CHAPTER V

RIGHTS OF THE ACCUSED AND CONSTITUTIONAL PROTECTION IN CASE OF PREVENTIVE DETENTION

“Rule a Kingdom by the Normal” – are the words uttered by the Chinese Saint, Lao Tse

The reasons –

“The more prohibition there are, the poorer the people become.
The more sharp weapons there are, the greater the chaos in the State.
The more skills of technique, the more cunning things are produced.
The greater the number of statutes, the greater the number of thieves and brigands.”

To rule by the above-mentioned principle of governance, however, needs courage of conviction in those who govern and self-awakening among the governed. ‘We the people’ no doubt have a democratic Constitution but we are yet to become democrat, constitutionally and conscientiously. That apart, man being a complex multidimensional being, including within him different elements of matter, life, consciousness, intelligence and the divine spark, is free when he acts from the highest level and uses the other elements for the realization of his purpose but when he is on the level of objective nature – “when he does not recognize distinction between self and non-self, he becomes a slave to the mechanism of nature. Hence the necessity of multiple laws to govern the human conduct on “the level of objective nature.”

The above observations seem to justify the multiplicity of laws by which we are governed. But certain laws are of a different nature and preventive detention happens to be one of them. Laws are basically spelled out to govern and regulate behaviour of man and various activities in connection with him. If a person deviates from these express provisions of law he is punished for the same. Hence it may be termed as punitive. There is a significant distinction between punitive and preventive detention. As far as

1 Justice S.R. Singh, “Inter Chapter” in S.S. Lal, Bharat’s Preventive Detention in India 7 (2000).
2 Ibid.
punitive detention is concerned a person is detained by way of punishment after he is found guilty of wrong doing as a result of a trial where he has had every opportunity to defend himself, whereas the other detention is not by way of punishment at all, the person has not committed any crime for which he is to be detained, but it is intended to pre-empt a person from indulging in any conduct injurious to the society. There is no authoritative definition of the term “Preventive Detention” but may be explained by stating that in this case a person is detained merely on suspicion with a view to prevent him from doing harm in future, to restrict him from indulging in nefarious activities detrimental to the state and to the society at large. In the Indian context the term preventive detention implies detention of a person by an executive order with a view to preventing him from endangering the security of the state, disturbing public order or essential supplies and services or adversely affecting other specified objects of public interest.3

Article 22 of the Constitution may be divided into two. Article 22(1) and (2) deal with right under ordinary detention, i.e. punitive detention whereas article 22 (3) to (7) deals with rights of the accused under preventive detention.

A. Detention

a) Right to be informed of grounds of arrest
Article 22(1) and (2) deals with arrest by a non-judicial authority upon an accusation which is of a criminal or quasi criminal in nature.4 It follows that clauses (1) and (2) does not apply to arrests which are made under a warrant of the Court, since such a person is made aware of the grounds of his arrest before the arrest is actually effected5 nor is it applicable to imprisonment on conviction by Court.6

The provision that a person to be arrested shall be acquainted with the grounds of arrest is fundamental in the scheme of rule of law. Only when a person is acquainted with the

---

4 Hence, it does not affect arrests for the purpose of carrying out the provisions of a statute of a civil nature.
grounds of arrest will he be able to apply for bail or in the alternate move the High Court for the writ of habeas corpus. These are the immediate requirements at the time of arrest but later on he will have to build up his defense after the trial commences. The law does not demand that every minute detail is to be given but what is expected is that as much information is to be given as would enable him to grasp the reasons for his arrest. In one case an accused was merely informed that he has been arrested under section 7 of the Criminal Law Amendment Act, 1932, without furnishing the particulars of the alleged acts for which such action has been taken, against him was held not to be sufficient compliance with article 22(1).7

The grounds of arrest must be explicit and nothing is to be left for imagination.8 Moreover the ground should be communicated in a language that is understood by the person to be arrested.9 The test is of reasonable person and if on reading the grounds furnished it is capable of being intelligibly understood by a reasonable person, and is sufficiently definite to enable the detenu to make a representation against the order of detention, it would be held as sufficient information of the grounds of arrest.10 In case when the person finds the grounds furnished inadequate for him to make a representation he may make further queries. Failure by the person detained in making queries, may, in certain circumstances, be taken in consideration in deciding whether grounds furnished were proper or vague.11

i) As soon as may be

The words 'as soon as may be' are subject to various interpretations. It may mean that the grounds are to be furnished before he is detained or the other interpretation is that the person may be detained and 'as soon as may be' meaning thereby as nearly as is reasonable in the circumstances of the particular case. Failure to inform the person

---

11 Ujagar Singh v. State of Punjab, AIR 1952 SC 350. Moreover as was held in State of M.P. v. Shobharam AIR 1966 SC 1910 at 1917, the right to be informed of the grounds of arrest is not dispensed with by giving bail to the accused.
arrested of the reasons for his arrest would entitle him to be released. In case the furnishing of the information of the grounds is delayed, there must be some reasonable grounds justified by circumstances.

ii) Grounds:
The term includes with its ambit only the basic facts and material in contradistinction to ‘further particulars’ which would mean the details of such basic facts and material.

b) Right to be defended by a lawyer of his own choice
A person arrested on the accusation of a crime has been granted a constitutional right to be represented or defended by a lawyer of his own choice. If an arrest is made without informing the accused that he has a right to consult the lawyer then in such circumstances, article 22(1) is violated and hence must be held that the trial was vitiated. Any provision which denies a person arrested the right to be defended by a lawyer of his choice in the trial of a crime for which he is arrested would be void. The right to consult is not only declaratory but the law makes it clear that such legal practitioner may be allowed the facility to consult the accused without the hearing of the police. The police may, however, be present in order to ensure that the accused does not abscond from custody, or do any thing that may be objectionable otherwise.

Nandani Satpathy’s case laid down the principle that article 22(1) does not mean that a person who is not under arrest or custody can be denied the right to consult an advocate of his choice. Iyer, J., categorically pointed out that the services of a lawyer shall be available for consultation to any accused person under “circumstances of near custodial interrogation.”

---

12 Supra note 6.
Moreover, as was held in Hussainara's case\(^\text{18}\) it is a constitutional right of every accused person who is unable to engage a lawyer at his own cost, to have a lawyer engaged by the state \(i.e\). at the cost of the state.

This right is reinforced by the fact that article 20(3) dealing with self-incrimination would be more meaningful and effective if the advocate of the accused is present at the time he is examined. If an accused expresses his wish to have his lawyer by his side when his examination goes on, this facility should not be denied to him.\(^\text{19}\)

Hidayatullah, J., in Shobharam's\(^\text{20}\) case held that it is not sufficient to say that a person who is exposed to fine and not in danger of losing his personal liberty has no right to be defended by a lawyer. His Lordship categorically states that:

> Personal liberty is invaded by arrest and continues to be restrained during the period a person is on bail and it matters not whether there is or not a possibility of imprisonment. A person arrested and put on his defense against a criminal charge which may result in penalty, is entitled to the right to defend himself with the aid of a counsel and any law that takes away this right offends against the constitution.

By virtue of the 42nd Constitutional Amendment, article 39A, has been added to the Directive Principles in the Constitution whereby right to legal aid has now become fundamental in the rule of law.

c) Right to be produced before a magistrate

To ensure that the arrest or detention\(^\text{21}\) is not arbitrary, section 22(3) lays down that judicial mind must be applied immediately to the legal authority of person making the

\(^{18}\) Hussainara v. Home Secy, AIR 1979 SC 1377.

\(^{19}\) Supra note 17.

\(^{20}\) Supra note 16.

\(^{21}\) The words 'arrest' and 'detention' have been interpreted to mean that the protection applies to such arrests as are effected on an allegation on accusation that the person arrested is suspected to have committed or is likely to commit, an act of a criminal or quasi-criminal nature, or some activity
arrest and regularity of procedure adopted by him. For this, the rule requires that an arrested person is to be produced before a magistrate within 24 hours of his arrest. This is a mandatory provision\textsuperscript{22} and the law requires that a magistrate is not to act mechanically but should apply judicial mind to see whether the arrest before him is legal, regular and in strict accordance with law. The policy of the law is that the magistrate before whom a prisoner is produced must be in a position to bring an independent judgment to bear on the matter.\textsuperscript{23}

The words “within 24 hours of such arrest” in the clause are significant and if 24 hours have passed without compliance with the requirement of the clause, the arrested person is entitled to be released forthwith.\textsuperscript{24} Compliance with the clause at any time afterwards does not satisfy the constitutional requirement.\textsuperscript{25}

\textit{i) Physical Presence}

The person arrested must be physically produced before the magistrate. In Bhim Singh’s case the magistrate passed an order without the accused having been produced before him personally. The Supreme Court criticized in very strong terms the conduct of the magistrate and remarked that the police officer acted deliberately and \textit{mala fide} and the magistrate aided him either by colluding with him or by his casual attitude. The apex court held it to be a gross violation of the constitutional rights of the accused under articles 21 and 22(2) and the State was ordered to pay Rs. 50,000/- to the concerned person as monetary compensation.

A judicial view has been expressed that articles 22(1) and (2) provide protection against the act of an executive or non-judicial authority. These articles apply when a person is arrested without, and not under, a court warrant. The reason is that the warrant \textit{ex facie} sets out the reasons for the arrest, and the arrested person is to be produced before the

\textsuperscript{22} \textit{State of Uttar Pradesh v. Abdul Samad}, AIR 1962 SC 1506.
\textsuperscript{23} \textit{Harisharanand v. Jailor}, AIR 1954 All. 601.
\textsuperscript{24} Ibid.
court issuing the warrant. On the other hand, in case of arrest without a court warrant, there is need for application of judicial mind as soon as possible after arrest. This rule may come to an end if the accused person is released on bail, or when a person has been produced before a High Court and remanded to custody, and then it is not necessary to produce him before the magistrate.

d) Exception to articles 22(1) and (2)

Article 22(3) makes two exceptions from the rigour of clause(1) and (2) and they are in case of:

(a) enemy aliens
(b) person arrested or detained under a law providing for preventive detention.

i) Enemy aliens and detenus

By virtue of article 22(3) enemy aliens as well as persons detained under preventive detention have neither the right to consult and be defended by any legal practitioner nor do they have the right not to be detained in custody beyond 24 hrs without the authority of the magistrate. However, in case of detenus there is a right of representation to the detaining authority (cl.(5)) and a provision for consideration of that representation by the Advisory Board.

Consequently, an enemy alien or a person arrested under a law of preventive detention has no right to be produced before a magistrate within 24 hours or be defended by a lawyer of his choice.

B. Preventive Detention

Preventive detention in its modern form owes its genesis largely to the First World War. With a change in the technique of war the old distinction between armed personnel and civil population almost disappeared. A nation at war involved the entire people and
The mobilization of the home front was not less important than the deployment of forces in the fighting front. In the conditions, which threatened the very existence of the State, it was inevitable that the life, liberty and property of the citizen must become subservient to the supreme end. No individual act or deed could possibly be permitted that would tend to obstruct or hamper the prosecution of war. Effectiveness lay in prevention, not punishment. Preventive detention became on unavoidable necessity.29

The expression ‘Punitive Detention’ has had its origin in the language of the Law-Lords in England. While explaining the nature of detention under the Regulation 14-B of 1914 and the subsequent emergency Regulations made during the World War. But deviating from this practice, in India preventive detention is an integral part of the Constitution of India and is a peace time measure. In the Indian context the law relating to preventive detention can be traced to the East India Company Act, 1793 which provided for detention of persons suspected of carrying on mediately or immediately any illicit correspondence dangerous to the peace or safety of British settlement or possession in India. Subsequently the Bengal State Prisoner’s Regulation of 1818 provided that an individual may be restrained in the interest of public tranquility. The restraint provision was qualified by an assurance that the affected persons have the right to bring to the notice of the Governor-General in Council all matters connected with the supposed grounds or with the manner of execution of the restraint order. It was further provided that during detention, the defence will be confined according to his status with proper allowances for his wants and that of his family. As far as his properties were concerned they were to be attached and kept under the management of the revenue authorities. This Regulation applied to Bengal and Madras and Bombay had parallel Regulations in the form of Madras Regulation 11 of 1819 and Bombay Regulations XXV of 1827.30

The First World War led to the passing of Defence of India Act, 1915. The Act was framed “to provide for special measures to secure the public safety and the defence of

30 For details see B.V.Kumar, Preventive Detention Laws of India 1-6 (1991).
British India and for the special trial of certain offences.” Senior judicial officers of the State were appointed as commissioners and rules were framed. The decision of the Commissioner was final and no further appeal was permitted. The Act expired with the end of the war.

By 1919, the movement for independence had gained momentum and Rawlett Act, 1919 known as “Black Law” was enacted which was very oppressive and draconian to overcome every opposition to the British Raj. Thereafter, the Bengal Criminal Law (Amendment) Act, 1915, the Sholapur Martial Law Ordinance IV of 1930 etc. were passed to deal with the uprising of the native population against British Raj. All of these had one similarity that all these enactments excluded the remedy of habeas corpus.

Then came the Defence of India Act, 1939 (Act XXXV of 1939) during the Second World War, which was passed for “securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.” Section 2(2) Clause X provided that rules may be made for or may empower any authority to make orders providing:

[T]he apprehension and detention in custody of any person reasonably suspected of being of hostile origin or of having acted, acting or being about to act, in a manner prejudicial to the public safety or interest or to the defense of British India, the prohibition of such person from entering or residing or remaining in any area and the compelling of such person to reside and remain in any area to do or abstain from doing anything.

Rule 26, framed under Defence of India Act, 1939 was actually a wartime measure. It was modelled on the line of Emergency Powers (Defence) Act, 1939, enacted by British Parliament during World War II. Rule 26, authorized the government to detain a person
where such detention was necessary to preventing him from acting in any manner prejudicial to the defense and safety of the country. Even after cessation of war, preventive detention continued under Provincial Maintenance Of Public Order Act.\textsuperscript{31}

The Defence of India Act was repealed after the war by the Repealing and Amendment Act II of 1948. However, due to the disturbed conditions in the country, immediately after the partition, for the safety of different states, certain security measures were enacted, some of these are:

- Bombay Public Security Measures Act, 1947
- The Punjab Disturbed Areas Act, 1947.
- C.P. and Berar Public Safety Act, 1948
- U.P.Commercial Disturbance Act, 1947
- West Bengal Security Act, 1948

The Constitution of India was adopted on 26\textsuperscript{th} January, 1950 wherein preventive detention was given a constitutional status.\textsuperscript{32} Preventive detention is invoked in circumstances where the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detenu by legal proof but may still be enough to justify his detention. The aim of this type of detention as opposed to punitive detention is to prevent him from doing something which comes within entry 9 of List-I and entry 3 of List III. The basis of detention is suspicion or reasonable probability of committing an offence as opposed to change formulated or offence is proved. Due to the peculiar problems facing India the provision for preventive detention has been provided for the Constitution by the drafters keeping in mind the public interest and hence it cannot be defeated on the ground of abridging the liberties of the people or the doctrine of 'due process'.

\textsuperscript{31} Supra note 1.
As mentioned earlier, preventive detention was given a constitutional status to prevent anti-social and subversive elements from imperiling the welfare of the infant Republic.\(^{33}\) But the very fact that a person could be arrested on a mere suspicion could have made it prone to abuse by law enforces. Hence the framers of the Constitution provided certain safeguards to mitigate their harshness, placing fetters on the legislative conferred on the subject under articles 21 and 22.

By virtue of article 21,\(^{34}\) preventive detention cannot be ordered by the executive without the authority of a law and unless in conformity with the procedure laid down therein. Furthermore, the law for preventive detention must be within the legislative competence of the legislature which enacts the same.\(^{35}\)

a) Detention not beyond two months
Preventive detention is, by nature, repugnant to democratic ideas, and no such laws exist in the U.S.A. or in England, in times of peace. In India, however, it is a peacetime legislation as opposed to emergency legislation\(^{36}\) and is a normal feature of the Indian Constitution.

By terming it as a normal feature we cannot, however, undermine its autocratic undertone. Hence certain safeguards have been provided by the Constitution itself. Article 22(4) guarantees that there shall be no preventive detention for more than 2 months unless the law authorizing it makes provision for an Advisory Board and the Board after considering each individual case separately reports that there is in its opinion sufficient cause for such detention. If no order of confirmation of the detention is made within the stipulated 2 months from the date of detention by the appropriate government,

\(^{33}\) A.K. Roy v. Union of India AIR 1982 SC 710.
\(^{34}\) Ibid.
further detention of the detenu after the expiry of that period is without the authority of law.37

Earlier the period of detention provided was for 3 months but after the 44th (Amendment) Act, 1978 the maximum period for which the person may be detained without obtaining the opinion of the Advisory Board is 2 months. The Amendment thus provides for two categories of preventive detention: (1) detention for a maximum period of two months under a law made by the legislature, and (2) detention for a period longer than 2 months provided the Advisory Board gives its opinion in favour of it.

b) Composition of Advisory Board
The Advisory Board is to be constituted38 in accordance with the recommendation of the Chief Justice of the appropriate High Court. It shall consist of a Chairman and not less than two other members. The Chairman of an Advisory Board shall be a sitting Judge of the appropriate High Court and the other members shall be sitting or retired Judges of any High Court. Thus an Advisory Board as envisaged under the Amendment Act of 1978 shall be an independent and impartial body and free from executive control. Before the amendment, the opinion of the Advisory Board was not necessary in the cases (1) when period of detention does not exceed three months, and (2) when Parliament by law prescribed the maximum period for which a person may be detained and clause (4)(b) and clause (7)(a) (now deleted). This was said to be the greatest blot on preventive detention in India.39 The amendment has now abolished the provision for preventive detention without reference to an Advisory Board. The fall-out of the amendment is that no person can be detained beyond the period of 2 months only after obtaining the opinion of the Advisory Board. It is a safeguard against executive highhandedness. If the Advisory Board reports that the detention is not justified, the detained person must be released. If it reports that the detention is justified the detaining authority will determine the period of

37 Nirmal Kumar v. Union of India, AIR 1978 SC 1155 (para 10); Satya Deo Prasad v. State of Bihar, AIR 1975 SC 367 (para 8).
38 44th Amendment Act, 1978.
detention. The Board is bound to give its opinion before the expiry of 2 months from the date of detention. Failure to do so renders detention illegal.40

In Union of India & others v. Muneesh Suneja,41 the Supreme Court held that in matters of pre-detention cases interference of court is not called for except in the circumstances set forth by it in Alka Subhash Gadia42 case, viz. (i) that the impugned order is not passed under the Act under which it is purported to have been passed; (ii) that it is sought to be executed against a wrong person; (iii) that it is passed for a wrong purpose; (iv) that it is passed on vague, extraneous and irrelevant grounds; or (v) that the authority which passed it had no authority to do so. The High Court cannot quash the order of detention either on the ground of delay in passing the impugned order or delay in executing the said order, for mere delay either in passing the order or execution thereof is not fatal except where the same stands unexplained. In the given circumstances of the case and if there are good reasons for delay in passing the order or in not giving effect to it, the same could be explained and those are not such grounds which could be made the basis for quashing the order of detention at a pre-detention stage. Therefore, the order made by the High Court quashing the detention order on ground of such delay was bad in law and deserves to be set aside.43

c) Grounds of detention must be communicated to the detenu

Article 22(5) imposes an obligation on the detaining authority to furnish to the detenu the grounds for detention “as soon as possible”. The detenu must be given the grounds in a language which he can understand, in a script which he can read if he is a literate person.44 The communication of grounds must be sufficient to enable the detenu to make representation. It has further been held that the detenu should be supplied with all

42 Adl. Secy, To the Govt. of India v. Alka Subhash Gadia, 1992 Supp (1) SCC 496:1992 SCC (Cri) 301
relevant documents so that the detenu can make effective representation, otherwise provisions of article 22(5) would be violated.  

An exception to the requirement to supply particulars is provided in article 22(6), namely, that such particulars as it would be against the public interest to disclose may be withheld by the authorities. Conversely, however, it does not mean that the authority is bound to disclose ‘all’ facts other than those, which he has the privilege to withhold under cl. (6). His obligation extends to those particulars without which the detenu cannot make an effective representation.

Where a detenu cannot read or understand English language, the grounds of detention should be explained to him as early as possible in the language he understands so that he can avail himself of the statutory right of making a representation. Mere handing over the ground and obtaining his thumb impression on it in token of his having received the same is not sufficient.

The grounds supplied to the detenu must not be ‘vague’, ‘irrelevant’ or ‘non-existent’. If the grounds are vague or irrelevant to the object of the legislation the right of detenu under article 22(5) is violated. A ground is said to be irrelevant when it has no connection with the satisfaction of the authority making the order of detention. The Court has held that the inclusion of even a single irrelevant or obscure ground is an invasion of the detenu’s constitutional right because it precludes the court from adjudication upon the sufficiency of the grounds.

d) Right of representation of the detenu

Right of representation flows from the right to be informed of the grounds of arrest. The communication of grounds of arrest is essential for 2 main reasons (1) it acts as a check

---

45 State of Tamil Nadu v. Senthil Kumar, AIR 1999 SC 971 (para 11, 12, 13).
against arbitrary and capricious exercise of power. The detaining authority cannot throw
a person behind bars at its own sweet will, it must have adequate grounds for doing so (2)
the detenu has to be given an opportunity of making a representation against the order of
detention.

The word “and shall afford” in article 22(5) casts a duty on the detaining authority to
inform the detenu while serving the order of detention that he has a right to make
representation against the order of detention and also a right to be heard by the Advisory
Board. This procedural safeguard must be observed strictly and the failure to comply
with this requirement would vitiate the order of detention.49

Moreover the ‘Materials and documents’ relied on in the order of detention must be
supplied to the detenu along with ‘grounds’. The supply of ‘grounds’ simpliciter would
give him not a real but merely an illusory opportunity to make a representation and would
thus make the procedure unjust and unreasonable which would be liable to be struck
down.50

Even where the law authorizing preventive detention does not contain provisions
embodying the safeguards in article 22(5), those safeguards must be read into the
provisions of that Act, in order to make it constitutionally valid.51

This clause provides two distinct safeguards to the detenu: 1) His case must be referred to
an Advisory Board for its opinion if it is sought to detain him for a period longer than 2
months (2) He should be given the earliest opportunity of making a representation against
the order of detention and such representation should be considered by the detaining
authority as early as possible52 before an order is made confirming the detention.53

49 A person in active politics and fully conversant with this right, in his case the failure to comply with the
above requirement does not vitiate trial – Wasi Uddin Ahmad v. District Magistrate, Aligarh, AIR 1981 SC
2166.
51 Vimal v. Pradhan, AIR 1979 SC 1501 (para 3).
53 Supra note 51.
The requirement of article 22(5) must be given a liberal interpretation in order to make the procedure 'reasonable, fair and just'. The opportunity of representation must, therefore, be effective, real and meaningful.

e) Subjective satisfaction of the detaining authority

In case of preventive detention the order of detention is passed on the basis of what has come to be known as the subjective satisfaction of the detaining authority. The term 'subjective' does not imply capriciousness but it does differ from person to person. It is one possible opinion what any reasonable person can arrive at. 'Satisfaction' denotes the intimate opinion of the person concerned and not the logical conclusion arrived at in accordance with the strict rules of evidence. Such subjective satisfaction has to be arrived at at two points:

i) Firstly: On the veracity of facts imputed to the person to be detained; and

ii) Secondly: On the prognostication of the detaining authority that the person concerned is liable to indulge again in the same kind of nefarious activities, of course, the second point depends on the first, but the subjectiveness is higher as regards the second point.

Patajali Shastri, J., very aptly stated that:

[F]or the purposes of preventive detention it would be difficult, if not impossible, to lay down objective rules of conduct failure to conform to which should lead to such detention. As the very term implies, the detention in such cases is effected with a view to preventing the person concerned from acting prejudicially to certain objected which the legislation providing for such legislation has in view. Nor would it be practicable to indicate or enumerate

54 Supra note 50.
55 Ibid.
in advance what acts or classes of acts would be regarded as prejudicial. The responsibility for the security of state and maintenance of public order etc., having been laid on the executive Government it must naturally be left to the government to exercise the power of preventive detention whenever they think the occasion demands it.

However, subjective satisfaction is to be based on material, whether sufficient or insufficient, true or otherwise. But to say that the detaining authority can reach any conclusion without there being any material would not be correct. Any satisfaction arrived at must be based on manufacture of imagination of the detaining authority.\textsuperscript{57}

Since, subjective satisfaction being a condition precedent for the exercise of the power conferred on the executive, the Court can always examine whether the requisite satisfaction is arrived at by the authority; if it is not, the condition precedent to the exercise of the power would not be fulfilled and the exercise of the power would be bad.

There are several grounds evolved by judicial decisions for saying that no subjective satisfaction is arrived at by the authority as required under the statute.

Such instances are, \textit{firstly}, where the authority has not applied its mind at all: in such a case the authority could not possibly be satisfied as regards the fact in respect of which it is required to be satisfied; \textit{secondly}, where the power is exercised dishonestly or for an improper purpose: such a case would also negative the existence of satisfaction on the part of the authority; \textit{thirdly}, where in exercising the power, the authority has acted under the dictation of another body; \textit{fourthly}, application of a wrong test or the misconstruction of a statute; \textit{fifthly}, where the satisfaction is not grounded on materials which are of rationally probative value, \textit{i.e.} the grounds on which the satisfaction is based must be such as a rational human being can consider connected with the fact in respect of which the satisfaction is to be reached and they must be relevant to the subject-matter of the

\textsuperscript{57} Ashok Kumar Jaggi \textit{v.} Union of India, 1989 Cr. LJ 539 (Del.).
inquiry and must not be extraneous to the scope and purpose of the statute; sixthly, failure of the authority to have regard to the express or implied statutory requirements of giving regard to certain matters when exercising the power, and lastly, where the subjective satisfaction is not such that any reasonable person could possibly arrive at and the inference is that the authority did not honestly form that view or that in forming it, he could not have applied his mind to the relevant facts.

The courts in such cases do not act as an appellate authority but as a judicial authority which is concerned, and concerned only, to see whether the statutory authority has contravened the law by acting in excess of the power which the legislature has confided in it. Though the last mentioned ground above tends to blur the dividing line between subjective satisfaction and objective determination, the dividing line is very much there howsoever faint or delicate it may be, and courts have never failed to recognize it.

Therefore, there is nothing like unfettered discretion immune from judicial reviewability. The truth is that in a government under law, there can be no such thing as unreviewable discretion.58

f) Judicial review of orders of detention

The area of preventive detention is very much administrative ridden. The law of preventive detention has been so designed as to leave a very broad discretion with administrative authorities to order preventive detention of a person, and leaves only a narrow margin for judicial review.59 Nevertheless since the liberty of an individual is at stake the judiciary in India has evolved certain safeguards to protect the60 most cherished value of mankind as without personal liberty life will not be worth living and hence even a slight deviation from the law may result in the order of preventive detention being quashed:-

i) Circumstances vitiating subjective satisfaction

59 Surendra Malik, Supreme Court on Preventive Detention 121-122 (1985).
The subjective satisfaction of a detaining authority cannot be substituted by the satisfaction of the court but it can be called in question on grounds of *mala fides*, non-application of the authority's mind, subjective satisfaction based on irrelevant grounds – some semblance of reasonableness must be inferred otherwise the courts can interfere *i.e.* where discretion is arbitrary, vague or fanciful. A note of caution, of course, the court does not go into the ‘adequacy or sufficiency’ of the grounds but only examines if there is any ground at all. The dividing line though thin is very much there.

**ii) Non consideration of a material fact**

The Supreme Court categorically stated in *Asha Devi v. K.Shivraj* that “… if a material or vital facts which would influence the minds of the detaining authority one way or the other is not considered by the detaining authority it would vitiate its subjective satisfaction rendering the detention order illegal.”

**iii) Non-application of mind**

The order for preventive detention is liable to be quashed if it is passed by the authority concerned mechanically, *i.e.* without applying its mind. Formal defect in the order may be regarded by the court as indicating non-application of mind by the authority making the order. In a detention order, in *Jai Singh v. State of J&K* the grounds of detention were a reproduction of the allegations made against the detenu in police dossier submitted to the detaining authority who was not even aware that the detenu was in custody at the time the order was issued. The apex court quashed the order and remarked that “we are afraid it is difficult to find greater proof of non application of mind.”

**iv) Mala fides**

The court may quash the order of preventive detention if *mala fide* is established. In *G.Sadanandan v. State of Kerala* the Supreme Court found substance in the allegations that order of detention was passed against a kerosene dealer to eliminate him as a wholesale distributor so that the DSP’s relatives may benefit. The apex court ruled that the detention order was ‘clearly and plainly *mala fide*’.

---


v) Colourable exercise of power
A detention order may be quashed on the ground of colourable exercise of power. In Re Nizumuddin v. State of West Bengal, there was a considerable delay between the date of making the detention order and the arrest of the person concerned and the authorities failed to furnish explanation for the delay, hence the subjective satisfaction was held to be 'colourable' and not genuine.

vi) Non existent or irrelevant ground
Although the subjective satisfaction of the detaining officer is not open to objective assessment, but nonetheless, satisfaction based on irrelevant ground is vitiated. The court may examine the grounds specified in the order of detention to see whether they are relevant to the circumstances under which the detention is supported. If the grounds relied on for detention have no connection with the prejudicial purposes stipulated in the statute then the order may be quashed.

vii) Filing of affidavits by detaining authority
It is a requirement of law that the detaining authority must file an affidavit. Since preventive detention order is a matter of subjective satisfaction of the detaining authority so the Apex Court has developed the norm that when a detenu moves a petition for habeas corpus challenging his detention, the counter-affidavit on behalf of the State ought to be made by the very authority on whose subjective satisfaction the detention order was made or (on sufficient reason to the Court's satisfaction) by some responsible officer who has personally dealt with, or has processed the detenu's case and by none other. The order of preventive detention may be quashed if the affidavit is not filed by a competent person.

---

64 AIR 1974 SC 2353.
g) Procedure established by law

Preventive detention must be carried out by following the procedure established by law under clauses 4 to 7 of article 22. Irregularity in form or substance of the procedure would render the detention invalid as was held by the Supreme Court in *Abdul Latif v. B.K. Jha*.

The procedural requirements are the only safeguards available to a detenu since the Court is not expected to go behind the subjective satisfaction of the detaining authority. The procedural requirements are, therefore, to be strictly complied with if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard. If a reference to an Advisory Board is to be made within three weeks, it is no answer to say that the reference, though not made within three weeks, was made before the hearing of the case. If the report of the Advisory Board is to be obtained within three months, it is no answer to say that the report, though not obtained within three months was obtained before the hearing of the case.

**C. Conclusion**

In the countries inheriting the traditions of common law, detention without trial does not exist in practice. Since the tradition of constitutional democracy has grown deep roots in these countries. Thus in Australia, Canada, England, the USA and Ireland preventive detention does not exist in times of peace.

---

Preventive detention has been operative in India since 1950 and in the present circumstance of terrorism and insurgency faced by India there does not appear to be any prospect of the law being withdrawn in the near future. M.P. Jain has suggested some very useful changes, which may soften the rigours of the preventive detention laws and are enumerated below:70

1. Detention cases should be reviewed periodically, say, at an interval of three months, so that those whose detention no longer appears to be necessary may be released.

2. Parole provisions in the law may be used more frequently.

3. The order passed by the advisory boards and the government should be 'speaking orders'.

4. There should be a constitutional obligation on Parliament to prescribe the maximum period of detention. Today this is optional. This involves a suitable amendment of Art. 22(7)(b).

5. Art. 2(7)(a) should be repealed so that in no case the protection of an advisory board is withdrawn from the detenu.

6. The detenu should be provided with legal assistance in preparing his representation for it may be quite difficult for an inarticulate detenu to draft his representation and properly marshal the facts and evidence in his favour. When the government has lawyers at its disposal, it is unfair to deny the services of a lawyer to a detenu.

7. A lawyer should be permitted to appear before the advisory board to represent the detenu. The advisory boards consist of lawyers as members and they will not feel embarrassed if lawyers were to appear before them.

8. The detenu should have a right to lead evidence before the advisory board in his defence and to controvert the facts and evidence which the administration may have collected against him. This is essential because the Courts have refused to assume responsibility of probing into the facts on which detention is based to find

out if they are correct or false. The Supreme Court in Roy\textsuperscript{71} has now accepted this right.

(9) The advisory boards need to be strengthened. This is very important for they stand between the detenu and the administrative power to detain and, thus, constitute the crucial safeguard in preventive detention cases. The Constitution requires that professional lawyers be appointed to these boards, but that by itself would not be much of a safeguard because much depends on the quality of people who are actually appointed. The boards do not appear to be acting very effectively as is clear from the fact that the Courts, even with their limited powers, are able to quash detention orders in quite a few cases. The boards are at present regarded as appendages of the administration and do not carry much credibility in the public eye. To make them effective and independent of the Administration, the best course will be to appoint sitting High Court Judges to these boards. The judges have a constitutionally guaranteed tenure and, thus, can bring to bear an independent mind on the administrative decision to detain a person.

(10) It means, therefore, that the modifications made in Arts. 22(4) to (7) by the 44th Constitutional Amendment should be implemented by notification in the gazette without any further delay.

With these amendments chances of abuse or misuse of the power to order preventive detention would be very much reduced. If the country cannot get rid of preventive detention, then it is extremely necessary that the chances of its misuse should be reduced as far as possible.

The scheme of the Constitution has been to give a vast range of administrative control over individual’s personal liberty in the field of preventive detention and the administrative decision is open to review by the advisory boards and not by the courts. However, judicial activism, conscious of the fact to uphold constitutionalism in the

\textsuperscript{71} Supra note 33.
country has played an active role in overseeing the administration in the exercise of its power, by pressing into service the principles of administrative law to control discretionary power. But still the role of judiciary is marginal.