The Issues Involved In The Inter-relation:

The inter-relation between the right to personal liberty in Art.21 and the fundamental freedoms dealt with by Art.19(1) involves two distinct but related issues. First, whether the contents of "personal liberty" in Art.21 also include the distinct freedoms separately dealt with in Art.19(1) or not; and second, whether a law depriving a person of his personal liberty must stand the test of reasonableness provided under Cls.(2) to (6) of Art.19(1).

Unlike in the case of the "due process" clause, the question of inter-relation of Art.21 with other fundamental rights in Part III, particularly with the rights in Art.19, did not seem to have evoked any serious debate in the Constituent Assembly. This might have been so,

1. The text of Art.19 is given in the Annexure.VIII, infra.

2. For the detailed analysis of the Constituent Assembly Debates on the 'due process' clause, see supra, Ch.II.
presumably, because the Constituent Assembly had not entertained any doubt or apprehension about Art.21 on this score.

As to the first issue, it is submitted, the Constituent Assembly could not have intended that the right guaranteed under one Article could be read into another right dealt with by a different Article, for, to do so would be to render the entire process of enacting different Articles defining, delimiting and regulating different rights a sheer exercise in futility. For instance, the 'liberty' clause as originally accepted by the Constituent Assembly, in the April-May 1947 session was in form as follows:

"No person shall be deprived of his life or liberty without due process of law nor shall any person be denied equality before the law within the territories of the Union". But, later the official amendment to the above clause which finally emerged from the Drafting Committee of the Constituent Assembly ran thus:

"No person shall be deprived of his life or personal liberty except according to procedure established by law". This clause was eventually accepted by the Constituent Assembly as the present Art.21.

4. See, ibid.
Thus the right to equality was taken out of the 'liberty' clause and was separately dealt with as an independent right under the present Art.14. And as recommended by the Drafting Committee, the word 'liberty' was qualified by the insertion of the word 'personal' before it, 'for otherwise it might be construed very widely so as to include even the freedoms already dealt with in the present Art.19'\(^5\). Unlike the removal of the "due process" clause which attracted stiff resistance and serious debates both within and without the Constituent Assembly, the separation of the equality right from the liberty clause as well as the addition of the word "personal" so as to ensure the non-inclusion of the Art.19(1) freedoms within the meaning of "personal liberty" in Art.21 were accepted by the Constituent Assembly virtually without any resistance or debate.\(^6\) Therefore, it is reasonable to assume that the intention of the Constituent Assembly was to treat the rights conferred under different (Arts.19 and 21) Articles as separate and independent rights without one right being read into another. This is neither to suggest that there can be no factual overlapping between the rights, nor is to deny the organic unity of the different attributes of liberty in its general and abstract sense.

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5. B.N.Rau, Draft Constitution, February 1948, f.n. to Article 15; also Rau, Indian Constitution, ed. by B.Shiva Rao, p.303.

6. Ibid.
Even as regards the second issue, the intention of the Constituent Assembly can reasonably be inferred from the schematic framework of the fundamental rights in Part III of the Constitution as well as from the sweep of Art.13(2). The only permissible means of State regulation of the rights conferred in Part III is law; and the law must be a valid law. Art.13(2) is comprehensive enough to include any 'law', as a result of which no law can be valid if it is inconsistent with any of fundamental rights guaranteed by Part III of the Constitution, including Art.19. The 'law' in Art.21 must also be a valid law and so cannot be an exception to the general sweep of Art.13(2). Therefore, it logically follows that a law providing for the deprivation of personal liberty in Art.21 must also stand the test of reasonableness under the relevant clauses of Art.19 if, and in so far as such law infringes upon any of the rights guaranteed by Art.19(1).

It is worthwhile to emphasise at this juncture that the distinction between the two issues referred to above is a fine and real one, which, unfortunately, is often missed or misconceived. It is one thing to say that the


8. A lack of proper appreciation of this nice distinction seems to be evident both in Gopalan's Case as well as in Maneka Gandhi's Case, but of course in different ways.
rights guaranteed under Art.19(1) are separate from, and independent of, the right to personal liberty in Art.21; and it is entirely a different thing to say that a law providing for deprivation of personal liberty in Art.21 must also be amenable to the test of reasonableness, if any of the rights guaranteed under Art.19(1) is factually infringed by such law.

With this backdrop, let us look at the judicial response to this question of inter-relationship of Arts.19 and 21.

The Judicial Response:

In Gopalan,\(^9\) it may be recalled, it was argued, though unsuccessfully, by the petitioner's counsel that imprisonment or detention involved curtailment of freedom of movement and consequently the guarantee of freedom from arrest and imprisonment should be found by the Court in Art.19(1) (d), according to which all citizens shall have the right "to move freely throughout the territory of India". Along with this argument, it was further contended that the various freedoms guaranteed under Art.19(1) could not be exercised when a person was placed under detention, that any law authorising preventive detention abridged those

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\(^9\) AIR 1950 SC 27.
freedoms; and that consequently such law must stand the test of "reasonable restriction" as provided under Art.19 cls (2) to (6). In taking resort to these arguments, it is submitted, the attempt of the petitioner's counsel seems to have been to forge an alternate strategy to secure the standard of reasonableness through Art.19 for the protection of personal liberty in Art.21 and thereby to persuade the court to apply that standard of reasonableness to the validity of the impugned law. Prof.Tripathi has rightly pointed out this contextual aspect of the petitioner's argument. He observed:

"Realising that article 21 by itself guaranteed no standard for the procedure it required, and further, that the guarantee of Article 22 was expressly denied to Gopalan who was detained under a law of preventive detention, Gopalan's counsel looked around for some provision in the Constitution which could be set up as the guarantee against unsatisfactory procedure in cases of detention. If any of the sub-clauses of clause (1)

10. Ibid., pp.34-35.

of article 19 could be harnessed for the purpose there would be the additional advantage of examining the law restrictive of freedom on the touchstone of reasonability. Article 19(1) (d) offered some opportunity for such use. That article guarantees the right to freedom of movement throughout the territory of India". 12

Thus the above arguments as well as their contexts have brought forth two crucial issues before the Court: the constitutional impact of the preventive detention of the petitioner on his rights conferred under Art.19 (1); and, as a logical corollary of the first, the answerability of the impugned law to the test of reasonableness under cls.(2) to (6) of Art.19. And it seems apparent that the acceptance of any of the petitioner's arguments, as mentioned above, would have compelled the Court to examine the validity of the impugned law not only under Art.21 read with Art.22(4) to (7) 13 but also with reference to the standard of reasonableness under Art.19(1) read with cls.(2) to (6) of that Article.

Confronted with such a perspective and predicament, the majority of the Court, which appears to


13. The procedural safeguards secured to those who are placed under preventive detention.
have been determined to resist all the attempts of the petitioner to introduce any element of 'due process' or 'reasonableness' as a protection for personal liberty in Art.21, had no hesitation to reject the above arguments of the petitioner's counsel in toto.

The majority held that Arts.19(1) and 21 were mutually exclusive and that 'contents and subject-matters of Arts.19 and 21 were thus not the same and they proceeded to deal with the right covered by their respective words from totally different angles'.

Chief Justice Kania said:

"... it appears to me that the concept of the right to move freely throughout the territory of India is an entirely different concept from the right to personal liberty contemplated by Art.21. 'Personal liberty' covers many more rights in one sense and has a restricted meaning in another sense. For instance, while the right to move or reside may be covered by the expression "personal liberty" the right to freedom of speech... or the right to acquire, hold or dispose of property... cannot be considered a part of the personal liberty of a

14. AIR 1950 SC 27, pp.37, 69, 97, 112.

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citizen. They form part of the liberty of a citizen but the limitation imposed by the word "personal" leads one to believe that those rights are not covered by the expression 'personal liberty'. So read there is no conflict between Art.19 and 21'.

In the same vein, Sastri J. observed:

"... The power of locomotion is no doubt an essential element of personal liberty which means freedom from bodily restraint, and detention in jail is a drastic invasion of that liberty. But the question is: Does Art.19, in its setting in part III of the Constitution, deal with the deprivation of personal liberty in the sense of incarceration? Sub.cl.(d) of cl.(1) does not refer to freedom of movement simpliciter but guarantees the right to move freely "throughout the territory of India".... Reading these provisions (Art.19(1) (d), (e) and 19 (5)) together, it is reasonably clear that they were designed primarily to emphasise the factual unity of the territory of India and to secure the right of a free citizen to move from one place in India to another... unhampored by any barriers

15. Ibid., at pp.36-37.
which narrow-minded provincialism may seek to impose".16

Referring to the insertion of the word 'personal' before 'liberty' as suggested by the Drafting Committee, he added:

"The acceptance of this suggestion shows that whatever may be the generally accepted connotation of the expression "personal liberty", it was used in Art.21 in a sense which excludes the freedoms dealt with in Art.19, that is to say, personal liberty in the context of Part III of the Constitution is something distinct from the freedom to move freely throughout the territory of India".17

It is submitted that the ruling of the majority that the expression "personal liberty" in the sense in which it was used in Art.21 did not include the specific freedoms that were separately dealt with in Art.19(1) appears to be right and consistent with the schematic framework of Part III of the Constitution.17a But that by itself could not

16. Ibid., p.69.
17. Ibid., p.71; pp.94-95, Per Mukherjea J., p.113, per Das.J.
have saved the impugned law from the challenge of Art.19 in view of the obvious fact that the detention of the petitioner has really resulted in the factual infringement of his 'freedom of movement' in Art.19(1) (d). Even if it is conceded that the 'freedom of movement' is an independent right distinct from the right to personal liberty in Art.21, the factual situation that obtained in Gopalan brings to light the truth that even as between two independent rights there can be factual overlapping.\(^\text{"18}\) Besides, even in the absence of such an overlapping, it is perfectly possible that a law depriving 'personal liberty' in Art.21 may simultaneously result in the direct and substantial encroachment upon another independent right protected by any of the sub-clauses of cl.(1) of Art.19\(^\text{"19}\) or, for that matter, by any other Article in Part III.\(^\text{"20}\) But, instead of recognising this plain constitutional reality, the majority of the Court, which appears to have been determined to save the impugned law from the challenge of Art.19, held that the deprivation of the personal liberty of an individual by

\(^{18}\) See, the dissenting opinion of Fazl Ali J. in Gopalan and Subba Rao J. in Kharak Singh, infra.

\(^{19}\) Ram Singh's Case has brought to light this aspect. See Infra.

\(^{20}\) There are many instances where a law, depriving personal liberty in Art.21 has been tested with reference to Art.14. See, State of West Bengal V. Anwar Ali, AIR 1952 SC 284; Kathi Raning V. State of Saurashtra, AIR 1952 SC 123.
virtue of detention would not be deemed to have affected or infringed his rights under Art.19. And the majority seems to have resorted to a plurality of strategic theories in order to exclude totally the applicability of Art.19 to test the validity of the impugned law which provided for the deprivation of the personal liberty of the petitioner under Art.21.

Thus, Kania C.J., joined by Mukherjea J., enunciated what may be described as the theory of directness of legislation and held:

"Article (19) has to be read without any pre-conceived notions. So read, it clearly means that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble... etc., the question whether the legislation is saved by the relevant saving clause of Art.19 will arise. If, however, the legislation is not directly in respect of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Art.19 does not arise. The
approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenue's life".21

Another strategy adopted by the majority was the theory of 'self-contained code'. According to this theory, Art.21 along with Arts.20 and 22 formed an exhaustive code relating to personal liberty and, therefore, the validity of a law depriving a person of personal liberty could not be challenged on the ground that it violated the requirements of Art.19.22

Then, resorting to the theory of 'deprivation' it was held by the majority that 'deprivation' (total loss) of personal liberty in Art.21 was quite different from the restriction (which is only a partial control) of the rights as safeguarded by Art.19(1); and, hence, a law which authorised a total deprivation of personal liberty in Art.21 could not be said to impose a restricting on the rights under Art.19.23

21. Ibid., at p.35; p.96, Per Mukherjea J.
22. Per Mahajan J., Art.22(4) to (7) was self-contained code in respect of a law dealing with preventive detention to the exclusion of Arts.21 and 19; ibid., at p.103. According to the other majority judges, Art.22 read with Art.21 form a self-contained code to the exclusion of Art.19; ibid., at pp.40-41, 75 and 94.
23. Per Kania C.J; Sastri, Mukherjea and Das JJ., ibid., at pp.37, 69-70, 93,43.

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Yet another theory laid down by the majority for the exclusion of Art.19 was the theory of 'free citizen', according to which the rights guaranteed by Art.19(1) were capable of being enjoyed by a person only so long as he remained free. As soon as he was deprived of his liberty as a result of detention, punitive or preventive, he could no longer complain of infraction of any of the rights guaranteed by Art.19.24

Thus the response of the majority of the Court in Gopalan to the question of inter-relationship of Arts.19 and 21 appears to be highly unsatisfactory. First, though it is justifiable for the Court to hold that the distinct freedoms that are separately dealt with in Art.19(1) cannot be read into the right to personal liberty in Art.21, it seems to be unrealistic for the Court to deny the possibility of factual overlapping of those independent rights under Arts.19 and 21, as it really was the case in Gopalan. Secondly, the total exclusion of the applicability of Art.19 to the validity of the impugned law, which deprived the petitioner's personal liberty in Art.21, notwithstanding the fact that the law has also directly and substantially infringed one of the freedoms guaranteed by Art.19(1), appears to be, it is submitted, clearly wrong and

unjustifiable.25 By such a calculated exclusion of Art.19, accomplished through the various theories, as mentioned above, the majority has successfully thwarted the attempt made by the petitioner's counsel, as an alternate strategy, to introduce the requirements of reasonableness as a protection against legislative deprivation of personal liberty in Art.21. Lastly, the restrictive and positivist theories which the Court has enunciated in order to exclude Art.19 has, ironically enough, recoiled on Art.19 itself, rendering the protection of the freedoms secured by that Article quite vulnerable against a law which deprives personal liberty in accordance with the minimal requirements of Art.21 read with Art.22.26

As elsewhere, here also on the inter-relationship of Arts.19 and 21, the dissenting judgement of Justice Fazl Ali struck a liberal and progressive note. He held the view that the scheme of the chapter dealing with the fundamental rights does not contemplate that each Article is a code by itself and is mutually exclusive. He said:

25. For the reasons stated in the beginning of this chapter.

26. For, the implication of the theories of 'deprivation'; 'exclusion or self-contained code'; and 'free citizen' seems to be that once a person is validly deprived of his personal liberty according to the requirements of Art.21 read with Art.22, he would cease to be a free man and would become incapable of excercising or enjoying his freedoms under Art.19(1), thus rendering Art.19 as a dependent and subservient right. See, Errabi, op.cit., pp.300-301.
"In my opinion it cannot be said that Arts.19, 20, 21 and 22 do not to some extent overlap each other. The case of a person who is convicted of an offence will come under Arts.20 and 21 and also under Art.22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with in Art.22, also amounts to deprivation of personal liberty which is referred to in Art.21, and is a violation of the right of freedom of movement dealt with in Art. 19(1) (d). That there are other instances of overlapping of articles in the constitution may be illustrated by a reference to Art.19(1) (f) and Art.31 both of which deal with right to property and to some extent overlap each other".27 (emphasis added).

Further, considering the argument that preventive detention not only takes away the right in Art.19(1) (d) but also takes away all the other rights guaranteed by Art.19(1), Fazl Ali J. observed:

"Where exactly this argument is intended to lead us to, I cannot fully understand, but it seems to me that it involves an obvious fallacy, because it

27. AIR 1950 SC 27, pp.52-53.
preventive detention operates on the right referred
overlooks the difference in the modes in which
to in sub cl.(d) and other sub-clauses of
Art.19(1). The difference is that while preventive
detention operates on freedom of movement directly
and inevitably, its operation on the other rights
is indirect and consequential and is often only
notional"28 (emphasis added).

Thus Fazal Ali J. appears to have held the view
that while all the distinct freedoms guaranteed under 19(1)
cannot be read into the right to personal liberty in Art.21,
there can be factual overlapping of some of the freedoms
such as the freedom of movement in Art.19(1)(d) and Art.21.
It is submitted that this theory of overlapping enunciated
by Fazl Ali J. should not be mistaken as a theory of total
inclusion or assimilation of Art 19(1) freedoms into the
right to personal liberty in Art.21.29

As regards the applicability of the criterion
under Art.19 to the validity of the deprivation of personal
liberty in Art.21 also the opinion of Fazl Ali J. has been
marked by a thorough constitutional realism. Referring to
the restrictive and exclusionary theories resorted to by the

28. Ibid., at pp.55-56.

29. Such a tendency is evident from the judgement of
Bhagwati J. in Maneka Gandhi V. Union of India, AIR
1978 SC 597. See, infra Ch.VI.
majority for the exclusion of Art.19. His Lordship rightly observed:

"There is nothing in Art.19 to suggest that it applies only to those cases which do not fall under Arts. 20, 21 and 22. Confining ourselves to preventive detention, it is enough to point out that a person who is preventively detained must have been, before he lost his liberty, a free man. Why can't he say to those who detained him: "As a citizen I have the right to move freely and you cannot curtail or take away my right beyond the limits imposed by cl.(5) of Art.19".... If he has been detained under some provision of law imposing restriction on the freedom of movement, then the question will arise whether the restrictions are reasonable".30

Further, even assuming that there exists no overlapping of rights and that the freedom of movement in Art.19(1) (d) has nothing to do with personal liberty, His Lordship held: "There can be no doubt that preventive detention does take away even this limited freedom of movement directly and substantially and, if so, I do not see

30. AIR 1950 SC 27, p.52.
how it can be argued that the right under Art.19(1) (d), is not infringed..."31 (emphasis added)

Thus, whether based on the theory of overlapping of the rights under Arts.19(1) (d) and 21 or otherwise, Fazl Ali J. concluded that 'preventive detention could not but be held to be a violation of the right conferred by Art.19(1) (d)' . He said:

"In either view, therefore, the law of preventive detention is subject to such limited judicial review as is permitted under Art.19(5). The scope of the review is simply to see whether any particular law imposes any unreasonable restrictions. Considering that the restrictions are imposed on a most valuable right, there is nothing revolutionary in the legislature trusting the Supreme Court to examine whether any Act which infringes upon that right is within the limits of reason".32

But, unfortunately Justice Fazl Ali's realistic appraisal of the relationship between Arts.19 and 21 did not find favour with the majority of the Court. Had it been so

31. Ibid., at p.55.
32. Ibid., at p.56.
that Court could have replenished the minimal standard of legality\(^ {33}\) in Art. 21 with some elements of reasonableness and thereby the Court could have secured at least a limited scope for judicial review of legislative deprivation of personal liberty in Art. 21.

The view held by the majority in Gopalan as to the exclusion of Art. 19 appears to have been followed by the Court in a few later cases\(^ {34}\) that came up immediately after Gopalan. For instance, Ram Singh v. State of Delhi,\(^ {35}\) the Court held that the petitioner, who was detained on the ground that he had been allegedly making speeches arousing communal hatred between the Hindus and the Muslims of Delhi, was not entitled to raise before the Court the question whether such speeches were entitled to constitutional protection under Art. 19.\(^ {36}\) Following the exclusionary theories laid down in Gopalan, the Court reiterated the position thus: "... a law which authorises deprivation of personal liberty did not fall within the purview of Art. 19

\(^{33}\) Art. 21, as construed by the majority in Gopalan, affords protection only against arbitrary executive action without the authority of law, the protection being the requirement that the executive should follow the procedure prescribed by a state-made law.

\(^{34}\) Ram Singh V. State of Delhi, AIR 1951 SC 270; State of Punjab V. Ajaib Singh, AIR 1953 SC 10; Collector of Malabar, V. Ibrahim, AIR 1957 SC 688.

\(^{35}\) AIR 1951 SC 270.

\(^{36}\) Ibid., p. 272.
and its validity was not to be judged by the criteria indicated in that Article but depended on its compliance with the requirements of arts.21 and 22..."37 The court, then, held: "It follows that the petitions now before us are governed by the decision in Gopalan's Case, notwithstanding that the petitioner's right under Art.19(1) (a) is abridged as a result of their detention under the Act".38

Thus, even admitting that the detention was made avowedly to take away the petitioner's freedom of speech guaranteed by Art.19, the Court refused to apply the criteria of reasonableness under that Article to test the validity of the detention.39 It is submitted that Ram Singh's Case seems to have brought to light the disastrous consequences that would ensue from an inflexible adherence to the exclusionary theories resorted to by the majority in Gopalan.

But, the triumph of the exclusionary theories as enunciated in Gopalan and reaffirmed in Ram Singh has proved to be short-lived. Through a series of subsequent decisions

37. Ibid.
38. Ibid.
39. For the criticism of Ram Singh's Case, See P.K. Tripathi, supra, n.11.
those theories have been knocked down by the court one after another.40

In Kochunni's Case,41 for the first time, the majority opinion in Gopalan on the inter-relationship of Arts.19 and 21 appears to have received a gentle knock from Justice Subba Rao who brought in the Supreme Court 'a new angle of approach to interpretation and enforcement of fundamental rights'.42 In this case the petitioner, a 'sthanee' of 'tarwad' was deprived of his properties under the Madras Marumakkathayam (Removal of Doubts) Act 1955, which provided that the properties of the sthanee 'shall be deemed and shall be deemed always to have been properties belonging to the tarwad'. The Act was challenged as violative of Arts.14, 19(1) (f) and 31.43 It was argued by respondent, obviously based on the reasoning of the majority in Gopalan, that Art.31(1) excluded the operation of Art.19(1)(f), for, a person's fundamental right under

40. The Court could not strictly adhere to the theory that Art.21 & 22 formed an exhaustive code relating to personal liberty in as much as it is obliged to hold that a law depriving 'personal liberty in Art.21 would be invalid if it violated the requirements of Art.14 or Art.20. See State of West Bengal V. Anwar Ali; AIR 1952 SC 284; Kathi Raning V. Saurashtra, AIR 1952 SC 123; Shiv Bahadur V. State U.P. (1958) SCR 1188.


42. M.C. Setalvad, op.cit., p.59.

Art.19(1) (f) to acquire, hold and dispose of property was conditioned by the existence of property and if he was deprived of that property by authority of law under Art.31(1), his fundamental right under Art.19(1) (f) would disappear with it.\textsuperscript{44}

Subba Rao J., speaking for the Court, pointed out, at the outset, the importance and the "transcendental position" of the fundamental rights in the Constitution, and said that it might be possible that the operation of a fundamental right in respect of a specific matter might be excluded either by any other Article in the Constitution or by an Article embodying another fundamental right.\textsuperscript{45} The Court said:

"But before such a construction excluding the operation of one or other of the fundamental rights is accepted, every attempt should be made to harmonise the two Articles so as to make them co-exist, and only if it is not possible to do so, one can be made to yield to the other. Barring such exceptional circumstances, any law made would be void if it infringes any one of the fundamental rights".\textsuperscript{46}

\textsuperscript{44} Ibid., at p.1089.

\textsuperscript{45} Ibid.

\textsuperscript{46} Ibid.
Then, considering the argument of the State that the validity of 'law' in Art.31 need not stand the test of Art.19(1)(f) read with Art.19(5), for, both the Articles are mutually exclusive, the Court held:

"... the law must satisfy two tests before it can be a valid law, namely, (1) that the appropriate legislature has competency to make the law; and (2) that it does not take away or abridge any of the fundamental rights enumerated in Part III of the Constitution. It follows that the law depriving a person of his property will be an invalid law if it infringes either Art.19 (1) (f) or any other article of Part III".  

Relying on the reasoning of the majority in Gopalan it was contended further by the respondent that "law" in Art.31(1) as in Art.21 was not to be subject to scrutiny in regard to its validity from the points of view of the various clauses of Art.19.  

Rejecting the above argument, Subba Rao J. appears to have distinguished the case from Gopalan, by maintaining that in Gopalan 'this Court held that the concept of the right" to move freely throughout the territory of India" referred to in

47. Ibid., at p.1092.

48. Ibid.
Art.19(1)(d) was entirely different from the concept of the right to "personal liberty" referred to in Art.21 and that Art.21 should not, therefore, read as controlled by the provisions of Art.19. Further, he said:

"Though the learned judges excluded the operation of Art.19 in considering the question of fundamental right under Art.21, the judgement of the Court discloses three shades of opinion.... The views of the learned judges may be broadly summarised under three heads, viz.,

(1) to invoke Art.19(1), a law shall be made directly infringing that right;

(2) Arts.21 and 22 constitute a self-contained code; and

(3) the freedoms in Art.19 postulate a free man".

Having referred to the above theories on the basis of which the Court in Gopalan had excluded Art.19 from the purview of 'law' in Art.21, Subba Rao J. held: "Had the question been res integra some of us would have been inclined to agree with the dissenting view expressed by Fazl Ali J., but we are bound by this judgement".

49. Ibid.
50. Ibid., at p.1093.
51. Ibid.
Thus, the judgement of justice Subba Rao, in Kochunni's Case appears to have clearly shaken the foundation of the exclusionary theories in Gopalan, in so far as he has refused to hold Arts.31 and 19(1) (f) as mutually exclusive self-contained codes. He has, infact, applied the criterion of reasonableness in Art.19(5) to test the validity of 'law' in Art.31.52 As regard Art.21, it is submitted that while he was expressing his 'inclination to agree with Fazl Ali J.'s dissenting view in Gopalan' he was really preparing the ground for the future. Further, it is submitted that the opinion of Subba Rao J. appears to have marked the beginning of an interesting process of introducing the judicial liberalism in property rights into the liberty jurisprudence in Art.21.53

In Kharak Singh's Case54 the majority of the Court did not consider the precise question of the inter-relationship between Arts.19 and 21.55 Nevertheless, while

52. This case was followed by K.T. Moopil Nair's Case (1961) 3 SCR.77 where the majority of the Court, including Subba Rao J., construing the word 'law' in Art.265, re-affirmed the position that "law" meant a law which could stand the tests of Arts.14, 19(1) (f) and 31, i.e. a valid law. Also it was followed by the Court in State of M.P. V. Ranojirao Shinde, AIR 1968 SC 1053.


54. Kharak Singh V. State of U.P. AIR 1963 SC 1295. For the details of this case, see, supra., Ch.III.

55. Ibid., at p.1301.
dealing with the 'scope and content of 'personal liberty' in Art.21 the majority held that 'personal liberty' in Art.21 was used as a 'compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of man other than those dealt with in several clauses of Art.19(1)' 56 In support of its view as to the non-inclusion of 'those elements or incidents of "liberty" already dealt with in Art.19(1) into the "liberty" guaranteed by Art.21', the majority referred to the insertion of the qualifying word "personal" before the expression "liberty" in Art.21, as well as to 'the context of the difference between the permissible restrictions which might be imposed by cls.(2) to (6) of Article 19 on the several species of liberty dealt with in the several clauses of art.19(1)'. 57 So far so good. But, the statement of the majority that 'while Art.9(1) deals with particular species or attributes of that freedom, 'personal liberty' in Art.21 takes in and comprises the residue', seems to indicate that it has not fully appreciated the possibility of factual overlapping between some of those freedoms in Art.19(1) and 'personal liberty' in Art.21. The majority seems to have, it is submitted, wrongly believed that the insertion of the

56. Ibid., at p.1302.
57. Ibid., at p.1301.
58. Ibid., at p.1302.
word "personal" before "liberty" in Art.21 was intended to 'avoid overlapping between those elements or incidents of "liberty"... dealt with in Art.19(1) and the "liberty" guaranteed by Art.21. In fact, the intention seems to have been only to avoid a total inclusion of all those distinct freedoms that are separately dealt with in Art.19(1) into the concept of 'personal liberty' in Art.21 through a wide construction. It is, further, submitted that there does not seem to exist any contradiction between the non-inclusion of Art.19(1) freedoms into the concept of 'personal liberty' in Art.21, as contemplated by the Constituent Assembly, and the possibility of a factual overlapping of some of those freedoms in Art.19(1) and the 'personal liberty' in Art.21, as Fazl Ali J. has rightly pointed out in Gopalan.

Justice Subba Rao, in his minority judgement, for himself and Shah J., appears to have agreed, as he promised in Kochunni, with the dissenting view of Fazl Ali J. in Gopalan on the question of interrelationship of Arts.19 and 21. Thus, Subba Rao J. held, unlike the majority, that

59. Ibid., at p.1301.
60. See, supra, n.5.
61. AIR 1950 SC.27, pp.52-55.
62. According to the majority, the Police Regulation violated only Art.21 and not Art.19(1) (d). See, AIR 1963 SC 1295, p.1303.
the impugned Police Regulations were violative of both Arts.19(1) (d) and 21; and proceeded to 'ascertain the scope of the said two provisions and their relation inter se. His Lordship held:

"Both of them are distinct fundamental rights. No doubt the expression "personal liberty" is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression "personal liberty" in Art.21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another" 63 (emphasis added).

And also as regards the applicability of Art.19 to the validity of 'law' in Art.21 Subba Rao. J appears to have disapproved the exclusionary theories of Gopalan 64 by declaring thus:

"If a person's fundamental right under Art.21 is infringed the State can rely upon a law to sustain

63. Ibid., at p.1305.
64. See, supra., ns.21, 22, 23 and 24.
the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Art.19(2) so far as the attributes covered by Art.19(1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Art.19(2) of the Constitution".65

Then, in Prabhakar Pandurung,66 Subba Rao J. speaking for the court, appears to have thrown overboard one of the exclusionary theories laid down in Gopalan. -- the theory that Art.19(1) freedoms postulate a free man.67 While rejecting the argument of the state that 'as the detenu is no longer a free man in view of his detention, his right to publish his book, which is only an attribute of personal liberty, is lost', the Court referred to 'five distinct lines of thought in the matter of reconciling


66. State of Maharashtra V. Prabhakar Pandurung, AIR 1966 SC 424. In this case the Court held that the right of a detenu to send the manuscript of a book written by him while he was in prison for publication was part of his right to "personal liberty" ibid., at p.426.

But the Court did not express any final opinion one way or the other on this matter.  

In Satwant Singh's Case, the right to go abroad was held to be a fundamental right forming part of personal liberty in Art.21. Of course, this case did not raise any controversy as to the applicability of Art.19 to the validity of 'law' in Art.21, obviously, for two reasons: on the one hand, admittedly there was no 'law' as required by Art.21; and on the other, right to go abroad is not explicitly guaranteed by any of the sub.cis of Art.19(1). But what makes this case relevant to the topic under discussion is the observation made by Subba Rao J., for the Court, on the interrelation between Arts. 19 and 21 in terms of their respective contents. While discussing the scope of personal liberty in Art.21, Subba Rao J. has made a thorough review of the previous decisions of the Court on the subject in Gopalan, Kochunni and Kharak Singh. Thus, referring to Kharak Singh, His Lordship said: "This Court, adverting to

69. Ibid.
70. Satwant Singh Sawhney V. Assistant Passport Officer, AIR 1967 SC 1836.
71. Ibid., at p.1845.
72. Ibid., at p.1842.
73. Ibid., at p.1843.
74. Ibid., at pp.1843, 1844;
the expression "personal liberty", accepted the meaning put upon the expression 'liberty' in the 5th and 14th Amendments to the U.S. Constitution by Field, J. in Munn V. Illinois (1879) 94 US. 113, but pointed out that the ingredients of the said expression were placed in two Articles, viz., Arts.21 and 19 of the Indian Constitution". Then he declared:

"This decision (in Kharak Singh) is a clear authority for the position that "liberty" in our Constitution bears the same comprehensive meaning as is given to the expression "liberty" by the 5th and 14th Amendments to the U.S. Constitution and the expression "personal liberty" in Art.21 only excludes the ingredients of "liberty" enshrined in Art.19 of the Constitution. In other words, the expression "personal liberty" in Art.21 takes in the right of locomotion and to travel abroad, but the right to move throughout the territories of India is not covered by it in as much as it is specifically provided in Art.19".76

Thus, it may be noticed that in Satwant Singh too Subba Rao J. appears to have rightly maintained the theme of

75. Ibid., at p.1844.
76. Ibid.
non-inclusion of Art.19(1) freedoms into the concept of personal liberty in Art.21, even while giving the most liberal and comprehensive meaning and scope to that concept.

R.C. Cooper's Case And the Emergence of The 'Alternate Strategy':

In R.C. Cooper v. Union of India, the Supreme Court appears to have completely demolished the exclusionary theories propounded by the majority in Gopalan. It was argued in this case that Art.31(2) and Art.19(1) (f), while operating on the same field of the right to property, were mutually exclusive, and therefore a law directly providing for acquisition of property for a public purpose could not be subjected to the test of reasonableness for its validity on the plea that it imposed restrictions on the right to acquire, hold and dispose of property as guaranteed by Art.19(1) (f). Thus the Court was obliged to consider the question of inter-relation between Arts.19 and 31, once again.

Shah J., speaking for the Court, rejected the above argument and held that Art.19(1) (f) enunciated the right to acquire, hold and dispose of property, and

77. AIR 1970 SC 564 or the Bank Nationalisation Case.
78. Ibid., at p.592.

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Art.19(5) as well as cls.(1) and (2) of Art.31 prescribed restrictions upon State action, subject to which the right to property might be exercised; and that 'the true character of the limitations under the two provisions was not different'.  

Therefore, according to the Court a 'law' providing for acquisition of property, to be valid, should comply not only with the requirements of Art.31(2), but also with the requirements of reasonableness under Art.19(5); and, hence, Arts.19(1) (f) and 31(2) could not be held to be mutually exclusive.

While laying down the above proposition, the Court had to reverse a large number of previous decisions where it had ruled that Art.19(1) (f) and Art.31(2) were mutually exclusive. And in that process, it appears to have been necessary and inevitable for the Court to shatter the very foundation of those previous decisions, namely, the Gopalan dictum on the exclusion of Art.19 in testing the validity of a law made under an Article outside Art.19. The Court has

79. Ibid., at p.596.
80. Ibid., at 596-597.
81. Ibid., at p.597.
83. Ibid., at p.593; see, D.D. Basu, op.cit., p.240.
rightly perceived the theoretical obstacle posed by Gopalan and observed thus:

"This case (Gopalan) has formed the nucleus of the theory that the protection of the guarantee of a fundamental freedom must be adjudged in the light of the object of State action in relation to the individual's right and not upon its influence upon the guarantee of the fundamental freedom, and as a corollary thereto, that the freedoms under Articles 19, 21, 22 and 31 are exclusive - each article enacting a code relating to protection of distinct rights." 84

Faced with such a perspective, the Court first referred to each one of those exclusionary theories 85 enunciated by the majority judges in Gopalan; 86 and then showed how those theories had got entrenched into the field of property rights through several cases 87 where the Court was led to the conclusion that Art. 19 and 31 were mutually exclusive. 88

84. Ibid., at p. 593.
85. Supra, f.n. 21, 22, 23 and 24.
86. AIR 1970 SC 564, pp. 593-94.
87. Supra., n. 82.
Then, the Court seems to have taken note of the process of steady and gradual erosion of those theories, as it began in Kochunni's Case\(^89\) and carried through by several other decisions\(^90\) that followed Kochunni, in the field of property rights.\(^91\)

Having made such an extensive and exhaustive survey of the previous decisions on the issue, the Court held:

"We have carefully considered the weighty pronouncements of the eminent judges who gave shape to the concept that the extent of protection of important guarantees, such as the liberty of person; and right to property, depends upon the form and object of the state action, and not upon its direct operation upon the individual's freedom. But it is not the object of the authority making the law impairing the right of a citizen, nor the he can claim: it is the effect of the law and of form of action taken that determines the protection

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90. Swami Motor Transport Co. V. S.S. Swamigal Mutt, AIR 1963 SC 804; Maharana Shri Jayavant Singhji V. State of Gujarat, AIR 1962 SC 821. These cases followed Kochunni's ruling that Art.19(1)(f) and Art.31(1) are not mutually exclusive, and that 'law' in Art.31(1) should stand the test of reasonableness under Art.19(5). Then State of Madhya Pradesh V. Ranjijirao Shinde, AIR 1968 SC 1053, where the Court ruled that Arts.31(2) and 19(1)(f) are not mutually exclusive.

91. AIR 1970 SC 564, pp.592, 596.
the action upon the right which attract the jurisdiction of the Court to grant relief. If this be the true view and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined neither by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual rights".92

Based on the above reasoning, the Court finally declared thus:

"Limitations prescribed for ensuring due exercise of the authority of the state to deprive a person of his property are, therefore, specific classes of limitation on the right to property falling within Art.19 (1) (f).... If the acquisition is for a public purpose, substantive reasonableness of the restriction which includes deprivation may, unless otherwise established, be presumed, but enquiry into reasonableness of the procedural provisions will not be excluded93... we are unable, therefore, to agree that Article 19(1) (f) and 31(2) are mutually exclusive."94

92. Ibid., at pp.596-97.
93. Ibid., at p.596.
94. Ibid., at p.597.
Thus, by the above ruling the Court appears to have redeemed the protection of property rights from the grips of the exclusionary theories and re-stated authoritatively the inter-relation between Arts.19(1) (f) and 31. And in doing so, the Court seems to have completely extinguished the exclusionary theories, enunciated by the majority judges in Gopalan, which had governed the inter-relation between Arts.19 and 21 and had sustained the ruling that Arts.19(1)(d) and 21 were mutually exclusive. Such an exercise was necessary for the Court because, those were precisely the theories that governed the inter-relation between Art.19 and 31 as well, and sustained the ruling that Arts.19(1) (f) and 31 were mutually exclusive.\(^{95}\) Thus,

\(^{95}\) It is this aspect of the decision which makes Cooper still more significant and relevant to the present discussion. But, unfortunately the eminent jurist H.M. Seervai, while making a scathing attack on Cooper, appears to have overlooked this aspect. His criticisms that in Cooper the Court "Went out of its way" to consider the correlation of Art.19(1) (f) to Art.31(2), and overruled a long line of decisions which had "settled the law"; and that there was absolutely no justification for "purporting to overrule Gopalan" seem to have totally disregarded the context of the arguments as well as the theoretical compulsions in Cooper which made the Court to consider those issues. See Seervai, Constitutional Law of India, op.cit., p.717; and Seervai, The Bank Nationalisation Case, (Lecture Delivered at University of Bombay, April, 1970), pp.5-6. On the contrary, D.D. Basu, rightly maintains that what was necessary for the Court to consider those issues in Cooper, and he also agrees with the views taken by the Court on these issues. See Basu, op.cit., p.240-241.
inflicting the direct and decisive death-blow to the exclusionary theory in Gopalan, the Court declared:

"In our judgement, the assumption in A.K. Gopalan's Case... that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the state action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct".  

Thus, the basic 'assumption' on which the inter-relation between Arts. 19 and 21 had been founded by the majority in Gopalan the proposition that Art. 22 is a complete self-contained code relating to preventive detention' as its major premise of basic assumption. It is true that at one place in his judgement, Shah J. said that the majority in Gopalan held Art. 22 as a complete self-contained code relating to preventive detention. It may also be true, from a legalistic angle, that the statement is factually inaccurate, for, admittedly, the majority judges in Gopalan, except Mahajan J., seem to have allowed Art. 21 also to be in company with Art. 22. But there is nothing in the judgement of Shah J. to suggest that he treated the above statement as major premise or the basic
majority judges in *Gopalan* appears to have been clearly and categorically diapproved by a larger Bench of the Court in *Cooper*. Having disapproved the exclusionary theories of *Gopalan*, the Court appears to have enunciated a new, liberal and comprehensive constitutional theory, which, it is submitted, can appropriately be called as the 'integral theory', in order to govern the inter-relationship of the

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assumption of the majority opinion in *Gopalan*. Seervai appears to have attempted to project a theory, based on the above statement of Shah J., that there occurred "fundamental error" in *Cooper* and the entire decision is based on that fundamental error and therefore the entire decision in *Cooper* is erroneous. It is respectfully submitted that the attempt of Seervai to project such a theory seems to be misconceived and misleading. See, Seervai, *Constitutional Law, op.cit.*, pp.718-19. Moreover, though Shah J.'s statement suffers from a formal inaccuracy, on merits and in substance his statement appears to be correct. In the context of the challenge to the validity of Preventive Detention Act in *Gopalan*, as Seervai himself admits (see id. at p.724), Art.14 was not invoked; and Arts.19 21 and 22 were invoked. Admittedly, the majority judges, including Mahajan J., completely excluded Art.19 from the purview of the scrutiny. Even Art.21 was excluded by Mahajan J., whereas the other majority judges did not do so. But it is to be noted that in view of the positivist interpretation of the expression "procedure established by law" in Art.21 as 'procedure prescribed by a state-made law; Art.21 cannot be a limitation on the power of the State to make any law, including a preventive detention law. That being the case, a preventive detention law, being a 'State-made law' becomes a law unto itself, provided it complies with the requirements of Art.22; and the applicability of Art.21 to that law is of little consequence in the context of the majority decision in *Gopalan*. Therefore in substance, if not in form, the statement of Shah J. in *Cooper* appears to be correct.

98. A Bench of eleven Judges, with the lone dissent of A.N.Ray J.
fundamental rights in Part III of the Constitution. The new theory seems to suggest that the validity of laws infringing fundamental rights should be adjudged with reference to the particular right that is being infringed and with reference to the effect of the direct operation of the law upon the right; and not with reference to the object of the legislator or the form of State action.\(^99\) And it is based on this new 'integral theory' that the Court has construed harmoniously Arts.19(1) (f) and 31, so as to make any law providing for deprivation or acquisition of property in Art.31 answerable to the test of reasonableness under Art.19.\(^100\) And, it is submitted that in no way the interrelation between Arts.19 and 21 can escape from the reach of this new 'integral theory' which has, as shown above, displaced the exclusionary theory from the realm of Part III of the Constitution.\(^101\) Whether the Court has succeeded in employing properly and fully this new theory in subsequent cases,\(^102\) involving deprivation of personal liberty in Art.21 is a different question altogether. But, it is submitted, Cooper can reasonably be said to have paved

\(^99\) AIR 1970 SC 564, p.596.

\(^100\) Ibid.

\(^101\) Ibid.

\(^102\) For instance, S.N.Sarkar V. State of West Bengal, AIR 1973 SC 1425; Haradhan Saha V. West Bengal, AIR 1974 SC 2154; Fagu Shah V. West Bengal, AIR 1974 SC 613; Khudiram V. West Bengal, AIR 1975 SC 550 etc.

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the way for the smooth importation of the requirements of reasonableness from Art.19(1) (d) read with Art.19(5) as a protection for personal liberty in Art.21.\textsuperscript{103} Thus, the 'alternate strategy' adopted by Fazl Ali J.\textsuperscript{104} in Gopalan and by Subba Rao J. in Kharak Singh\textsuperscript{105} to secure the standard of reasonableness as a protection for personal liberty in Art.21 through an integral approach towards the inter-relation between Art.19 and 21 appears to have been made possible by the Supreme Court in Cooper's Case.

**The 'Alternate Strategy' and the Protection of Personal Liberty:**

The impact of Cooper on the inter-relation between Arts.19 and 21 came to be considered by the Court in S.N.Sarkar V. State of West Bengal.\textsuperscript{106} In this case, the petitioner, who was preventively detained under the Maintenance of Internal Security Act, 1971, (MISA) challenged the validity of his detention on the ground that

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\textsuperscript{104} AIR 1950 SC 27, p.52, see, supra., f.n.30.

\textsuperscript{105} AIR 1963 SC 1295.

\textsuperscript{106} AIR 1973 SC 1425.
Sec.17A of the 'Act' did not prescribe both the circumstances under which, and the class or classes of cases in which a person might be detained for a longer period than three months without obtaining the opinion of an Advisory Board, as required by Art.22(7)(a). A larger Bench of seven judges overruled Gopalan on the interpretation of Art.22(7)(a), and held Sec.17A invalid on the ground that it did not comply with requirements of Art.22(7) (a).107

Referring to the argument of the Attorney-General that the majority decision in Gopalan has stood for such a long time that it should not be disturbed, the Court observed: "since the matter involves the right of personal liberty, the fact that the decision has held the field should not by itself be a deterrent against its reconsideration".108 In this context the Court referred to Cooper and said: "Further, the major premise in the majority decision (in Gopalan) that Art.22 was a self-contained code and that therefore the provisions of a law permitted by that Article would not have to be considered in the light of the provisions of Art.19 was disapproved in R.C.Cooper V. The Union of India...."109

107. Ibid., at p.1441.
108. Ibid., at p.1435.
109. Ibid.
Again, faced with another argument of the petitioner, challenging the validity of the Act with reference to Art.14, Shelat A.C.J., speaking for the Court, held:

"In Gopalan... the majority Court had held that Art.22 was a self-contained code and therefore a law of preventive detention did not have to satisfy the requirement of Arts.19,14 and 21 ... the aforesaid premise of the majority in Gopalan... was disapproved and therefore it no longer holds the field. Though Cooper's Case... dealt with the inter-relationship of Art.19 and Art.31, the basic approach to construing the fundamental rights guaranteed in the different provisions of the Constitution adopted in this case held the major premise of the majority in Gopalan... to be incorrect".110

Thus, the Court appears to have held the view the Cooper disapproved the Gopalan premise that Art.22 was a self-contained code relating to preventive detention to the total exclusion of Arts.14,19 and 21. And by necessary implication the Court in S.N.Sarkar can be said to have held that a preventive detention law should stand the test not

110. Ibid., at p.1441.
only of Art.22, but also of Arts.14, 19 and 21 in view of the 'basic approach' in Cooper.

However, it is respectfully submitted that the judgement of Shelat A.C.J. appears to suffer from certain infirmities, which he could have avoided without any fear of contradiction with his unqualified approval of the authority of Cooper. For instance, the reference to Art.14, in his statement that the majority in Gopalan held that 'Art.22 was a self-contained code and a law of preventive detention did not have to satisfy the requirements of Arts.19, 14 and 21' is plainly incorrect and misleading. For, the applicability of Art.14 to the scrutiny of the Preventive Detention Act was not at all in question in Gopalan and so was not dealt with by any of the judges in that case. Similarly, in the course of his judgement, Shelat A.C.J. seems to have created an impression that the court in Cooper has treated the above statement as the 'major premise in the majority opinion' in Gopalan. This imputation also does not seem to be correct. The judgement of the Court in Cooper does not contain any statement to that effect. On the contrary, Shah J. has explicitly stated what he considered as the basic assumption in Gopalan. According to him the

111. Seervai also points out this error and criticises it. See, H.M. Seervai, Constitutional Law of India, op.cit., p.724-25.

assumption was that certain Articles in the Constitution deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored". It was that assumption which Shah J. held as incorrect in Cooper. And it was the disapproval of that assumption that led to the negation of the exclusionary theories enunciated by the majority judges in Gopalan; including the theory that Art.22 is a self-contained code. But, unfortunately this aspect of Cooper appears to have been completely missed by the Court not only in S.N. Sarkar but also in the subsequent cases as well.

Besides, it is submitted, the Court does not seem to have fully appreciated the sweep and depth of the theory that the validity of laws affecting fundamental rights should be judged with reference to the effect of the direct operation of the law upon right and not with reference to the object of the legislator, as laid down in Cooper. This theory seems to be larger and broader than the mere

113. Cooper, op.cit., p.596.
disapproval of the so called 'major premise of the majority in Gopalan' that Art.22 was a self-contained Code.

Further, in S.N.Sarkar's Case the Court could have reconsidered Gopalan on the correlation of Art.19 to Arts.21 and 22 and ré-stated the inter-relationship of those Articles in the light of the above said integral theory propounded in Cooper. The Court could have done so especially in view of the fact that, unlike in Cooper, the fact situation that obtained in this case which involved deprivation of personal liberty, provided an appropriate opportunity and context to reconsider Gopalan on the inter-relation between Arts.19 and 21; and that, this case was heard by a larger Bench of seven judges. But unfortunately the Court appears to have failed to take advantage of the opportunity in S.N.Sarkar to reconsider Gopalan and to re-state the interrelation between Arts.19 and 21 based on the new theory in Cooper.

In Haradhan Saha v. West Bengal, the constitutional validity of the MISA was challenged as violative of Arts.14, 19, 21 and 22(5). The petitioners argued, obviously taking the cue from Cooper, that the Act was reasonable and so was violative of Art.19 in as much as

114. AIR 1974 SC 2154.
the Act did not make any provision for objective
determination of the facts on which the order of detention
could be based; that the Act violated Art.21 because the
guarantee of a right to be heard was infringed; that
Art.22(5) was violated because the Act did not provide for a
just procedure ensuring an impartial consideration of the
detenu's representation by the government; and finally that
the Act violated Art.14 because it permitted
discrimination. The Court, led by Ray C.J., upheld the
validity of the Act on the ground that it did not suffer
from any constitutional infirmity. Irrespective of the
correctness or otherwise of the decision as to the validity
of the Act on merits, it is respectfully submitted that the
judgement of Ray C.J. seems to unfold a disturbing tendency
to relapse into the Gopalan syndrome on the question of the
interrelationship of Arts.19 and 21, Cooper and S.N.Sarkar
notwithstanding.

Considering the arguments with reference to
Art.19, Ray C.J. said:

"It is not possible to think that a person who is
detained will yet be free to move or assemble or

116. Supra, n.114.
117. Ibid., at p.2160.
form association or unions or have the right to reside in any part of India or have the freedom of speech or expression... A law which attracts Art.19 therefore must be such as is capable of being tested to be reasonable under clauses (2) to (5) of Art.19.\textsuperscript{119}

Evidently, the above statement of the Court seems to echo only the exclusionary theory held by Das J. in Gopalan that 'Art.19(1) freedoms postulate a free man';\textsuperscript{120} and not the disapproval of that theory in Cooper.

Perhaps, having realised the binding nature of the decision in Cooper, Ray C.J. (who, significantly enough, was the lone dissenter in that case) observed: "This Court in A.K. Gopalan V. State of Madras... held that Article 22 is a complete code and Article 19 is not invoked in those cases. It is now said that the view in Gopalan's case... no longer holds the field after the decision in the Bank Nationalisation case...."\textsuperscript{121} Having, thus, acknowledged, though half-heartedly, the authority of Cooper, he added: "We may proceed on the assumption that the Act which is for

\textsuperscript{119} AIR 1974 SC 2154, p.2157.
\textsuperscript{120} Supra., f.n.24.
\textsuperscript{121} AIR 1974 SC 2154, p.2158.
preventive detention may be tested with regard to its reasonableness with reference to Article 19". 122

On the face of the challenges to the validity of preventive detention based on Art.19, the Court could have considered and declared the true inter-relationship of Arts.19, 21 and 22 on the basis of the principles laid down in Cooper. But the Court appears to have preferred only to proceed on an 'assumption' as to the applicability of Art.19 to test the validity of the Act. Even to this 'assumption', it is submitted, the Court appears to have given only a lip-service. Instead of scrutinising the validity of the impugned Act for preventive detention on the touchstone of reasonableness under Art.19, as Cooper or at least the 'assumption' as to Cooper would require, Ray C.J. seems to have attempted only to establish that the impugned Act incorporated all the procedural safeguards enshrined in Art.22.123 Reverberating the tone of the legal positivism of Gopalan,124 Ray C.J. said:

"Principles of natural justice are an element in considering the reasonableness of a restriction where Article 19 is applicable.... Elaborate rules

122. Ibid.

123. Ibid., at pp.2058-59.

124. See supra., Ch.IV.

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of natural justice are excluded either expressly or by necessary implication where procedural provisions are made in the statute.... If a statutory provision excludes justice then the Court does not completely ignore the mandate of the legislature".  

Ironically enough, the nations of justice and reasonableness seem to have been made subservient to positive law, thereby completely reversing the equation between justice and positive law.  

Finally, disclosing his subjective mind, Ray C.J. said:

"Art.22 which provies for preventive detnetion lays down substantive limitations as well as procedural safeguards. The principles of natural justice in so far as they are compatible with detention laws find place in Art.22 itself and also in the Act. Even if Article 19 be examined in relation to preventive detention, it does not increase the

125. AIR 1974 SC 2154, p.2159.

126. For a detailed discussion about the implications of liberty as a constitutional guarantee and of judicial review and 'due process', see Part I of this study.
content of reasonableness required to be observed in respect of orders of preventive detention”. 127

It appears from the above conclusion that to Ray C.J. Art.22 still remains to be a self-contained code relating to preventive detention, a thesis which 'no longer holds the field after the decision in the Bank Nationalisation Case', as he himself has acknowledged at the beginning of his judgement. 128 It is respectfully submitted that the opinion of Ray C.J. in Saha's Case appears to denigrate not only Cooper, but also the very concept of reasonableness as a protection against the legislative vagaries. 129 As Prof. Ghouse 130 has observed, 'it was expected that with the help of Cooper the Court would release the right to life and liberty from the shackles of Gopalan and extend the protection due to it. The opinion of Ray C.J. in Saha's Case has reduced this promise of Cooper to the vanishing point'.

127. Supra n.125, pp.2159-60.
128. Ibid., at p.2158.
129. For, according to Ray C.J. even if Art.19 is applicable to a preventive detention law, the criteria of reasonableness in Art.19 becomes inert and is of no consequence, for, it 'does not increase the content of reasonableness' of such a law provided it complies with the requirements of Art.22.
But in *Khudiram V. West Bengal*, Bhagwati J. appears to have retrieved to some extent the promise of *Cooper* from 'the vanishing point' to the point of visibility. In this case the petitioner who was detained under the MISA challenged the constitutional validity of the Act as well as the order of detention thereunder on the ground, *inter alia*, that Sec.3 of the Act, in so far as it empowered the detaining authority to exercise the power of detention on the basis of its subjective satisfaction, imposed unreasonable restrictions on the fundamental rights of the petitioner under Art.19(1) and therefore was void.\(^{132}\)

Dealing with the above challenge under Art.19 to the validity of preventive detention, Bhagwati J. held:

"The view taken by the majority in *A.K. Gopalan V. State of Madras*... was that Article 22 is a self-contained code, and therefore, a law of preventive detention does not have to satisfy the requirements of Articles 14, 19 and 21 .... In *Rustum Cavasjee Cooper V. Union of India*... it was held by a majority of judges... that though a law of preventive detention may pass the test of Article 22, it is yet to satisfy the requirements of other

\(^{131}\) AIR 1975 SC 550.

\(^{132}\) Ibid., at p.558.
fundamental rights such as Article 19. The ratio of the majority judgement in **R.C. Cooper's Case**... was explained in clear and categorical terms by Shelat, J... in **Sambhu Nath Sarkar V. State of West Bengal**... subsequently in **Haradhan Saha V. State of West Bengal**... a Bench of five judges... proceeded on the assumption that the Act which is for preventive detention has to be tested in regard to its reasonableness with reference to Article 19. That decision accepted and applied the ratio in **Sambhu Nath Sarkar's Case**... as well as **R.C. Cooper's Case**... This question, thus, stands concluded and a final seal is put on this controversy and in view of these decisions, it is not open to any one now to contend that a law of preventive detention, which falls within Art.22, does not have to meet the requirement of Art.14 or Art.19".133

Thus, unlike in Saha's case where Ray C.J. was prepared to proceed only on an "assumption" as to the authority of Cooper, in Khudiram, Bhagwati J. appears to have asserted unequivocally on the authority of Cooper, that a law of preventive detention which falls within Art.22 must have to meet the requirements of Arts.14 and 19 as well.

133. Ibid., at pp.558-59.
Nevertheless, it is respectfully submitted that the above assertion of Bhagwati J. in this case, though desirable, does not seem to have been based on sound reasoning, for, the reasoning appears to have proceeded on a series of presumptions rendering His Lordship's review of the previous decisions of the Court far from satisfactory.

For instance, while referring to Gopalan,\textsuperscript{134} Bhagawati J. seems to have repeated the error contained in the judgement of Shelat A.C.J. in S.N.Sarkar's Case in so far as the reference to Art.14 was concerned. As has been shown earlier,\textsuperscript{135} the applicability of Art.14 to preventive detention was an a non-issue in Gopalan's Case. Then, while referring to Cooper, Bhagwati J. appears to have presumed that the Court in that case had overruled Gopalan on the precise question of inter-relationship of Arts.19, 21 and 22 and had "held" that 'though a law of preventive detention may pass the test of Art.22, it is yet to satisfy the requirements of Art.19'. And it is presumed, further, by His Lordship that this ratio of R.C.Cooper's Case was "explained in clear and categorical terms" by Shelat, J. in S.N. Sarkar's Case. But these presumptions, it is submitted, do not seem to be well founded. As it has already been shown,\textsuperscript{136} in Cooper the Court enunciated a new

\textsuperscript{134} AIR 1950 SC 27.

\textsuperscript{135} See supra., p.370.

\textsuperscript{136} See supra., p.367.
integral theory' after disapproving the theoretical 'assumption' which sustained the exclusionary theories that were laid down in Gopalan. And on the basis that new theory the Court harmoniously construed Arts.19(1) (f) and 31 and held that any law providing for deprivation or acquisition of property in Art.31 must be answerable to the test of reasonableness under Art.19.\textsuperscript{137} And the extension of this new theory to the interrelationship of Arts.19, 21 and 22 was wisely left to be accomplished by a future Bench in an appropriate case involving deprivation of personal liberty. And in S.N. Sarkar's Case, though such an appropriate opportunity was available, the Court, unfortunately, failed to undertake a systematic extension of the theory in Cooper to the realm of personal liberty in Art.21 and to its interrelation with Art.19. Instead of overruling Gopalan on the inter-relationship of Arts.19, 21 and 22 on the basis of Cooper, Shelat A.C.J. appears to have assumed without any explanation that Cooper had overruled Gopalan.\textsuperscript{138} This unexplained assumption of Shelat A.C.J. as to the overruling of Gopalan can hardly be said to have 'explained' the "ratio" of Cooper in "clear and categorical terms".

Further, in the light of the earlier analysis\textsuperscript{139} of the judgement of Ray C.J. in Haradhan Saha's Case, it is

\begin{itemize}
\item[137.] Cooper, \textit{op.cit.}, p.596.
\item[138.] See supra, p.372.
\item[139.] See supra, p.377.
\end{itemize}
submitted that Bhagwati J.'s reliance on Saha's Case as "having finally laid at rest" all questions regarding the applicability of Art.19 to test the validity of a preventive detention law seems to be incredible. As a natural consequence of these presumptions on which Bhagwati J. seems have proceeded in Khudiram's Case, the Court has once again failed to undertake complete re-appraisal of Gopalan on the specific question of the inter-relation between Arts.21 and 19 in the light of the integral theory enunciated in Cooper. Thus, it is submitted that in spite of the repeated assertions of the Court in Sarkar, Saha and Khudiram as to the applicability of Art.19 to test the validity of a law of preventive detention which falls within Art.22, a systematic reconsideration of Gopalan and a restatement of the inter-relation between Arts.21 and 19 on the basis of a reasoned and principled extention of the Cooper thesis to the realm of personal liberty seems to have eluded the Court throughout the period under survey. And such a reasoned and principled extention of the theory in Cooper to the field of personal liberty would have led the Court to consider and adopt the dissenting opinion of Fazl Ali J.\textsuperscript{140} in Gopalan and the minority opinion of Subba Rao J.\textsuperscript{141} in Kharak Singh on the question of the inter-relation between Arts.21 and

\textsuperscript{140} AIR 1950 SC 27, pp.52-53.

\textsuperscript{141} AIR 1963 SC 1295, p.1305.
And such a course would have further led the Court to consider comprehensively the two specific issues pertaining to the problem of the inter-relation between those two Articles, i.e., the issue whether the distinct freedoms separately dealt with in Art.19(1) could be read into the concept of 'personal liberty' in Art.21; and whether the criterion of reasonableness in Art.19 would be applicable to test the validity of a law providing for the deprivation of personal liberty in Art.21. But, unfortunately that was not to be; the Court seems to have adopted a course of limited extension of the Cooper thesis through an over-simplified assertion as to the applicability of Art.19 to a law relating to preventive detention which falls within Art.22.

Curiously enough, in Sarkar, Saha and Khudiram the Court has not even referred to these memorable dissenting opinions of Fazl Ali and Subba Rao JJ. This omission on the part of the Court in the wake of Cooper, especially while dealing with the inter-relation between Arts.21 and 19 seems to be surprising.

For, the Court, in dealing with this issue, seems to have looked at it from the narrow and limited perspective of the applicability of Art.19 to a preventive detention law under Art.22, instead of adopting a broader perspective of the applicability of Art.19 to any law providing for the deprivation of personal liberty in Art.21, including, of course, a law of preventive detention.

For, the assertions have not been supported and substantiated by any reasoned arguments, explaining the theoretical principles on which they are founded.
Thus the above survey of the Supreme Court decisions form Gopalan to Khudiram on the inter-relation between Arts. 21 and 19 leads to a few important inferences. As regards the inter-relationship of these two Articles in terms of their respective contents, the view that has emerged through judicial process during this period seems to be this: The concept of personal liberty in Art. 21 does not include the distinct freedoms separately dealt with in Art.19(1), though there may be factual overlapping to some extent between some of the independent rights in Art.19(1) and the right to personal liberty in Art.21. And on the question whether and to what extent and on what principles the standard of reasonableness in Art.19 is applicable to test the validity of a law providing for the deprivation of personal liberty in Art.21, the most satisfactory answer seems to have been provided by the dissenting opinion of Fazl Ali J.\textsuperscript{145} who appears to have viewed the invocation of Art.19 as an 'alternate strategy' to secure a meaningful protection to personal liberty in Art.21. Though the opinion of Fazl Ali J., found favour with Subba Rao J.\textsuperscript{146} in later cases, it could not be construed to be the opinion of the Court due to the formidable obstacle posed by the exclusionary theories enunciated by the majority judges in

146. In Kharak Singh, op.cit.
which, by that time, had come to be a "hardened precedent" on the issue. But the liberlism evinced by the Court in Kochunni in the field of property rights has eventually led in Cooper to the total and categorical disapproval of the exclusionary theories by the Court. The disapproval of the exclusionary theories by the Court in Cooper has removed the theoretical obstacles to re-state the inter-relation between Arts. 21 and 19 so as to make any law providing for the deprivation of personal liberty in Art.21 answerable to the test of reasonableness under Art.19 in so far as that law infringes any of the freedoms in Art.19(1). That is to say, Cooper has promised the resurgence of the liberal views of Fazl Ali.J and Subba Rao J. on the inter-relation between Arts.19 and 21. But in the post-Cooper decisions during the period under survey the Court has failed to realise fully and properly the promise of Cooper, though the promise as such has been kept alive by the Court by virtue of its repeated assertions as to the authority of Cooper.

Thus during the period that separates Maneka from Gopalan though the Court has given the most comprehensive

147. See, supra., ns.21,22,23 and 24.


149. AIR 1960 SC 1080.

meaning and expansive scope for the concept of personal liberty in Art.21, the nature and extent of protection secured to that concept has continued to be grossly inadequate or even illusory. The positivist interpretation of the expression "procedure established by law" has rendered the standard of protection for personal liberty in Art.21 as inert and illusory. Even the 'alternate strategy', envisioned by Fazl Ali and Subba Rao JJ., to secure the requirements of reasonableness as a protection for personal liberty in Art.21 through the invocation of Art.19 has not come to be fully realised. This apparent asymmetry between the liberal meaning given to 'personal liberty' and the minimal and restrictive protections secured to that right has been a characteristic feature of the judicial process vis-a-vis the right to personal liberty in Art.21 ever since Gopalan. A departure from this course of asymmetric development of the right to personal liberty appears to have taken place for the first time in Maneka Gandhi's Case where the Court has adopted an integral approach towards the interpretation of Art.21, ushering into a new era in the history of liberty jurisprudence in India, which is dealt with in the ensuing chapter.

151. See supra, Ch.III.
152. See supra, Ch.IV.
PART III

PERSONAL LIBERTY AND JUDICIAL PROCESS:
THE MANEKA ERA