be disclosed in the public interest, the order of detention will still be good, in certain circumstances, because it is for the Government to decide to what
extent information could be furnished consistently with considerations of public interest.

Where the grounds and reasons for detention were contained in the first paragraph of the order and the other paragraphs were only compendium of the facts and particulars on which the subjective satisfaction of the statutory authority has been based for coming to the conclusion mentioned in the first paragraph, any vagueness, irrelevancy or the like in the facts and particulars supplied in those other paragraphs, would not affect the validity of the detention so long as the grounds furnished did not suffer from any such defect. Even otherwise, the question whether the vagueness or indefiniteness of the statement furnished to the detenu is such as to deprive or preclude him of the earliest opportunity to make a representation to the authority is, however, a matter within the jurisdiction of the High Court. If the grounds supplied to the detenu are understandable by the detenu to make an effective representation, the grounds would be regarded as clear and unambiguous. The grounds cannot be said to be vague when on reading them, they are capable of being intelligently understood. No hard and fast rule being possible to be laid down to determine vagueness or otherwise of the grounds, there is considerable authority to hold that an order of detention will fail even if one of several grounds as stated is found to be vague.

Where the grounds supplied are so vague as to make the detention order void, the detenu has to be released. Grounds furnished within prescribed time but particulars of the grounds supplied thereafter within such
time as not to conflict with detenu’s right to make representation, are not illegal.

The delay of 11 days in serving the detention order is not violation of Article 22 (5), if the delay was valid and for sufficient reasons.

**Failure of one or more out of General Grounds:**

The law is well settled that when one of several grounds on which the order of detention is based, fails, the entire order of detention has to be struck down. This well-accepted rule has one exception that where the grounds are separately indicated and instances to support each ground are also supplied, the failure of one of the grounds will not make the order of detention liable to the struck down.

If the detention order has been passed on several grounds and if one of the grounds fails then the detention order can be sustained on other grounds provided the constitutional and statutory safeguards are observed in confirming the detention order on the said grounds.

In *Kusum Shah v. State of Bihar*29 the statement in the order of detention was that it was passed with a view to preventing the petitioner from acting in a manner prejudicial to the maintenance of public order and the maintenance of supplies and services essential to the community but the facts in one of the three grounds had referred to more than a stray and simple fracas arising out of a bottleneck on a public street and those in another ground had referred to an assault on a public servant. It was held that the order was bad because of failure of two out of the three grounds.

29. AIR 1974 SC 156.
Since too many grounds may vitiate an order of detention if any one of them is irrelevant or non-existent, the authorities should, therefore, be careful to see that only the relevant and valid grounds are selected having a nexus with the object of the order of detention. Vagueness only one of several grounds may invalidate an order of detention, even if other grounds are justified. In *Mehtab Ch.Chakraborty v. State of Assam*, one of three grounds was vague and another had not constituted a ground at all. The order of detention was set aside.

**Supplementary Grounds:**

When the authorities have only furnished details of the grounds of detention already supplied, they cannot be treated as fresh or new grounds. If by supplementary grounds is meant additional grounds, i.e. conclusions of fact required to bring about the satisfaction of the Government, the furnishing of any such additional grounds at a later stage will amount to an infringement of the first mentioned right in Article 22 (5) as the grounds for detention must be before the Government before it is satisfied about the necessity for making the order and all such grounds have to be furnished as soon as may be.

It is not permissible for the detaining authority to justify the detention by amplifying and improving the grounds originally furnished. It is not open to the detaining authority to furnish grounds in several instalments.

The law is by now well settled that a detenu has two rights under Article 22 (5) of the Constitution: (1) to be informed, as soon as may be of the grounds on which the order of detention is made, that is, the grounds which led to the subjective satisfaction of the detaining authority, and (2) to be
afforded the earliest opportunity of making a representation against the order of detention, that is, to be furnished with sufficient particulars to enable him to make a representation which on being considered may obtain relief to him. The inclusion of an irrelevant or non-existent ground, among other relevant grounds is an infringement of the first of the rights and the inclusion of an obscure or vague ground among other clear and definite grounds is an infringement of the second of the rights. Therefore in this view of the legal position if the grounds are vague and indefinite that would amount to an infringement of the second right of the appellant.

A detenu was detained in February, 1950, but he did not receive the particulars of the grounds served in the middle of March, until towards end of July, 1950. The so-called supplementary ground by giving specific instances to support the general statement made earlier. It was held that the detenu had been given the grounds of detention “as soon as may be”. The expression “as soon as may be” has to be interpreted as meaning as soon as circumstances permit.

A delay of 14 days in furnishing the grounds was held not unreasonable in Maqdoom Mohiuddin v. State of Hyderabad. The delay in furnishing the grounds is otherwise a question of fact to be determined in each case and this does not exclude reasonable time for formulating the ground on the materials in possession of the authorities.

The grounds of detention are required to be prepared soon after the detention if not simultaneously with it or prior thereto. In Mohit Lal v. State, a delay of 22 days was not held unreasonable.
Question of Language of the Grounds served on detenu:

In case the grounds of detention are furnished in English which language the detenu does not know or understand, the absence of translated copy either in the regional language or at least in Hindi being supplied to the detenu will amount to violation of Article 22 (5). A mere oral explanation, in Hindi, of the English version of grounds is not sufficient compliance of the mandatory requirement of Article 22 (5). Copy of detention order served in English with copy of grounds served in language known to the detenu does not handicap the accused in making representation. Similarly, when a content of detention order was translated by person serving order into language understood by detenu, the order was held to have been properly served. Communication of grounds of detention in a language which the detenu does not understand is no communication.

Grounds served in English running into fourteen typed pages and referring to activities over 13 years in addition to a large number of court cases concerning the detenu and his associates, will amount to denial of right of being communicated the grounds when a translation in script known to detenu has not been furnished but only an oral explanation of such a complicated order has been made by the authorities.

Where the detenu did not know the Hindi language and was conversant only with Gurumukhi script and the order and grounds of detention were not supplied in Gurumukhi language, the detention was held to be illegal as no opportunity was offered to detenu to make representation.

The Question of Language is material only when the detenu has been prejudiced in making effective representation.

When detenu is illiterate, the grounds read out and explained to him is sufficient compliance of law.

**Opportunity of Representation:** An opportunity of making representation means an early opportunity.

Right of representation implies the sufficiency of grounds to enable detenu to exercise his right to make representation.

The right to make representation includes not merely to take exception to the grounds or show that the grounds are not enabling but also to take exception to the validity of the order of detention. This right accrues not only after he detenu is served with the copy of the grounds but also during period between commencement of detention and date on which grounds are communicated to him.

Opportunity of representation will be held to have been denied when out of several grounds for detention, even if one was never communicated to the detenu, as also when the intelligence report and other materials considered by that detaining authority in passing detention order have not been put forth before the detenu.

**Effective Opportunity:** The opportunity of making a representation to be an effective opportunity would be one which provides a real and meaningful opportunity to the detenu to explain his case to the detaining authority. Unless the materials and documents relied in the order of
detention are supplied to the detenu along with the grounds, the supply of
grounds simpliciter would merely give an illusory opportunity to make a
representation, invalidating the order of detention,^32 entitling the detenu to
be released.34 It is immaterial in this context, to contend that the detenu was
aware of contents of documents.35

The Home Secretary and Home Minister could act on behalf of the
State Government and, therefore, it is immaterial whether the detaining
authority or Home Minister disposed of the representation.36

It is no every failure to furnish copy of a document referred to in the
grounds of detention which amounts to an infringement of Article 22 (5).
What renders an order of detention illegal is failure to furnish copies of such
documents as were relied on by the detaining authority, rendering it difficult
for the detenu to make an effective representation.

**Disposal of Representation:**

(i) **Forwarding of representation:** The representation of the detenu is
to be forwarded for disposal of the same by the competent authority.

Failure on part either of the Jail Superintendent or of the State
Government to forward the representation of the detenu to the Central
Government will render the detention illegal. 37 The representation
made by the detenu must without any delay be forwarded by the
person receiving the same to the concerned authority, and it should be
death with by the authority receiving the same as expeditiously as

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34. Abdul Aziz v. Delhi Administration, AIR 1981 SC 1839
37. Rattan Singh v. State of Punjab, AIR 1982. SC. 1
possible. Only so much time, which is absolutely necessary, in the circumstances of a particular case, in the representation reaching the concerned authority and in dealing with the same, can be countenanced. The burden of showing that all the time consumed in dealing with the representation was necessary, in the circumstances of the case is upon the detaining authority.

An unexplained delay of 28 days in forwarding the representation is violative of Article 21 of the Constitution. Where the representation of the detenu was not received by the Government, the question of its being sent to the Advisory Board and the contravention of Article 22 (5) does not arise.

(ii) **Authority competent for disposal of representation:** There is nothing in the Scheme of Article 22 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 - which requires that the representation ought always to be considered by the appropriate Government notwithstanding the fact that the order of detention has been made by an officer specially empowered in that behalf the power to revoke the order of detention conferred on the State and the Central Government does not mean that the initial representation, which the detenu has a right to make, must, of necessity, be considered by the Government. The initial representation that a detenu has a right to make, on receipt of the grounds of detention, would ordinarily be addressed to the detaining authority which has taken a decision adverse to the detenu and which has to be persuaded to reconsider the same, though it is undoubtedly open to the detenu to make a presentation requesting the appropriate Government to revoke the order of detention. However, the failure to submit the presentation, addressed to the detaining authority and considered by him, to the Government would not vitiate the detention order.39

38. Julia Jose Mary v. Union of India, AIR 1992 SC 139 at p. 141
39. Pushpa (Smt.) v. Union of India, AIR 1979 SC 1953
Where the representation of the detenu against his detention was not placed before the Advisory Board by the State Government, the appropriate Government, within the period prescribed under Sec. 10, the detention could not be sustained. It could not be said that as the representation was addressed to the Advisory Board it would be tantamount to making no representation for consideration of which an obligation was cast on the State Government, and therefore, there was no violation of the mandatory procedure prescribed under the law.

Reasons for disposal of representation - Whether necessary:

The order of the appropriate Government, rejecting the representation of a detenu, need not be a speaking order, but this does not mean that the Government can reject the representation in a casual or mechanical manner. The Government must bring to bear an unbiased mind on the representation.\(^{40}\)

Delay in Disposal of Representation:

Although no period of time is fixed for disposal of representation, yet, it should be disposed of without unreasonable delay. Delay made in the consideration of detenu’s representation\(^{41}\) or in any step leading to disposal of representation, will be fatal to the detention. Where here had been delay of one month and five days in communicating representation of the detenu from

\(^{40}\) John Martin v. State of West Bengal, AIR 1975 SC 775
\(^{41}\) Khatoon Begum (Smt.) v. Union of India, AIR 1981 SC 1077
jail to the detaining authority, it was held\textsuperscript{42} that detention was rendered illegal because of contravention of right to representation.

In \textit{S.M. Jahubar Sathic v. State of Tamil Nadu}\textsuperscript{43} in Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, Section 3 (1) and 9 (1), the court considered the explanation and have also examined the original files. The respondents before disposing of the representation and sought clarifications thrice. A perusal of the original file placed before us reveals that the clarifications were sought in the usual bureaucratic style only for the sake of clarification without there being any need for it. In these circumstances, it cannot be said that the representation was disposed of with promptitude. On the contrary, even the explanation offered by the respondents in their counter affidavit filed before the High Court indicates the lethargic attitude with which the presentation was taken up, dealt with and ultimately disposed of after seeking clarifications thrice on issues which did really not arise nor were there any necessity for seeking clarifications. The representation could have been disposed of without seeking clarification which obviously was sought to cover up the delay in prompt disposal of the presentation.

Since the matter was not considered by the High Court in the right perspective, the impugned judgement cannot be sustained. The appeal is allowed. The judgement and order dated 15.12.1998 passed by the High Court is set aside and the detention order dated 4.11.1997 passed under section 3 (1) (i) of the Act as also the declaration made on 27.11.1997 under section 9 (1) of

\textsuperscript{42} Tara Chand v. State of Rajasthan 1981, 1 SCC 416  
\textsuperscript{43}
the Act are quashed with the direction that the appellant shall be set a liberty forthwith unless his detention is required in connection with some other case.\textsuperscript{44}

\textit{Clause 7: Jurisdiction of Advisory Board:} The Advisory Board is a forum where the detenu has the opportunity of canvassing even such allegations for which the court is not proper forum, such as examining the truth or falsity of the material upon which the order of detention is based.

No law providing for preventive detention can authorise the detention for a longer period than two months unless before expiry of the said two months, the Advisory Board constituted, under Article 22 (4) has reported as to the expediency of detention for a long period. But, the Supreme Court\textsuperscript{45} holds, that the Government is not bound by such opinion and can revoke a detention order despite such opinion.

The Government must have first considered the representation before forwarding it to the Advisory Board.\textsuperscript{46}

Notice to detenu is not necessary for confirmation of order of detention by Government.\textsuperscript{47}

\textbf{Preventive Detention in India is a Constitutional Tyranny}

India is one of the few countries in the word whose Constitution allows for preventive detention during peacetime without safeguards that elsewhere are understood to be basic requirements for protecting fundamental human

\begin{flushright}
\textsuperscript{44} Website: supremecourtonline.com \\
\textsuperscript{45} Deb Sadhan Roy v. State of West Bengal 1972 1 SCC 308 \\
\textsuperscript{46} Jayanarayan Sukul v. State of West Bengal, AIR 1970 SC 675 \\
\textsuperscript{47} Karim Bux v. State of J & K, AIR 1969
\end{flushright}
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.48

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

48. Human Rights Features voice of Asia Pacific Human Rights Network
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 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]nyone 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.
STATEMENT REFERRED TO REPLY TO PART (A) OF
LOK SABHA UNSTARRED QUESTION NO.1741 FOR
ANSWER ON 5.8.93

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Statement showing the Number of persons ordered to be detained under the provisions of the National Security Act, 1980 during 1992 and 1993 (Upto May):

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Total                        | 1074 | 590

Note:- 1. The National Security Act, 1980 is not applicable to Jammu and Kashmir.
2. The State Governments of Kerala, West Bengal, Arunachal Pradesh, and U.T.Administrations of Dadra and Nagar Haveli, Lakshadweep, Pondicherry, and Daman and Diu have not invoked the provisions of NSA.
**UNSTARRD QUESTION NO.1199**

Statement referred to part b) of Rajya Sabha Unstarred Question No.1199 for answer on 14.12.94.

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Total: 144068 | 238828 | 336590

*Information is maintained only Quarterly and not monthly, and, hence the data for Oct, 1994 is not available.

In '975 persons, 17875 persons and 24554 persons were released on bail as on Dec.'91, Dec.'92 and Dec.'93 respectively.

Note: The provisions of TADA are invoked by 19 States at present.
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<th>No. of persons arrested &amp; under detention under TADA Act.</th>
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