Judicial Creativity and Preventive Detention in India: An Aspect of Indian Constitutional and Administrative Law

I

There has been a long standing controversy over the question whether courts make or do not make law. The traditional English view has been that courts only declare the law and do not make it.[1] However, in modern times, the view has crystallised that courts do not merely expound, declare or interpret the law, but play a law-creating role as well through their interpretative process.[2] The Indian Constitution confers an extensive power of judicial review on the Supreme Court of India.[3] In discharge of this power, the court has, on the whole, adopted a passive role. The dominant trend of the interpretative process has been "to go by the plain words used by the constitution-makers."[4] But cases are not completely lacking in which the court has broken from this self-imposed rule and adopted a creative role. The example, *par excellence*, of this approach is to be found in the series of cases on the Amendment of the Indian Constitution.[5] But barring these flashes, the Court's over-all attitude towards the constitution has been to adopt the norms of literal interpretation and eshew any desire to adopt policy considerations. Such statements as that the court is not concerned with policy may be found strewn throughout the case-law con-

[1] Lord Evershed announced in 1961 that the English judges do not legislate even interstitially with the possible exception of the law developed behind equitable remedies. See, Evershed, *The Judicial Process in XXth Century England*, (1961) 61 Col. L.R. 761, 789.

[2] See, generally, on this subject: Stevens, *The Role of a Final Court in a Democracy: The House of Lords Today*, (1965) 28 MLR 509; Allen, *Law in the Making*, 302 (1964); Cardozo, *The Nature of Judicial Process* (1921); Clark and Trubeck, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, (1961) 71 Yale L.J. 225; Davis, *English Administrative Law – An American View*, (1962) *Public Law* 139; Denning, *The Changing Law* (1959); Diplock, *The Courts as Legislators* (1965); Jaffe, *English and American Judges as Lawmakers* (1969); Friedmann, *Legal Theory* (1967); Radeliffe, *The Law and its Compass* (1960).

[3] Jain, *Indian Constitutional Law*, 139–181 (1970).

[4] Mukherjea, J., in *Chiranjit Lal* v. *Union of India*, AIR 1951 SC41. Also, Jain, *ibid.*, 758.

[5] *I.C. Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643; *Kesavanand Bharati* v. *State of Kerala*, AIR 1973 SC 1461; Jain, *ibid.* 777–805.

cerning constitutional interpretation.[6] However, even in this climate, the Court has consciously adopted over time a creative role in the extremely sensitive area of Preventive Detention. An attempt is made in this paper to highlight, exemplify and evaluate the contribution made by the Supreme Court in this respect.

Preventive detention means detention of a person without trial and conviction by a court of law for any specific offence under the ordinary criminal law of the country. In preventive detention, the person concerned is detained not after proof of his guilt beyond any reasonable doubt, but on suspicion, or, as it may be called, in the 'subjective satisfaction' of the administrative authority authorised by the law to do so. The institution of preventive detention prevails in many democratic countries and, in some form or other, at one time or other, each democratic country has taken recourse to preventive detention, especially during the war period. In the U.S.A., in 1950, the Internal Security Act was enacted by the Congress providing *inter alia* for preventive detention (or 'emergency detention', as it was called in the Act) during an emergency of war, invasion or domestic insurrection, of a person about whom there is a reasonable ground to believe that he would probably engage in acts of sabotage or espionage.[7] The U.S. Constitution also provides for suspension of *habeas corpus* during rebellion or invasion if public safety so requires.[8] In England, under Regulation 14B of the Defence of Realm Act Regulations, 1914, during World War I, government got the power to detain a person of alleged 'hostile origin or association.'[9] And, again, in 1939, during World War II, a more extensive provision for emergency detention was made under Regulation 18B of the Defence Regulations leading to the celebrated case of *Liversidge v. Anderson.*[10] Examples of provisions concerning preventive detention can

[6] See, for example, *State of Bombay* v. *Bombay Education Society*, AIR 1954 SC 561, 567. Also *Gopalan v. State of Madras*, AIR 1950 SC 27; see *infra*, n. 22.

[7] Ss. 103–111 of the Act. See Emerson and Haber, *Political and Civil Rights in the U.S.A.*, I, 168 (1967).

[8] Art I. Sec. X, cl. 2. Corwin, *The Constitution and What It Means Today*, 76–77 (1958).

[9] Allen, *Law and Orders*, 44(1965).

[10] [1942] A.C. 206. Allen, *op. cit.*, 52–62, 364 et seq. Also, Cotter, *Emergency Detention in Wartime: The British Experience*, (1954) 6 Stanford L.R. 238; Keith, *The War and the Constitution*, 4 Mod. L.R. 1, 82; Cohn, *Legal Aspects of Internment, Ibid.* 200. Under Reg. 18B, Home Secretary could order detention if he had "reasonable cause to believe any person, to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts . . .."

be cited from several other democratic countries.[11] In India, because of unstable law and order situation, preventive detention has been in vogue since its independence in 1947. After the commencement of the Constitution, Parliament enacted the Preventive Detention Act, 1950, to lay down a legal framework for preventive detention on certain grounds. The present day law for the purpose is the Maintenance of Internal Security Act, 1971.[12] A salient feature of the law of preventive detention in India has been to confer a very broad discretion on the administrative authority to order preventive detention of a person in certain circumstances.[13] The law of preventive detention has therefore been too much administrative-ridden and the scope of judicial review has been very much limited. Nevertheless, the Supreme Court has been conscious of the fact that preventive detention constitutes a grave infringement of one of the most cherished rights of a human being, namely, the freedom of the person, and, therefore, through a series of creative pronouncements over time, it has sought to expound a number of principles to soften the rigours of the law somewhat, to humanise it, and to erect some sort of judicial control-mechanism over the vast discretionary power vested in the concerned administrative officers in this respect. The court has sought to give some protection to individual freedom from an undue exercise of administrative power of preventive detention. The court has not adopted a mechanistic, but a purposeful, role in this area to draw a fine balance between personal freedom and social control. There has been a catenation of court cases, as preventive detention has been a very contentious measure since the day of the enactment of the relevant statute, so much so that it will not be an exaggeration to say that a distinct jurisprudence of preventive detention has come into being in India.

II

The relevant provisions in the Indian Constitution having a bearing on preventive detention may be noted first.

A law for preventive detention can be made by Parliament exclusively under entry 9, List I, for reasons connected with 'defence', 'foreign affairs'

[11] See, Art. 151 of the Federal Constitution in Malaysia. The same provision operates in Singapore as well. In Malaysia, preventive detention is authorised by the Internal Security Act, 1960, as well as under the Emergency (Public Order and Prevention of Crime) Ordinance, 1969. The classic case in Malaysia on preventive detention is *Karam Singh* v. *Minister of Home Affairs*, [1969] 2 MLJ 129. See Suffian, *An Introduction to the Constitution of Malaysia*, 95, 178 (1972). For a discussion on preventive detention in Singapore see, Daw, *Preventive Detention in Singapore – A comment on the Case of Lee Mau Seng*, (1972) 14 Malaya L.R. 277.

[12] This Act has been cited hereafter as MISA.

[13] See, *infra*, Sec. III.

or the 'security of India.' Further, under entry 3, List III, Parliament and the State Legislatures can concurrently make a law for preventive detention for reasons connected with the 'security of a State', 'maintenance of public order,' or 'maintenance of supplies and services essential to the community.' Parliament thus has a wide legislative jurisdiction in the matter as it can enact a law of preventive detention for reasons connected with all the six heads mentioned above.[14] The Preventive Detention Act, 1950, and now the Maintenance of Internal Security Act, 1971, have been enacted by Parliament providing for preventive detention for all these six heads.

This however is not all. In the scheme of division of legislative powers between the Centre and the States in India, the 'residuary' power vests with Parliament.[15] Therefore, in exercise of its 'residuary' power, Parliament can make a law providing for preventive detention on any other ground. For example, in 1974, Parliament enacted the Conservation of foreign exchange. This Act derives its validity from entry 36, List 1,[16] read with residuary powers of Parliament.

The legislative power regarding preventive detention is not however completely uncontrolled. India has a Chapter on Fundamental rights and the provisions in this Chapter control government powers.[17] The provisions relevant to preventive detention are Arts. 21, 19, and 22. Art. 21 runs as follows: "No person shall be deprived of his life or personal liberty except according to procedure established by law."[18] Art. 19 guarantees seven rights, viz., freedom of speech and expression; right to assemble peaceably; right to form associations; right to move freely throughout the territory of India; right to hold and acquire property and the right to practise any profession. On each of these rights, however, reasonable restrictions can be imposed by the legislature for certain specified purposes.[19]

[14] For a discussion on Distribution of Legislative Powers in India see Jain, *op. cit.* n.3, 272–314.

[15] Jain, *op. cit.*, n.3, 274.

[16] This entry runs as: "Currency, coinage and legal tender; foreign exchange."

[17] Jain, *op. cit.*, n.3, 474–668.

[18] Art. 5(1) of the Malaysian Constitution closely resembles Art. 21 of the Indian Constitution. The only difference between the two provisions is that the word 'procedure' is missing in Art. 5(1). Art. 21 says, 'according to procedure established by law' while Art. 5(1) says "save in accordance with law". See *Karam Singh* v. *Minister of Home Affairs, op. cit.*, n. 11. For a discussion on Art. 21, see Jain, *op. cit. n.3, 572–579.*

[19] Jain, *op. cit*, n.3, 522–571.

The most significant provision concerning preventive detention is Art. 22 which prescribes a few safeguards, and the minimum procedure, which a law authorising preventive detention must conform with.[20] If any of the safeguards is not observed, the detention would be bad as infringing a fundamental right of the detainee. Under Art. 22(4)(a), preventive detention for over three months is possible only when an advisory board holds that, in its opinion, there is sufficient cause for such detention. The board is to consist of persons qualified to act as the Judges of a High Court. For preventive detention for less than three months, no reference to such a board is necessary. Under Art. 22(7)(c), Parliament is authorised to prescribe the procedure to be followed by an advisory board. Another safeguard provided to a detainee by Art. 22(5) is that the detaining authority should, *as soon as may be*, communicate to him the grounds on which the detention order has been made, and afford the detainee the *earliest opportunity* to make a representation against the detention order. Art. 22(5) thus provides some semblance of natural justice to a person whose personal liberty has been taken away by an administrative order. However, the right conferred on the detainee is only to make a representation and not that of being heard orally or through a lawyer or to lead evidence in his defence. The efficacy of this safeguard has been whittled down somewhat by Art. 22(6) which permits the detaining authority, while communicating the grounds of detention, not to disclose such facts as it considers to be against public interest to disclose. A distinction is drawn here between 'facts' and 'grounds' of detention. The detaining authority is under an obligation to disclose all the 'grounds' of detention in any given case, though he may keep back certain 'facts' in public interest.

Under Art. 22(7)(b), Parliament may prescribe the maximum period of detention. This provision has been held to be *merely* permissive. It has been held by the Supreme Court that Art. 22(7)(b) does not obligate Parliament to prescribe any maximum period of detention. The Court has also held that when Parliament proposes to fix the maximum period of detention of a person, it is not necessary for it to do so in terms of specific number of years, months or days. It is valid for Parliament to fix such period in terms of a specific event, as for example, Parliament can say that a person may be kept in preventive detention until the expiry of the 'emergency' proclaimed under Art. 352.[21] This interpretation of Art. 22(7)(b) makes things very flexible for Parliament in the matter of fixing any maximum time-limit for preventive detention of a person.

[20] Jain, *op. cit.*, n.3, 594.

[21] *State of West Bengal* v. *Asbok Dey*, AIR 1972 SC 1660; *Fagu Shaw* v. *State of West Bengal*, AIR 1974 SC 613, *Golam Hussain* v. *Police Commissioner, Calcutta*, AIR 1974 SC 1336. For discussion of Art. 352 see Jain, *op. cit.*, n.3, 394. Also, *infra*, n.25.

Under Art. 22(7)(a), Parliament may by law prescribe "the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months" *without* referring his case to an advisory board. The interpretation of this clause has caused some difficulty. In *Gopalan,*[22] the Supreme Court had held by majority that the word 'and' between 'circumstances' and 'class' in this clause were used not conjunctively but disjunctively, i.e., it meant 'or' not 'and'. This meant that it was not obligatory for Parliament to lay down both the 'circumstances' and the 'class or classes of cases' in which a person can be detained for more than three months without referring his case to an advisory board. But the Supreme Court has now overruled this view in *Sambhu Nath Sarkar* v. *State of West Bengal.*[23] There, s.17A of MISA verbatim repeated five of the six heads for which a law of preventive detention can be made,[24] as 'circumstances' in which reference to an advisory board would not be necessary. The court declared the section unconstitutional. It treated Art. 22(7)(a) as an exception to Art. 22(4), which means that the intercession of an advisory board in preventive detention cases for *over* three months is the *normal rule* and that its dispensation can be justified only in *exceptional* and extraordinary cases. The law under Art. 22(7)(a) being a drastic law should apply only to exceptional circumstances and exceptional activities expressly and in precise terms prescribed by Parliament. The Court therefore ruled that the word 'and' in Art. 22(7)(a) should be interpreted to have its ordinary *conjunctive* sense requiring Parliament to prescribe *both* the circumstances under which, and the class of cases in which, only consideration by the advisory board of a preventive detention case can be dispensed with. Merely repeating the heads of legislation of preventive detention as given in entry 9, List I and entry 3 in List III, does not satisfy Art. 22(7)(a). It is neither prescribing 'circumstances' nor the 'classes of cases' to which only, as against the rest of the individuals, the safeguard of intercession of an independent body would not apply. Parliament has to apply its mind and prescribe specific situations and types of cases which require a drastic treatment by way of dispensation of the advisory board. This pronouncement of the Supreme Court has made it much more difficult for Parliament to bypass the safeguard of an advisory board in preventive detention cases. The new judicial view is in harmony with the judicial philosophy of protecting freedoms of the individuals against undue interference by the Legislature and the Executive. Parliament's power of curtailing the safeguard of an advisory board in preventive detention cases stands restricted

[22] *Gopalan, A.K.* v. *State of Madras,* AIR 1950 SC 27. Also see *infra,* Sec. IV.

[23] AIR 1973 SC 1425.

[24] *Supra,* text accompanying n.14.

as it now has to lay down in clear terms both the 'circumstances' and the 'classes' of cases in which reference to an advisory board can be dispensed with. Parliament cannot verbatim repeat any of the heads given in the constitution and say that reference to an advisory board in a preventive detention case under such a head is not necessary. The change in the judicial view from *Gopalan* to *Sambhu Sarkar* denotes a strengthening of restraints on Parliament insofar as the dilution of the safeguard by way of an advisory board is concerned. It may also be noted that only Parliament, and not a State Legislature, is entitled to legislate under Art. 22(7)(a) for dispensation of an advisory board in cases of preventive detention for over three months.

Much of the efficacy of the provisions contained in Arts. 19, 21 and 22 can be diluted during an emergency. Under Art. 352, the President can declare an emergency in India because of war, or external aggression, or internal disturbance. When such a proclamation is issued, Art. 19 is automatically suspended by virtue of Art. 358. Further, under Art. 359, the President has the power to make an order declaring that the right to move any court for the enforcement of any of the fundamental rights shall be suspended. This means that during an emergency, enforcement of Arts. 21 and 22 can be suspended.[25] Therefore, it is to be noted that the following discussion relates to the 'non-emergency' period when Art. 22 is fully operative. Many of the restraints which the Supreme Court has spelled out on the power of preventive detention, as are noted below, arise from a creative interpretation of Art. 22. When the enforcement of Art. 22 is suspended, the institution of preventive detention becomes much more drastic. The immediate purpose of this paper, however, is to demonstrate how the Supreme Court in India has performed its role of the 'guardian' of personal freedom of the individuals vis-a-vis Art. 22. The 'emergency' aspects of preventive detention are outside the purview of this paper.[26,27]

[25] For a discussion on the emergency provisions in the Indian Constitution see, Jain, *op. cit.*, n.3, 394–406.

[26] At the time of this writing, the impact of emergency on judicial review of preventive detention is being debated before the Supreme Court. Wide ranging arguments are being advanced before the Court on this matter and the judicial verdict is awaited with keen interest. For a discussion of 'Emergency and Fundamental Rights' in India, see Jain, *op. cit.*, n.3, 662–668.

[27] Art. 151 of the Malaysian Constitution also imposes certain restrictions on the power to make law for preventive detention, and also provides for certain procedural safeguards to the detainee. Barring certain differences, Art. 151 very much resembles Art. 22 in India. The differences between the two provisions are: (1) Art. 151 does not contain any provision like Art. 22(7)(b). Therefore, in Malaysia, reference to an advisory board cannot be avoided except during an emergency declared under Art. 150. (2) In India, the opinion of the advisory board is binding on the government while it does not appear to be so in Malaysia.

III

It will be convenient at this stage to briefly notice the statutory provisions concerning preventive detention. As stated above, to meet the critical law and order situation in the country, Parliament enacted the Preventive Detention Act, 1950.[28] It was a temporary measure to begin with, but it remained in operation till December 31, 1969, when it was allowed to expire. Its place was then taken by the Maintenance of Internal Security Act, 1971. In the beginning, the provisions of the preventive detention law were very severe but, in course of time, they were somewhat liberalised. For example, the Act of 1950 contained a provision saying that no court could look into the grounds of detention served on the detainee. A sort of 'iron curtain' was thus sought to be placed around the acts of the executive in the area of preventive detention. The Supreme Court declared the provision invalid in *Gopalan* on the ground that it came in the way of the courts discharging their function of seeing whether the detention order was *mala fide* or *bona fide*, whether the grounds of detention were relevant to the objects for which detention was permissible under the Act and the Constitution, or whether or not the grounds were sufficient to enable the detenu to make a representation as laid down in Art. 22(5).[29] In course of time, Parliament itself relaxed somewhat the rigour of some other provisions in the Act, and made it more favourable to the detainee.

The salient features of MISA are as follows.[30] An order of preventive detention can be made by the Central or State Government if it is satisfied with respect to any person that it is necessary to do so to prevent him from acting in any manner prejudicial to the 'defence of India,' the 'relations of India with foreign powers', 'security of India', 'security of a State,' 'maintenance of public order,' or the 'maintenance of supplies and services essential to the community.' These are all the grounds mentioned in the two legislative entries in Lists I and III.[31] A district magistrate can make such an order on the last three grounds, which are the grounds which fall within List III. As a safeguard against misuse of power by a district magistrate, he is required to communicate forthwith to the State Government concerned the fact of his making the order along with necessary particulars, and such an order cannot remain in force for more than 12 days unless it is approved by the State Government in the meantime. A

[28] *Op. cit.*, n. 12.

[29] Jain, *op. cit.*, n.3, 596.

[30] As noted before, *op. cit.* n. 26, the discussion in this paper relates to the period prior to June, 1975, when an emergency was declared in India resulting in several amendments of MISA.

[31] *Op. cit.*, n. 14.

State Government making or approving the order has to report the fact to the Central Government within seven days along with necessary particulars. This is to enable the Central Government to keep some control over the State Governments in this area. As laid down in Art. 22(5), provisions have been made in the Act for communication of grounds to the detainee and giving him the earliest opportunity to make a representation against his detention to the government concerned.[32] Provisions have also been made for constituting advisory boards in terms of Art. 22(4).[33] Such a board is to consist of three persons qualified to act as High Court Judges, and one of the members, who is or has been a High Court Judge, is to act as the Board's chairman. The government is to place before the board, within 30 days of the date of detention, the grounds of detention, the representation made by the detainee and the report of the detaining officer. The board is to submit its report within ten weeks of the date of detention. The board could give a personal hearing to the detainee, if it considers it essential, or if the detainee desires to be heard. The detainee could not appear before the board through a legal representative. The board is to specify whether or not, in its opinion, there is sufficient cause for the detention of the person concerned. If the board reports in favour of detention, the government may confirm the detention order and continue his detention for such period as it thinks fit. In case the board reports unfavourably, the order of detention is to be revoked and the person released forthwith. The government concerned has power to revoke the order at any time. The government has power to release a detainee on parole conditionally or unconditionally. Under the Act originally, the maximum time-limit for which a person could be detained was fixed at twelve months.

The validity of the detention orders passed under MISA was challenged on the ground that, as the long title of the Act denotes,[34] it was enacted for maintaining 'internal security' and, therefore, the orders for 'maintenance of public order' could not be made under it as 'internal security' does not include 'public order'. The Supreme Court rejected the argument in *Abdul Aziz* v. *District Magistrate, Burdwan.*[35] The Supreme Court pointed out that Parliament had power to legislate for preventive detention connected with 'public order' under entry 3, List III. The power conferred by the Act could not be controlled by its long title. The expres-

[32] *Supra*, Sec. II.

[33] *Ibid.*

[34] The long title of the Act runs as follows: "An Act to provide for detention in certain cases for the purpose of maintenance of internal security and matters connected therewith."

[35] AIR 1973 SC 770.

sion 'internal security' used in the long title was broad enough to comprehend the concept of 'public order' as internal disturbances can threaten the 'security of state' and may impinge on 'public order.'

In 1974, Parliament enacted the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act to provide for preventive detention for preventing smuggling and for preventing a person from acting in a manner prejudicial to conserving and for augmenting foreign exchange.[36] The Act by and large follows the pattern of MISA and fulfils the requirements as to communication of grounds, advisory boards, etc., as laid down in Arts. 22(4) and (5). Thus, from 1974 onwards, preventive detention has become possible in India under two Parliamentary statutes.

IV

No sooner had Parliament enacted the Preventive Detention Act, 1950, a challenge was mounted to its validity in the Supreme Court. This resulted in the famous *Gopalan* case.[37] On behalf of Gopalan, an attempt was made to persuade the court to hold that it could go into the 'reasonableness' of the law of preventive detention, or the procedure laid down therein. A three-pronged argument was developed before the court for this purpose. First, the word 'law' in Art. 21 does not mean merely the 'enacted' law but incorporates the 'principles of natural justice' so that a law depriving a person of his life or personal liberty cannot be valid unless it incorporates the principles of natural justice in the procedure laid down by it for depriving life or personal liberty. This means that if the procedure falls short of the standard of natural justice then the law is invalid. Second, a law of preventive detention affects some of the rights guaranteed by Art. 19 and, therefore, the 'reasonableness' of the law can be judged under the various sub-clauses 19(2) to 19(6).[38] Thirdly, the expression 'procedure established by law' used in Art. 21[39] introduces into India the American concept of *procedural due process* which enables the court to see whether the law fulfils the requisite elements of *due* procedure. This implies that a law depriving a person of his life or personal liberty can be declared invalid if it fails to conform with the standard

[36] *Op. cit.*, nn.15 and 16.

[37] *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27.

[38] See, *supra* Sec. II. Particular stress was laid on Art. 19(1)(d) according to which a citizen of India has the right to move freely throughout the territory of India. Under Art. 19(5), 'reasonable restrictions' can be imposed on this right 'in the interests of general public'. The argument was that since preventive detention affected the right of movement, the 'reasonableness' of the Act could be adjudged under Art. 19(5).

[39] *Op. cit.*, n. 18.

prescribed by due process. On behalf of the Government, it was argued that the words 'procedure established by law' in Art. 21 meant nothing else but such procedure only as may be laid down by a law enacted by a competent legislature and that the court could not therefore go into the 'reasonableness' of the law so made or the procedure so laid down. This argument substantially means that a law of preventive detention has only to conform with the procedure prescribed in Art. 22 and that no additional safeguard can be claimed by a detainee over and above what is prescribed in that constitutional provision. Gopalan's arguments in reality meant that a law of preventive detention not only had to conform with Art. 22, but also that the procedure laid down therein must conform with the higher norms of 'natural justice' or 'procedural due process' and in case the procedure fell short of this higher norm, the law would be invalid even though it might be in conformity with Art. 22. Thus, in *Gopalan*, an attempt was made to win for a person detained under the law of preventive detention better procedural safeguards than those envisaged in Art. 22.

In this very first case under the Constitution, the Supreme Court adopted a positivist approach and rejected, by majority, all contentions raised on behalf of Gopalan, and substantially upheld the government's position. It held that the word 'law' in Art. 21 did not mean natural justice. The word 'law' had been used in the sense of *lex*, i.e. a state made law and not in the sense of *jus*. Therefore, the expression 'procedure established by law' in Art. 21 would mean the 'procedure as laid down in a law.' The main reason advanced by the majority for this view was that the rules of natural justice were vague and indefinite and had not been defined anywhere and the Constitution could not be read as laying down a vague standard. Further, the word 'law' had not been used anywhere in the Constitution in the sense of abstract law or natural justice. However, Fazl Ali, J., disagreed with the majority approach and ruled that the principle of natural justice that 'no one shall be condemned unheard' was a part of the general law of the land and the same must therefore be read into Art. 21.

The court also rejected the argument based on the concept of procedural due process. As is well known, the Fifth Amendment of the U.S. Constitution lays down *inter alia* that 'no person shall be deprived of his life, liberty or property, without due process of law.' This clause has proved to be the most significant single source of judicial review in the U.S.A.[40] The word 'due' is interpreted as 'just', 'proper', or 'reasonable', according to the judicial view. Therefore, courts can pronounce whether a law affecting a person's life, liberty or property is reasonable or not. The court may declare a law invalid if it does not accord with its notions of

[40] Corwin, *The Constitution and What It Means Today*, 217, 222, (1958).

what is just and fair in the circumstances of the case. Due process has two aspects — substantive due process and procedural due process. The former envisages that the substantive provisions of a law should be reasonable and not arbitrary; the latter envisages a reasonable procedure, i.e., the person whose life, liberty or property has been affected should have a right of fair hearing which includes four elements, viz., notice, opportunity to be heard, an impartial tribunal to adjudicate, and an orderly procedure. Under the 'due process' concept, the courts become the arbiter of reasonableness of both substantive as well as procedural provisions of law. The word 'due' is of variable content in the due process concept. It denotes that the law should be 'just', but what is 'just' and 'reasonable' is not a static or rigid concept; it varies from one situation to another, and what may be regarded as reasonable in one situation may not necessarily be so in another. Now the argument in *Gopalan* was that the expression 'procedure established by law' in Art. 21 was synonymous with the American concept of 'procedural due process' so that the reasonableness of the Preventive Detention Act would be justiciable in order to assess whether the person affected had been given a right of fair hearing. The court rejected this contention giving several reasons. It argued, for instance, that the word 'due' was absent in Art. 21 and this was a very significant omission, for the entire efficacy of the procedural due process concept emanated from the single word 'due'. The court noted that in the draft Indian Constitution at first the words 'due process of law' had occurred, but these words were later dropped and the present expression adopted instead. This is strong evidence to show that the Constituent Assembly did not desire to introduce into India the concept of procedural due process. The court also pointed out that the concept of 'due process' had been avoided in India because of its extreme uncertainty as the concept of 'reasonable' had varied from judge to judge, and time to time. Also, the concept of 'due process' had generated in the U.S.A. the countervailing doctrine of 'police power' which was another complicated concept. As usual, Justice Fazl Ali disagreed with the majority on this point as well. He interpreted the phrase 'procedure established by law' in Art. 21 as implying 'procedural due process' meaning thereby that no person can be condemned unheard, a principle well-recognized in all modern civilized legal systems.

On the third question, viz., the relation between Art. 21 and Art. 19, the majority ruled that the two Articles were not inter-related and that they operated in different areas. While the expression 'personal liberty' used in Art. 21, if left alone, might have a comprehensive content and could be interpreted to include freedom from arrest or detention, yet reading Arts. 19 and 21 together, the scope of each will have to be curtailed somewhat. Thus, Art. 19 must be held to deal with a few specific freedoms only and not with freedom from detention whether punitive or

preventive. Similarly, Art. 21 should be held as excluding the freedoms dealt with in Art. 19. The majority ruled that 'life and personal liberty' were protected only by Arts. 20 to 22 and not by Art. 19 which could be invoked only by a man having his freedom and not by one under arrest, and only when a law *directly* attempted to control a right mentioned therein. Thus, a law directly controlling a citizen's freedom of speech could be tested under Art. 19(2), but Art. 19 could not be invoked when a law *not directly* in respect of a right mentioned therein, infringed a right guaranteed by Art. 19. Fazl Ali, J., differing with the majority however maintained that Art. 19(1)(d) did control Arts. 21 and 22 because juridically freedom of movement was an essential requisite of personal liberty and, therefore, the reasonableness of the Preventive Detention Act should be justiciable under Art. 19.[41]

The Supreme Court's decision in the *Gopalan* case is not free from criticism. This case denotes the high-water mark of legal positivism and literal interpretation of the Constitution.[42] The court adopted a very strict and literal approach which was too much influenced by the imperative theory of law. The way Art. 21 was interpreted made it impotent against legislative power which could make any law, howsoever drastic, to impose restraints on personal liberty without being obligated to lay down any reasonable procedure for the purpose. Some of the arguments adopted by the majority to reach the result cannot stand close scrutiny. For instance, the court decried the concept of 'natural justice' as vague and uncertain and yet the concept is not unknown in India and has been applied by the courts in hundreds of cases ever since *Gopalan*, and its vitality is on the increase in India with the passage of time.[43] Then, the majority described the concept of 'due process' or 'reasonable' as vague and variable, but the obvious fact is that the Indian Constitution itself has used the expression 'reasonable restrictions' four times in Art. 19. Further, the difficulties pointed out by the majority in adopting the concept of 'due process' really pertain to the area of 'substantive due process' and not to that of 'procedural due process', and it was the latter, not the former, which was sought to be imported into Art. 21 by Gopalan. This concept is not so much vague as it basically means 'fair hearing' which is a well understood concept. This concept is very well entrenched in the Indian jurisprudence.

[41] See, Jain, *op. cit.*, n.3, 572 *et seq.*

[42] Alan Gledhill, *Life and Liberty in Republican India*, 2 JILI 241 (1960); Schwartz, *"A Comparative View of the Gopalan case*, 1950 Ind. L.R. 276; Edward McWhinney, *Judicial Review*, 133; Jain, *op. cit.*, n.3.

[43] Jain & Jain, *Principles of Indian Administrative Law*, 172–222 (1973).

Gopalan therefore remains a disappointing judicial pronouncement. The only substantial argument against importing 'procedural due process' in Art. 21 advanced by the court was that the phrase 'due process' was adopted first but dropped later in the Constituent Assembly. But even this could not be a decisive argument, for the language of the constitution is to be interpreted in a purposeful manner and the intentions of the framers could not bind all future generations to come. If this were not so, constitutions would cease to grow and would become static documents. Every constitutional lawyer knows that such is not the case and judicial interpretation is an accepted instrumentality of effectuating subtle constitutional changes without the obvious and overt mechanism of amending the constitutional text. The Indian Supreme Court has itself done so in innumerable cases. The institution of judicial review would lose much of its meaning and significance if the court were to interpret the constitutional document merely in the light of beliefs and faiths prevailing at the time of the framing of the constitution.[44] Justice Fazl Ali had adopted the correct approach but, unfortunately, he could not persuade his colleagues to fall in line with him. In this connection, it may be worthwhile to refer to a war-time American case *Wong Yang Sung* v. *McGrath*,[45] where the U.S. Supreme Court construed the term 'statute' as including the broader concept of 'law' and thus extended procedural safeguards to an alien in deportation proceedings. On the same analogy, the word 'law' in Art. 21 could have been construed somewhat broadly than mere 'enacted law' so as to lay down that the right of fair hearing to the person being deprived of his life or personal liberty was an essential element of 'law' and that any 'law' denying this basic and elementary right to the individual would be invalid.

Gopalan settled the point that the word 'law' in Art. 21 means a 'statutory' law and that a law affecting personal liberty cannot be declared unconstitutional merely because it lacks 'natural justice' or a *due* procedure. The court's job is to see that the provisions of the law are observed faithfully by the executive and any deviation from the law can be held to be unconstitutional. But the validity of the law as such is beyond judicial scrutiny. The courts have to accept the law as it is. However, it needs to be emphasized in this connection that although a statute may not be held to be invalid because it fails to provide for natural justice, nevertheless, the courts may still bring in natural justice into the law by their interpretative process so long as a law depriving personal freedom does not expressly or by necessary implication rule out the application of the concept of natural justice. This means that if the law in question does not lay down a pro-

[44] Jain, *op. cit.*, n. 3, 755–764.

[45] 339 U.S. 33(1950).

cedure satisfactory to the court, the court can treat natural justice as a part of the law, and declare administrative action as infringing 'procedure established by law' if it is found to be not in conformity with natural justice. This sort of approach is depicted in *Lakhanpal*,[46] a case of preventive detention during the emergency period when the safeguards contained in Art. 22 had been suspended. The Defence of India Rules under which Lakhanpal had been detained provided for review of all detention cases after every six months. The detainee had no right of representation against his detention at any stage. Nevertheless, the Supreme Court ruled that although the initial detention was in exercise of an administrative power, the six-monthly review by the administration of the preventive detention cases was a 'quasi-judicial' function and, therefore, the detainee should be given a right of representation at the time of review. As the administrative authority had failed to give such a right to the petitioner, his detention was held to have been vitiated. This is an example of judicial creativity within the constraints of Art. 21. There was nothing in the law in question for giving any right of representation to the detainee at this stage of review, yet the court was able to give him some protection by importing natural justice by its interpretative process.

However, the sum and substance of the matter of preventive detention is that whatever procedural protection the court can give to the detained person has to be spelled out of Art. 22 which specifically deals with preventive detention. Another source of judicial protection to the detainee is the Administrative Law. Preventive detention being a matter of administrative discretion, all the norms of administrative law which regulate the exercise of administrative discretion, become relevant to the area of preventive detention. It is in this sphere that the Indian Supreme Court has shown much creativity. This aspect of the matter has been explored in the next section. But before doing so, it is necessary to add a foot-note here. In *Gopalan*, the Supreme Court had delinked Art. 21 and 19 holding that the two Articles operated in two different spheres.[47] In course of time, this judicial view has undergone a change and Art. 19 is now not held to be completely irrelevant to a law made for curtailing the personal freedom of an individual. It has now been held by the Supreme Court that since a law of preventive detention affects the right of movement of a person, its reasonableness can be tested with reference to Art. 19(1)(d) read with Art. 19(5).[48] However, even this liberalisation in judicial thinking has not helped the detained persons much because the Supreme Court has also held that the Maintenance of Internal Security Act, 1971, does not suffer

[46] *P.L. Lakhanpal* v. *Union of India*, AIR 1967 SC 1507.

[47] *Op. cit.*, n. 38.

[48] *Op. cit.*, n. 38.

from any constitutional infirmity because the procedure contained therein (which accords with Art. 22) cannot be said to be unreasonable. Under the Act, the grounds of detention have to be supplied to the detainee; he has a right to make a representation which has to be considered by the government as well as an advisory board, the composition of which follows the fundamentals of fair-play.[49] The court has ruled that 'natural justice' insofar as it is compatible with preventive detention finds a place in Art. 22 and MISA. In another case,[50] the Supreme Court rejected a challenge to MISA on the ground that conferment of drastic discretionary power of preventive detention, which infringed personal liberty, on the district magistrate who was not a high official in administrative hierarchy was not reasonable and it thus violated Art. 19. The court ruled that the district magistrate was the head of the district administration, was in charge of maintaining law and order within the district and was a high administrative official. Further, the exercise of power of preventive detention by him was subject to the supervisory control of the State Government. Under the relevant law, the order issued by him was subject to government's approval. Therefore, conferment of discretionary power on the district magistrate was not an unreasonable restriction on the right of personal liberty of a citizen under Art. 19.

Although these judicial pronouncements have upheld the constitutional validity of MISA with reference to Art. 19, nevertheless, the constitutional significance of these pronouncements should not be minimised. The position today is essentially different from that laid down in *Gopalan*. It is one thing to say, as had been said in *Gopalan*, that Art. 19 did not apply to a law restricting personal liberty, but it is quite another thing to apply Art. 19 to such a law and then find the law to be reasonable and valid. Herein lie the germs of further judicial creativity. To-day the Supreme Court may find a law of preventive detention conforming with Art. 22 as reasonable but, in future, it is quite possible for the court to take the view that some better safeguards than what Art. 22 provides for are necessary to make the law reasonable. However, this development in judicial thought process lies in the womb of the uncertain future. At present, as stated above, the courts can give whatever protection they can to a detainee only by a purposeful interpretation of Art. 22 and the application of relevant principles of Administrative Law, and it is this aspect to which we must

[49] *Haradhan Saha* v. *State of West Bengal*, AIR 1974 SC 2154. Also, *Khudiram* v. *State of West Bengal*, AIR 1975 SC 550.

[50] *John Martin* v. *State of West Bengal*, AIR 1975 SC775.

[51] Under Art. 32, the Supreme Court, and under Art. 226, the High Courts, have power to issue writs in the nature of *Habeas Corpus*, *Quo Warranto*, *Mandamus*, *Certiorari* and Prohibition to enforce Fundamental Rights. Therefore, a person

turn our attention now and see how the Supreme Court has played its creative role to somewhat humanise the law of preventive detention by its pronouncements.

V

No objective standard necessary: It is now definitely established that a law of preventive detention is not invalid because it prescribes no 'objective' standard for the executive to follow in ordering preventive detention of a person, and that it leaves the matter to its 'subjective satisfaction'. The reason for this view is that such detention is not punitive but preventive and is resorted to with a view to prevent a person from committing certain activities regarded as prejudicial to certain objects which the law of preventive detention has in view. Preventive detention is thus resorted to for preventing mischief to the community and is based on suspicion or anticipation and not on proof. It is therefore not possible to lay down objective rules of conduct, the non-observance of which by a person should lead to his preventive detention. The responsibility for 'security of state' or 'maintenance of public order' or 'essential services and supplies' rests on the executive and it must therefore have the necessary power to order preventive detention.[52] The Supreme Court has also taken the position that the subjective satisfaction of a detaining authority whether or not to detain a person is not open to objective assessment by a court. A Court is not a proper forum to scrutinise the circumstances of suspicion in which such action has been taken, or to go into the merits of the administrative decision to detain a person. The court cannot substitute its own satisfaction for that of the 'authority' concerned and decide whether administrative satisfaction was proper or not, in the circumstances of the case, or whether the person concerned should have been detained or not.[53]

As a general rule, the courts do not also go into the question whether the facts mentioned in the grounds of detention served on the detainee are correct or false. The reason for the rule is that to decide this, evidence may have to be taken by the courts and this would be contrary to the policy of

seeking to challenge his detention may bring his case before a High Court under Art. 226 and then come before the Supreme Court on appeal, or may come before the Supreme Court straight away under Art. 32.

[52] For relevant provisions of MISA see, sec. III, *supra.*

[53] *Gopalan* v. *State of Madras, op. cit.*, n.37; *Godavari* v. *State of Maharashtra,* AIR 1966 SC 1404; *Nabani* v. *State of West Bengal,* AIR 1974 SC 1706; *Imam Shaik* v. *State of West Bengal,* AIR 1974 SC 2131.

the law of preventive detention. This matter lies within the competence of the advisory board.[54]

Circumstances vitiating subjective satisfaction: Whatever has been said above, however, does not mean that the subjective satisfaction of the detaining authority is completely unreviewable. There are a number of principles from Administrative Law which the courts have frequently invoked to control discretion of the administrative authority concerned to some extent. Thus, satisfaction of the detaining authority can be called in question *inter alia* on such grounds as *mala fide*, non-application of the mind of the authority concerned to the case of the detainee, subjective satisfaction being based on irrelevant grounds. The satisfaction of the detaining authority must be grounded on materials of rationally probative value and it should not be arrived at without taking into account relevant factors. Another increasingly important ground is that discretion should not be arbitrary, vague, fanciful but should be legal and regular. If the detaining authority has come to a conclusion so unreasonably that no reasonable person could have ever come to, then the court can interfere. The court does not, of course, go into the 'adequacy' or 'sufficiency' of the grounds on which the order of detention may be based, but it merely examines whether on the grounds communicated to the detainee, a reasonable person could possibly have come to the conclusion to which the detaining authority did. Here the dividing line between 'subjective satisfaction' and 'objective determination' may, at times, become somewhat blurred, but, nevertheless, the line still remains howsoever faint or thin it may become[55] in a case.

Non-application of mind: As stated above, MISA authorises preventive detention on certain specified grounds.[56] It is therefore mandatory that the order of detention should state the specific ground or grounds on which detention has been ordered. An order will be bad if it says that the detention has been ordered on ground (a) *or* on ground (b). For example, in *Kishori Mohan* v. *State of West Bengal*,[57] the Supreme Court quashed an order which recited that it was necessary to detain the petitioner with a view to preventing him from acting in a manner 'prejudicial to the maintenance of the public order' *or* 'security of state.' 'Public order' and 'security of state' are two separate grounds of detention under MISA. If the prejudicial activities of the petitioner affected both these grounds,

[54] *Bhim Sen* v. *State of Punjab*, AIR 1951 SC 481; *Taraknath Chakraborty* v. *State of West Bengal*, AIR 1972 SC 388; *Ghetu Sheik* v. *State of West Bengal*, AIR 1975 SC 982. Also see under 'Non-application of Mind', *infra*, nn. 57–62.

[55] *Khudiram* v. *State of West Bengal*, AIR 1975 SC 550. Also, Jain & Jain, *Principles of Admin. Law*, 378–417 (1973).

[56] *Supra*, Sec. III.

[57] AIR 1972 SC 1749.

then the order should have used the conjunctive *and* instead of the disjunctive *or*. The use of the word *or* indicates that the detaining authority was either not certain whether the petitioner's activities endangered one or the other ground, or it did not apply its mind to the question whether his activities fell under one *or* the other head and merely reproduced mechanically the statutory formula.[58] Therefore, an order of preventive detention mentioning the grounds in the *alternative* has been invariably held to be invalid.[59]

The Home Department of Government of Bengal followed a practice of issuing a detention order automatically when the police recommended it, and the Home Secretary did not personally satisfy himself on the materials placed before him whether or not it was necessary to issue such an order in a particular case. A detention order issued in such a routine manner was quashed by the Privy Council in *Emperor* v. *Sibnath Banerji,*[60] on the ground that the Home Secretary had not applied his mind to the question of issuing the order and that his personal satisfaction in each case of detention was a condition precedent to the issue of such an order.

Factual errors in the grounds of detention served on the detainee may at times be of such a nature that the court may be led to draw the inference that the order of detention was made without proper application of mind by the detaining authority. In such an eventuality, the order will be held bad. However, as stated above, the Court does not permit evidence to be led to establish such an error.[61] It will have to be established through affidavits. In an order of preventive detention, it was given as a ground that the detainee sold 1200 litres of diesel to one A through one cash memo. The court found this allegation to be patently incorrect as this particular cash memo was only for 200 litres. There was another cash memo issued on another date for sale of 1000 litres of diesel to A. This cash-memo was not mentioned in the grounds. The Court ruled that this was indicative of the rather casual manner in which the district magistrate had proceeded to make the order of detention without proper application of mind and this invalidated the order of detention.[62]

Mala fides: The courts will quash an order of detention if *mala fides* of the detaining authority is established. The burden to prove that the detaining authority acted *mala fide* in issuing the detention order lies on

[58] *Akshoy Konai* v. *State of West Bengal,* AIR 1973 SC 300; *Binod Bihari* v. *State of Bihar,* AIR 1974 SC 2125.

[59] The Federal Court in Malaysia has refused to apply this principle; see *Karam Singh* v. *Government of Malaysia, supra,* note 11.

[60] AIR 1945 PC 156.

[61] *Op. cit.,* n. 54.

[62] *Dwarika Prashad* v. *State of Bihar,* AIR 1975 SC 134.

the detainee, and it is extremely difficult to discharge this onus. A kerosene dealer was detained. Challenging his detention, he alleged in the court that the Deputy Superintendent of Police, at whose instance the order had been issued, had made false reports against him so that he could be eliminated as a wholesale kerosene dealer and the D.S.P.s' relatives might be benefited by obtaining the distributorship for kerosene. The D.S.P. filed no affidavit to controvert the allegations made against him, and the affidavit filed on behalf of the government was very defective. The Supreme Court ruled that the detention order was 'clearly and plainly *mala fide*.'[63]

Will a detention order be regarded as *mala fide* and hence invalid because it was made against a person on the very same grounds on which he had been earlier prosecuted in a court but was discharged? It can plausibly be argued that preventive detention in such a situation circumvents the ordinary law of the land and defeats the court's order, and what better proof of the detaining authority's *mala fides* could there be than its use of its extraordinary power of preventive detention when a person has been acquitted or discharged by a court. However, it is now a well established judicial view that the mere fact that criminal proceedings had been initiated against a person for certain incidents, and that he had been discharged by the trying magistrate for *want* of evidence, does not mean that no valid detention order could be passed against him on the basis of those very same incidents, or that such an order can for that reason be characterised as *mala fide*. The rationale of this judicial view is that while the purpose of trial and punishment under the ordinary criminal law is 'punitive', and it seeks to punish a person for past offences committed by him and, therefore, needs proof beyond reasonable doubt, the purpose of preventive detention is different. It is a precautionary measure; it is based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of surrounding circumstances, and subjective satisfaction is sufficient to sustain it. Therefore, the fact that evidence is not sufficient to sustain a prosecution does not mean that the detaining authority did not have before him evidence on which he could be satisfied.[64] Many a time, the prosecution fails because witnesses are afraid to depose against desperate characters, but detaining authorities may be satisfied, on the basis of the past activities of the persons concerned, that it was necessary to detain them in order to prevent them from committing prejudicial activities.[65] Nor can a detention order be held bad on the

[63] *Sadanandan* v. *State of Kerala*, AIR 1966 SC 1925. Also, *Lawrence D'Souza* v. *State of Bombay*, AIR 1956 SC 531; *Puranlal Lakhanpal* v. *Union of India*, AIR 1958 SC 163.

[64] *Samir Chatterjee* v. *State of West Bengal*, AIR 1975 SC 1164.

[65] *M.S. Khan* v. *C.C. Bose*, AIR 1972 SC 1670; *Golam Hussain* v. *Police Commissioner*, AIR 1974 SC 1336; *Babulal* v. *State of West Bengal*, AIR 1975 SC 606.

ground that it is based on such grounds as could be tried under the criminal law, and that the detainee should have been so tried instead of being detained.[66] In *Ashim Kumar* v. *State of West Bengal*,[67] the detainee was first arrested on the charge of committing an offence. He was then released on bail. The police then took steps to prosecute him in a court but, in the meantime, an order of preventive detention was passed against him. It was held that the order was not vitiated.

What however has been said above is a general, but not a universal, rule, and there may be extreme cases and exceptional circumstances when a prior court case, or lack of it, may be a factor in holding the detention invalid. The courts have been conscious of the danger that the executive may tend to shy away from court proceedings for bringing home to the person concerned his guilt in the normal manner, and instead adopt the easier strategy of issuing preventive detention orders based on its subjective satisfaction. Such a tendency, if allowed unchecked, may pose a danger to the democratic way of life. Referring to this aspect of the matter, the Supreme Court has observed in *Bhut Nath* v. *State of West Bengal*:[68] "*. . . detention power cannot be quietly used to subvert*, supplant or to substitute the punitive law of the Penal Code. The immune expedient of throwing into a prison cell one whom ordinary law would take care of, merely because it is irksome to undertake the inconvenience of proving guilt in court is unfair abuse." In *Ram Bali* v. *State of West Bengal*, the court has stated that "in some cases, the facts may so clearly indicate that an ordinary criminal prosecution would suffice that the necessity to order the detention of an offender for one of the objects of the Act could not be said to be reasonably made out."[69] The Supreme Court has therefore been cautious in this area, and some qualifications have been imposed by it on the rule above mentioned. During the course of prosecution of a person in a court on certain charges, a preventive detention order was served on him on the self-same grounds. The Supreme Court declared the detention order invalid in *Biram Chand* v. *State of Uttar Pradesh*[70] on the ground that – (1) two parallel proceedings—prosecution as well as detention—should not be resorted to simultaneously against a person; (2) a person faced simultaneously with a criminal charge and prosecution, has no proper and reasonable opportunity to make an effective representation against his

[66] *Borjahan Gorey* v. *State of West Bengal*, AIR 1972 SC 2256; *Sahib Singh Dugal* v. *Union of India*, AIR 1966 SC 313. *Mohd. Subrati* v. *State of West Bengal*, AIR 1973 SC 207; *Masood Alam* v. *Union of India*, AIR 1973 SC 897; *John Martin* v. *State of West Bengal*. AIR 1975 SC 775.

[67] AIR 1972 SC 2561. Also see *Abdul Aziz* v. *District Magistrate, Burdwan*, AIR 1973 SC 770.

[68] AIR 1974 SC 806.

[69] AIR 1975 SC 623, 625.

[70] AIR 1974 SC 1161.

detention; (3) the fact that a criminal prosecution is pending against a person is not a relevant ground for making a detention order. This was impeccable logic, but still in *Haradhana Saha* v. *State of West Bengal,*[71] the Supreme Court ruled that a detention order passed during the pendency of the prosecution would not be invalid. In *Srilal Shaw* v. *State of West Bengal,*[72] a preventive detention order was issued against a person mainly on the ground that he had stolen railway property. He had documents to show that he had purchased the goods in question in the open market. A criminal case filed against him was dropped and detention order passed instead. A 3-Judge-Bench of the Supreme Court declared the order bad. The court thought that it was a typical case where, for no apparent reason, a person who could easily be prosecuted under the punitive law was being preventively detained. The court noted that Parliament had enacted a special law to cover cases of theft of railway property conferring extensive powers on the executive to bring to book persons who were found to be in unlawful possession of railway property. If the facts stated were true, then it was an easy case to take to a successful conclusion. The court felt that the criminal case against the detainee was probably dropped because he might have been able to prove his innocence. The court therefore ruled that, on the basis of the material available to the detaining authority, "it was impossible to arrive at the conclusion that the possession of the petitioner was unlawful." Subsequently, in *Samir Chatterjee v. State of West Bengal,*[73] a two-judge-Bench declared that the *Shaw* bench had failed to appreciate the implications of the *Saha*[74] case where it had been held that preventive detention could not be regarded as invalid merely because where there was a possibility of prosecution, the person had been detained and not prosecuted. In reality, however, the *Shaw* ruling went further than this simplistic statement and came very close to holding the preventive detention order as *mala fide.* In spite of the *Samir* case, the Court again adopted the *Shaw* ruling in *L.K. Das* v. *State of West Bengal*[75] and held a detention order bad as being based on a 'simple, solitary incident of theft' without anything more. The government's contention that the prosecution could not be pursued as witnesses were afraid to give evidence against the person concerned was rejected by the court as being repugnant to 'reason and reality'. The court called it a 'fanciful plea' which could not be swallowed even by an ultra-credulous man without straining his credulity to the utmost. In *Noor Chand* v. *State of West Bengal,*[76] the Supreme Court emphasized that the fact that the petitioner was discharged from the criminal case was not entirely irrele-

[71] AIR 1974 SC 2154.
[72] AIR 1975 SC 393.
[73] AIR 1975 SC 1165.
[74] *Op. cit.,* n. 71.
[75] AIR 1975 SC 753.
[76] AIR 1974 SC 2120.

vant or of no significance; it was a circumstance which the detaining authority could not altogether disregard. In this case, the court held that the order of detention was a colourable exercise of power because the court felt convinced that there was no material on the basis of which the detaining authority could have arrived at his subjective satisfaction to detain the person concerned. The man had been discharged in a criminal trial but then detained. The petitioner claimed that he had been discharged because there was no material against him and not because the witnesses were afraid to give evidence. The witnesses in the case were members of the railway protection force and there was no question of these people being afraid to give evidence. The magistrate detaining the person did not file an affidavit controverting the suggestion made by the detainee. The court found it an infirmity that the detaining authority had not asserted that "in spite of the discharge he was satisfied, on some valid material, about the petitioner's complicity in the criminal acts which constitute the basis of the detention order." Again in *Abdul Gaffer* v. *State of West Bengal*,[77] the detainee was released by the court. He had been apprehended by the railway protection force on the ground of breaking open railway wagons. A criminal case was registered against him and he was released on bail but then he was put under preventive detention. The justification given for the detention was that witnesses were afraid to give evidence against him. The court could not however believe this because the only witness in the case were the members of the railway force which is a para police organisation. Applying the *Shaw* and *Noor Chand* rulings,[78] the Court came to the "inescapable conclusion" that the petitioner had been detained without application of mind as to whether the prosecution against him was foredoomed to failure on the ground of witnesses being afraid to depose against the detainee in court and that the impugned order had been made in a casual and cavalier manner. In *Sadhu* v. *State of West Bengal*,[79] the detention order was quashed because the court could not accept the assertion of the state that witnesses were afraid to give evidence against the detainee in the open court. The witnesses were all officials and so the assertion could not be "swallowed gullibly'. The court emphasized that although the subjective satisfaction was not to be tested by 'objective' standards in preventive detention cases, nevertheless, a 'sham satisfaction' is no satisfaction. The upshot of this all is that while discharge in a criminal case alone is not sufficient to vitiate the later detention, there may be circumstances which, coupled with non-prosecution, or failure of prosecution in a court, may make detention bad. The courts do not take at face value the assertion that the witnesses were afraid to testify and,

[77] AIR 1975 SC 1496.

[78] *Op. cit.*, nn. 72 and 76.

[79] AIR 1975 SC 919.

hence, the prosecution could not be undertaken. If the court feels satisfied that the detainee was discharged not because witnesses were afraid to give evidence, but because there was no material against the detainee, then the court can hold that the satisfaction of the detaining authority was 'colourable,'[80] as there was no rational basis for the satisfaction of the authority concerned. In this connection, *Dulal Roy* v. *District Magistrate, Burdwan*,[81] needs to be noted. A person was arrested on charge of two simple thefts. While he was in the prison under remand, a preventive detention order was served on him. He was later discharged by the Magistrate in the criminal case against him, but he was kept in the prison thereafter under the preventive detention order. The order was quashed by the Supreme Court. The Court stated that a detention order passed against a person in jail custody on the same facts on which he was being tried for an offence was "easily vulnerable" to the charge that there was no basis for the satisfaction of the detaining authority and that the power was being misused as a cloak "solely" to punish the detainee for the substantive offence for which he was prosecuted. In such circumstances, the counter-affidavit filed by the Magistrate in support of the detention order should specifically say that the prosecution failed for reasons other than that the charge was groundless. "There is no averment whatever that the charges against the petitioner were true but the evidence collected against the petitioner was deficient. . .. The circumstances in which the petitioner was discharged by the Judicial Magistrate have not been set out." The Court refused to draw the presumption that the prosecution failed because of paucity of evidence and not because the charge was baseless. If the petitioner was discharged because there was no material against him, then "there would be apparently no rational basis for the subjective satisfaction of the detaining authority."

It is clear that the court would not sustain an order of preventive detention if it does not not feel satisfied that it was passed because the evidence to establish guilt was not sufficient and not because there was no material to base the charges. This rule may be equated to the well-known difference between "no evidence" and "some evidence" – the test used to issue *certiorari* to review questions of fact decided by a quasi-judicial body. Similarly, detention will be vitiated if the court had declared the

[80] See below, text accompanying nn. 83–89.

[81] AIR 1975 SC 1508.

[82] *Golam Hussain* v. *Police Commissioner*, AIR 1974 SC 1336. Reference may be made here to a Malaysian case, *Yeap Hock Seng* v. *Minister of Home Affairs* (dec. dtd. October 28, 1975, High Court in Malaya at Ipoh) in which these Indian cases have been cited.

[83] *Anil Dey* v. *State of West Bengal*, AIR 1974 SC 832.

case against the detainee to be false or baseless and he was detained on the same grounds as had formed the subject-matter of the case which failed. In such a situation, the detaining authority with that judicial pronouncement before him may not reasonably claim to be satisfied about prospective activities based on what a court has found to be baseless.[82] This cautious approach of the courts reflects their anxiety that preventive detention should not be used to supplant the ordinary judicial process which may become a threat to democratic values.

Colourable exercise of power: At times, a detention order has been quashed on the ground of colourable exercise of power. As the Supreme Court has emphasized: ". . . the opinion of the officer must be honest and real, and not so fanciful or imaginary that on the facts alleged no rational individual will entertain the opinion necessary to justify detention.[83] Thus, a detention order can be questioned on the ground that the subjective satisfaction of the detaining authority was not based on 'adequate' or 'rational' material,[84] or that the grounds on which the authority has reached its satisfaction are such that no reasonable person could possibly arrive at such satisfaction.[85] The test applied here is: were the prejudicial activities of the detainee such as to satisfy a reasonable mind that if he was left at large, he would commit similar activities again. If the order of detention suffers from any such infirmity it would be quashed as being based on 'colourable exercise of power'. A considerable delay between the date of making the order and the date of arrest of the person concerned under it, has been taken as a circumstance which throws considerable doubt on the genuineness of the authority's satisfaction. The rationale of this judicial view is that if the detaining authority was 'genuinely satisfied', after proper application of mind to materials before it, that the person in question should be detained to prevent him from further committing prejudicial activities, then the authority would act promptly to arrest him immediately after the order is made and would not let him remain at large for long to carry on his objectionable activities. When this happens, it shows that the authority's satisfaction was "colourable and not genuine," unless the authority furnishes a reasonable explanation for the delay and thus dispels the inference that its satisfaction was colourable.[86] A delay of one month in making the arrest after issuing the detention order has been held not to vitiate the detention.[87]

[84] *Dhurus Kanu* v. *State of West Bengal*, AIR 1975 SC 571; *Noor Chand Sheikh* v. *State of West Bengal*, AIR 1974 SC 2120; *Sudhir Chandra* v. *District Magistrate, Malda*, AIR 1975 SC 732.

[85] *Dilip Nayak* v. *District Magistrate, Burdwan*, AIR 1975 SC 572; *Khudiram Das* v. *State of West Bengal*, AIR 1975 SC 550.

[86] *Sk. Nizamuddin* v. *State of West Bengal*, AIR 1974 SC 2353.

[87] *Suresh Mahato* v. *District Magistrate, Burdwan*, AIR 1975 SC 728.

If a person is already in the prison when the detention order is passed, and he is not likely to be released for a fairly long time, the order can be held bad because there can be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in prejudicial activities. The satisfaction of the authority as to the inclination of the detainee to act in a prejudicial manner is the *sine qua non* for making a detention order. It presupposes that on the date of the order, or in the near future, the detainee will have freedom of action. Therefore, when a person is in jail with no immediate prospect of release on bail or otherwise, the authority cannot be legitimately satisfied on the basis of his past antecendents that he is likely to indulge in similar prejudicial activities again after his release in the distant or indefinite future.[88] If, however, there is a likelihood of a prisoner being released soon, then the detention order will not be vitiated.[89]

Non-existent or irrelevant ground: A detention order is bad if it is based on a non-existent ground.[90] For example, in the grounds served on a detainee, certain prejudicial activities were said to have been committed by him on a day when he was in police custody. The order was quashed as having been based on a non-existent ground.[91] A dealer in high speed diesel oil was detained for "maintenance of essential supplies and services." One of the grounds was that he supplied some oil against a cash memo without mentioning on it the purchaser's name and address which was not only against the licensing order but also showed that the purchasers were fictitious persons. The Supreme Court found that the requirement of giving purchaser's address on a cash-memo had been withdrawn by the government by an order. There was thus no contravention of any law and the detaining authority could not rationally draw an inference merely from the absence of the customer's address, without anything more, that the sale in question was fictitious. The order was held bad as the ground in question was wholly unfounded, misconceived, non-existent and not available under the law.[92] A detention order should not be based on a ground which is irrelevant or extraneous to, or falls outside, the scope and object of the law of preventive detention, and the grounds on which a detention order has been made must have some rational connection with, and be relevant and germane to, the objects to prevent which the specific

[88] *Ashim* v. *State of West Bengal*, AIR 1972 SC 2561; *Dulal Roy* v. *District Magistrate, Burdwan*, AIR 1975 SC 1508.

[89] *Masood Alam* v. *Union of India*, AIR 1973 SC 897.

[90] *Shibban Lal Saxena* v. *State of Uttar Pradesh*, AIR 1954 SC 179; *Gopal Bauri* v. *District Magistrate*, AIR 1975 SC 781.

[91] *Mintu Bhakta* v. *State of West Bengal*, AIR 1972 SC 2132.

[92] *Dwarika Pershad* v. *State of Bihar*, AIR 1975 SC 134.

order has been made. Although the subjective satisfaction of the detaining officer is not open to objective assessment, nevertheless, satisfaction based on irrelevant ground is vitiated. The test to determine the relevancy is this: are the grounds such as a rational human being can consider to be connected in some manner with the objects which are sought to be prevented.[93] If the grounds relied on have nothing to do with the prejudicial purposes stipulated in the statute and the detention order, no *nexus* exists and the order is bad.[93a] Even if the incidents attributed to the detainee have some connection with the obnoxious activities, it should not be too *trivial* in substance. A few examples of the application of this principle may be mentioned here. The MISA authorises preventive detention for 'maintenance of public order.' 'Public order' has been judicially distinguished from 'law and order'; 'maintenance of public order' means prevention of disorder of a grave nature. An act can be said to affect 'public order' only if it affects the public at large.[94] On the other hand, maintenance of 'law and order' means prevention of minor disorders or breaches of peace of a local nature which primarily injure specific individuals: such acts do not affect 'public order' though they may affect 'law and order.' An act affecting the current of community life is germane to 'public order'; an act affecting merely an individual leaving public tranquility undisturbed will be relevant to 'law and order' and not to 'public order'. Thus, acts of theft or robbery;[95] solitary cases of assault;[96] or assault on a public servant;[97] casting aspersions on the Chief Justice of the High Court in filthy language,[98] are not relevant to the concept of 'public order', and a preventive detention order based on any such grounds cannot be sustained as these affect only 'law and order.' But highway robbery using daggers;[99] murder by members of an extremist party with the object of promoting party cause,[1] affect 'public order'. A murderous

[93] *Sodhi Shamsher* v. *State of Pepsu*, AIR 1954 SC 276; *Biram Chand* v. *State of Uttar Pradesh*, AIR 1974 SC 1161.

[93a] *Nathmal* v. *State of Rajasthan*, AIR 1975 SC 2198.

[94] *Samaresh Chandra Bose* v.*District Magistrate*, AIR 1972 SC 2481; *Shyamlal Chakraborty* v. *Commissioner of Police*, AIR 1970 SC 269; *Ram Rajan* v. *State of West Bengal*, AIR 1975 SC 609.

[95] *Sushanta* v. *State of West Bengal*, AIR 1696 SC 1004.

[96] *Pushkar Mukherjee* v. *State of West Bengal*, AIR 1970 SC 852; *Arun Ghosh* v. *State of West Bengal*, AIR 1970 SC 1228; supra, nn. 83, 94, 95; also, *Ram Manohar Lohia* v. *State of Bihar*, AIR 1966 SC 740.

[97] *Kuso Sah* v. *State of Bihar*, AIR 1974 SC 156.

[98] *Sodhi Shamsher* v. *State of Pepsu*, AIR 1954 SC 276.

[99] *Milan Malik* v. *State of West Bengal*, AIR 1973 SC 1214.

[1] *Abdul Azis* v. *District Magistrate, Burdwan*, AIR 1973 SC 770.

assault by the detainee on a person causing him grievous injuries resulting in his death has been held to raise a 'law and order' problem and not a 'public order' problem and a preventive detention order based on such a ground cannot be upheld.[2] There may however be some circumstances in which a criminal act against one person may amount to a 'public order' problem.[3] Possession of high explosive bombs has been held to be prejudicial to 'public order'.[4] A mere peaceful protest does not disturb public peace and thus has no nexus with 'public order.'[5]

In this area, the *Magan Gope* case is very instructive.[6] Magan was detained on the ground *inter alia* that while engaged in the act of smuggling on a particular day, he along with his associates attacked a party of home guards at about 7 p.m. The Court held this to be a matter of law and order' and not relevant to 'public order' because of the following reasons: there is absolutely no mention that any scare was caused within the locality as a result of the incident; it is not mentioned that the detainee and his associates were armed with any deadly weapons; the incident was confined to the detainee and his associates on the one hand and home guards on the other. As a general proposition, the court stated that *prima facie* there was no relation between smuggling from one State to another in the country, which was essentially a secret operation, and maintenance of 'public order' in which the operative word was 'public'. There may however be cases of smuggling with violence affecting public tranquility which may be related to 'public order.' The order of preventive detention was thus quashed. Another significant point settled by the court was that where the order *ex facie* was made with a view to prevent an act prejudicial to the maintenance of 'public order', the detaining authority would not then be permitted to show before the court that, in fact, the order was made to prevent an act 'prejudicial to the maintenance of supplies and services essential to the life of the community.'

The Courts have been vigilant to ensure that an isolated solitary offence is not made the ground of preventive detention so as to bypass normal judicial process. Thus, in *Debu Mahto,*[7] the court ruled that one solitary act of wagon-breaking could hardly persuade a reasonable person to reach the satisfaction that unless the petitioner was detained, he would in all probability indulge in further acts of wagon-breaking and thus prejudice

[2] *Manu Bhushan* v. *State of West Bengal,* AIR 1973 SC 295.

[3] *Golam Hussain* v. *Police Commissioner,* AIR 1974 SC 1336.

[4] *Nisbi Kanta* v. *State of West Bengal,* AIR 1972 SC 1497.

[5] *Ram Bahadur* v. *State of Bihar,* AIR 1972 SC 223.

[6] *Magan Gope* v. *State of West Bengal,* AIR 1975 SC 953.

[7] *Debu Mahto* v. *State of West Bengal,* AIR 1974 SC 816.

maintenance of supplies and services. But it may be otherwise in case of crimes involving sophisticated, complex technique requiring experience and expertise, as for instance, theft of railway signal material.[8] The rationale here is that it is no simple theft indulged in by a layman, but shows professionalism and even one incident may demonstrate a course of conduct of the same type. The test in such cases is: Is the incident too *flimsy* or *trivial* to support the subjective satisfaction to detain the person concerned? Is the past activity of the detainee reasonably suggestive of a repetitive tendency on his part to do likewise in future? The Supreme Court has emphasized that the power of preventive detention is to be exercised only if the detaining authority, on the basis of the past prejudicial conduct of the detainee, is satisfied about the probability of his acting similarly in future. While a simple solitary incident of theft without anything more is hardly suggestive of any such tendency,[9] a single incident of armed and organised dacoity may be regarded as adequate to sustain a detention order, for only a single deviance may itself demonstrate its potentiality for continuing criminality and "indicate previous practice, experiment and expertise."[10] Recently, in *Abdul Latif* v. *District Magistrate, Malda,*[10a] rejecting a challenge to a preventive detention order on the ground that it was based on a solitary incident, the Supreme Court has stated:

> "Although the detention order was based on a single incident but the nature and the circumstances in which that criminal incident was committed could not be said to be such that on its basis, the detaining authority could not possibly have formed an opinion as to the tendency of the detenu to act likewise in future also."

Here the order was passed to prevent the detainee from acting in a manner prejudicial to maintenance of supplies and services essential to the community. The incident in question was an act of wagon-breaking committed by an organized gang in a daring fashion in the teeth of opposition from the Railway Police.

The following activities *inter alia* have been held to be relevant to the maintenance of supplies and services essential to the community – a ground quite commonly invoked in preventive detention orders: stealing of batteries from railway coaches;[11] hoarding of stock of goods to sell in the

[8] *Anil Dey* v. *State of West Bengal,* AIR 1974 SC 832; Also *Dhurus Kanu* v. *State of West Bengal,* AIR 1975 SC 571; *Babulal* v. *State,* AIR 1975 SC 606.

[9] *L.K. Das* v. *State of West Bengal,* AIR 1975 SC 753.

[10] *Babulal* v. *State of West Bengal,* AIR 1975 SC 606.

[10a] AIR 1975 SC 2213.

[11] *Gopal Bar* v. *State of West Bengal,* AIR 1975 SC 751.

black market;[12] theft of telephone cable;[13] smuggling of rice;[14] black-marketing;[15] theft of overhead railway communication wire disrupting railway services;[16] removal of fish plates from the railway track resulting in disruption of railway traffic;[17] theft of electric copper wire disrupting electric supply.[18]

The expression 'service and supplies' has been held to mean 'service' or 'supplies'. Thus, an act which disrupts either service *or* supplies is a prejudicial act. All 'supplies' are not 'services' and all 'services' are not 'supplies'. But the complex needs of society and modern life and the multifarious obligations of a welfare state very much mingle 'supplies and services'. In a few cases, these two expressions may carry a meaning distinct and different from each other. In most cases, however, the same activity may affect both. Many essential commodities may be regarded both as 'supplies' and 'services' simultaneously.[19] It has further been held that an undue time-lag between the offending activity and the making of order of detention may vitiate the order on the basis that no authority, acting rationally, can be satisfied subjectively of future mischief merely because long ago the detainee had done something evil. Therefore, grounds which are remote in proximity with the object of detention are regarded as irrelevant for purposes of subjective satisfaction. For example, in *Abdul Munnaf* v. *State of West Bengal,*[20] the preventive detention order made after nine months of the commission of the prejudicial activity was quashed, as the authority concerned could not explain the delay in taking action. The court explained the position thus: the past conduct of a person can appropriately be taken into account in making a detention order, for it is largely from prior events showing tendencies of a person that an inference can be drawn whether he is likely in future to act in a prejudicial manner. But such an inference is justifiable if the past conduct is proximate in point of time and has a rational connection with the conclusion that the detention of the person is necessary. If in a case, the

[12] *Kamla Prasad* v. *District Magistrate,* AIR 1975 SC 726. But see, *Nathmal* v. *State of Rajasthan,* AIR 1975 SC 2198.

[13] *Mohd. Alam* v. *State of West Bengal,* AIR 1974 SC 917.

[14] *Jagdish Prasad* v. *State of Bihar,* AIR 1974 SC 911.

[15] *Bhim Sen* v. *State of Punjab,* AIR 1951 SC 481.

[16] *Habibullah* v. *State of West Bengal,* AIR 1974 SC 493.

[17] *Dhurus Kanu* v. *State of West Bengal,* AIR 1975 SC 571.

[18] *Dilip Nayak* v. *District Magistrate,* AIR 1975 SC 572.

[19] *Jagdish Pershad* v. *State of Bihar,* AIR 1974 SC 911; *Mohd. Alam* v. *State of West Bengal,* AIR 1974 SC 917.

[20] AIR 1974 SC 2066.

time-lag between the prejudicial activity of a detainee and the detention order made because of that activity is *ex facie* long, the detaining authority should explain to the court the delay in making the order to show that there was proximity between the prejudicial activity and the detention order. If the detaining authority fails to do so, the order would be held to suffer from an infirmity.[21]

It is now a very well settled rule that if a detention order is based on several grounds, and if any one of these grounds is either *non existent* or *irrelevant*, then the detention order will be held to be invalid even though the rest of the grounds may be good. The reason for this proposition is that in such a case it can never be predicated as to what extent the bad ground operated on the mind of the detaining authority; whether the relevant and admissible grounds, or the irrelevant or non-existent ground, gave the requisite satisfaction to the concerned authority, or whether the detention order would have been made at all if the bad ground were excluded and only the good grounds were placed before the authority making the detention order.[22]

It needs to be emphasized here that although the several circumstances which may vitiate the subjective satisfaction on which a detention order may be based have been discussed above under several heads, yet there is no such rigid classification in practice, and a vitiating circumstance may fall under several heads, e.g., *'mala fide'* and 'colourable exercise of power' come very near to each other. The courts at times use these expressions interchangeably without much articulation.

Communication of grounds and the right of representation: Art. 22(5) has two limbs.[23] One, the detaining authority is to communicate to the detainee the grounds of his detention as soon as may be. Two, the detainee is to be afforded the earliest opportunity of making a representation against the order of detention. There is an integral relation between these two limbs. Grounds are to be communicated to the detainee so as to

[21] This principle has been applied in a number of cases: *Nagem Murmu* v. *State of West Bengal*, AIR 1973 SC 844; *Lashaman Khatik* v. *State of West Bengal*, AIR 1974 SC 1264; *Golan Hussain* v. *Police Commissioner*, AIR 1974 SC 1336; *Kamal Pramanik* v. *State of West Bengal*, AIR 1975 SC 730; *Md. Sahabuddin* v. *District Magistrate*, AIR 1975 SC 1718.

[22] *Shamrao* v. *District Magistrate*, AIR 1952 SC 324; *Shibban Lal* v. *State of Uttar Pradesh*, AIR 1954 SC 179; *Dwarka Das* v. *State of Jammu & Kashmir*, AIR 1957 SC 164; *Pushkar Mukherjee* v. *State of West Bengal*, AIR 1970 SC 852; *Ram Krishna Paul* v. *State of West Bengal*, AIR 1972 SC 863; *Biram Chand* v. *State of Uttar Pradesh*, AIR 1974 SC 1161; *Bhupal Chandra* v. *Arif Ali*, AIR 1974 SC 255; *Dwarika Prasad* v. *State of Bibar*, AIR 1975 SC 134; *Magan Gope* v. *State of West Bengal*, AIR 1975 SC 953, *supra*, n. 6.

[23] *Supra*, Sec. II, n. 20.

enable him to defend himself. This is natural justice to some extent woven into the fabric of preventive detention by the Constitution. From this the courts have drawn certain propositions to ensure that the authority concerned communicates grounds to the detainee in such manner that his constitutional right to make a representation against his detention is exercised effectively and is not reduced to something merely illusory or a sham. The words 'as soon as may be' in Art. 22(5) have been held to mean that the detaining authority communicates the grounds to the detainee with reasonable despatch. Failure to communicate the grounds within a reasonable time will vitiate the detention. If is for the courts to consider whether in the circumstances of a case, the time taken to communicate the grounds was 'reasonable' or more than 'reasonable.'[24] Taking note of this judicial approach, MISA fixes a period of five days from the date of detention within which the grounds must be communicated to the detainee. Further, it has been held by the Supreme Court that under Art. 22(5), communication of grounds means communication to the detainee of all the *basic* facts and *materials* which went into the subjective satisfaction of the authority to detain the detainee. The detention will become vitiated if any factual components constituting the real grounds for detention are not fairly and fully put across to the detainee, the reason being that if some facts are held back from the detainee, his right to make an effective representation against his detention is infringed.[25] The Supreme Court has emphasized that Art. 22(5) vests a real and not imaginary right in the detainee. Communication of facts is the cornerstone of the right of representation and an order of detention passed upon uncommunicated materials is unfair and illegal. A single ground, *viz.*, that the detainee committed theft of telephone cable wire, was communicated to him. In his affidavit before the court, the magistrate asserted that the detainee was a 'notorious' stealer of cable wire and that the particular episode was cited merely as an instance thereof. The Supreme Court held the detention invalid because while the subjective satisfaction of the magistrate was based not on one solitary incident which was communicated to the detainee but on a course of conduct as was indicated by the word 'notorious', this injurious information was not communicated to the detainee. There was, thus, incomplete communication of grounds to the detainee and this was bad as infringing his right under Art. 22(5).[26] In another case, the only ground communicated to the detainee was that on a

[24] *Ujagar Singh* v. *State of Punjab*, AIR 1952 SC 350.

[25] *Madhab Roy* v. *State of West Bengal*, AIR 1975 SC 255; *Panna* v. *State of West Bengal*, AIR 1975 SC 863.

[26] *Sheik Hanif* v. *State of West Bengal*, AIR 1974 SC 679; *Alek Mohd.* v. *State of West Bengal*, AIR 1974 SC 889; *G.H. Mondal* v. *State of West Bengal*, AIR 1974 SC 895.

certain date he was caught red-handed while attempting to commit theft of overhead electric wire. But the affidavit of the district magistrate disclosed that one of the reasons for his detention was that he was a man of dangerous and desperate habits. This reason was not communicated to him and so the detention was declared to have become invalid because of the breach of Art. 22(5).[27] In *Khudiram Das* v. *State of West Bengal,*[28] the Supreme Court considered an important point in this connection. In the grounds of detention communicated to the detainee, three incidents were mentioned. The district magistrate had before him the history sheet of the detainee at the time of making the detention order, but none of the injurious facts contained therein was communicated to the detainee. The magistrate asserted in an affidavit that beyond the three grounds communicated, he had not taken any other material from the history-sheet into account in passing the order. The detainee argued that though the magistrate was influenced in making the order by the material in the history-sheet, it was not communicated to him and thus his right under Art. 22(5) was infringed. The government asserted that the court should accept the magistrate's affidavit, should not call for the history-sheet in question, and should not probe into the nature of the material before the district magistrate or into whether or not he was influenced by it in making the detention order. The court rejected this argument saying that as the custodian of the citizen's fundamental rights, it was its duty to satisfy itself whether there were any other materials which could have influenced the magistrate in arriving at his subjective satisfaction but which he did not communicate to the detainee. Whether the other materials on record had or had not any effect on the mind of the magistrate could not be decided solely on the basis of the magistrate's own ipse dixit. Art. 22(5) insists that all basic facts and particulars which influenced the detaining authority in arriving at its satisfaction must be communicated to the detainee. It is therefore the duty of the court to examine what are the basic facts and materials which actually, and in fact, weighed with the detaining authority in reaching its satisfaction and to

[27] *Fogla* v. *State of West Bengal,* AIR 1975 SC 245. In *Bhut Nath* v. *State of West Bengal,* AIR 1974 SC 806, a few charges were communicated to the detainee but his bio-data consisting of adverse remarks considered by the detaining authority was not communicated to him. The court held his detention bad under Art. 22(5) and quashed it. In *Madhab Roy* v. *State of West Bengal,* AIR 1975 SC 255, the court held that one single act of theft involving sophisticated and complex operation requiring specialised experience may indicate the course of conduct and the infirmity which was held to arise in *Fogla* and *Bhutnath* would not arise. A distinction has thus been drawn between a case of ordinary theft and theft requiring expertise such as theft of copper feeder wire from railway traction, or that of railway signal material: *Anil Dey* v. *State of West Bengal,* AIR 1974 SC 832 Also, *supra,* n. 9.

[28] AIR 1975 SC 550. Also, *Daktar Mudi* v. *State of West Bengal,* AIR 1974 SC 2086.

this end the court could require the detaining authority to produce before the court the entire record of the case which was before it. If there was before the district magistrate material against the detainee which was of a highly damaging character, and having *nexus* and relevancy with the object of detention, and proximity with the time when the subjective satisfaction forming the basis of the detention order was arrived at, it would be legitimate for the court to infer that such material must have influenced the district magistrate in arriving at his subjective satisfaction and, in such a case, the court would refuse to accept the bald statement of the magistrate that he did not take such material into account and excluded it from his consideration. It is elementary that the human mind does not function in compartments. All such material should be communicated to the detainee and failure to do so would vitiate the detention.

The courts have further held that once the grounds have been conveyed to the detainee, *fresh, new* or *additional* grounds cannot be added thereto later on to strengthen the original detention order.[29] The reason for this judicial stand is that all the grounds on which the subjective satisfaction of the detaining authority was based must be communicated to the detainee all at once and nothing should be held back. The constitutional mandate in Art. 22(5) is to supply nothing less than *all* the materials which operate to create the subjective satisfaction leading to the detention order. Therefore, if the *additional* grounds were *non-existent* at the time the detention order was made, then these were *not elements* to bring about the subjective satisfaction of the detaining authority to make the detention order in question and, hence, they are irrelevant. On the other hand, if these grounds were in existence at that time, their non-communication earlier was a breach of Art. 22(5) insofar as they were not communicated to the detainee 'as soon as may be'. This prohibition to serve the additional grounds after the initial communication of grounds does not however apply to furnishing of additional facts, data or particulars on which the grounds were based. The test, therefore, is whether the subsequent communication contains any additional grounds or only additional facts on which the grounds originally conveyed were based. But even specification of additional facts must be within a reasonable time-limit otherwise the detainee's right under Art. 22(5) to make a representation is breached.[30]

The efficacy of the above norms regarding communication of grounds and facts to the detainee is diluted to some extent by Art. 22(6) which permits the detaining authority to withhold those facts which it considers not desirable to disclose in the public interest. However, subject to a claim

[29] *State of Bombay* v. *Atma Ram Vaidya*, AIR 1951 SC 157.

[30] *Ujagar Singh* v. *State of Punjab*, AIR 1952 SC 350; *Tarapada De* v. *State of West Bengal*, AIR 1951 SC 174.

of privilege under Art. 22(6), the communication of particulars should be as full and adequate as circumstances permit. The detaining authority can withhold facts and not the grounds under Art. 22(6). It is the obligation of the detaining authority and of none else to consider whether disclosure of any facts is against public interest. It is not necessary for the detaining authority to disclose to the detainee its decision to withhold disclosure of some facts under Art. 22(6) and the ambit of non-disclosure.[31] There is nothing wrong in the detaining authority placing before the advisory board the facts which have not been supplied to the detainee in the public interest.[32]

Another rule developed by the courts out of the right guaranteed to the detainee by Art. 22(5) to make representation against his detention is that the grounds conveyed to him must not be *vague* or *inadequate*. The detaining authority is under a constitutional duty to furnish reasonably definite grounds to the detainee as well as adequate particulars of the grounds of detention. The courts have argued that the right to make representation given to the detainee by the Constitution is not 'illusory'. The detainee should be placed in a position so that he can make an effective representation against his detention, and he cannot do so unless the grounds of detention are communicated to him in clear and unambiguous terms giving as much particulars as possible. Accordingly, the inadequacy or vagueness of the grounds from the point of view of the detainee's right to make an effective representation becomes a justiciable matter. If the grounds supplied are inadequate or vague, the detainee is entitled to be released. A ground is not to be regarded as vague if it is capable of being intelligently understood and is sufficiently definite to enable the detainee to make an effective representation.[33] Further, if the ground is vague or inadequate, the detainee has a right to ask for further particulars but that is not obligatory on him. The order may be declared invalid even though he has not asked for further particulars. His failure to do so may be relevant only to consider the question whether the ground is vague or not.[34] If out of the several grounds, even *one* ground is vague or inadequate, the right of the detainee to make a representation is infringed and the detention becomes invalid.[35] The effect of a vague or inadequate

[31] *Puranlal Lakhanpal* v. *Union of India*, AIR 1958 SC 163.

[32] *Jagannath* v. *Union of India*, AIR 1960 SC 625.

[33] *State of Bombay* v. *Atma Ram Vaidya*, AIR 1951 SC 157, 163; *Lawrence D'Souza* v. *State of Bombay*, AIR 1956 SC 531; *Rameshwar Lal* v. *State of Bihar*, AIR 1968 SC 1303; *Ajit Kumar Kaviraj* v. *District Magistrate*, AIR 1974 SC 1917.

[34] *Prabhu Dayal* v. *District Magistrate*, AIR 1974 SC 183; *Shaik Hanif* v. *State of West Bengal*, AIR 1974 SC 679.

[35] *Prabhu Dayal* v, *District Magistrate*, *ibid.*

ground is the same as that of an irrelevant ground. A few examples of grounds held vague or not vague may be cited here. A person was detained on the ground that he made speeches which, in the opinion of the detaining authority, were calculated to prejudice the maintenance of public order. Extracts from the speeches were not given to the detainee, but the time and place where they were delivered were communicated to him. The detainee contended that in the absence of indication of the offending passages in the speeches, he could not make an effective representation. The Supreme Court held by a majority that the particulars communicated to the detainee were sufficient to enable him to make the representation. The minority view however was that at least the gist of the speeches should have been communicated to the detainee so that he could show that no reasonable person could draw the inference from them that was sought to be drawn by the detaining authority.[36] In course of time, however, the courts' attitude in this respect appears to have stiffened and they have started to adopt a more scrutinising and stringent approach.[37] A student leader was detained under the head of 'public order.' One of the grounds served on him was that, as the Secretary of the All-India Vidyarthi Parishad (students' body), he attended a meeting of the Bihar State Chhatra Neta Sammelan (student leaders' conference) at the Patna University campus where, at his instance, it was decided to start a 'Gujarat type' agitation in Bihar. The Supreme Court held that the phrase 'Gujarat type' agitation was of vague and uncertain import.[38]

Grounds served on a detainee in a language which could not be interpreted by a layman but needed a lawyer's assistance for the purpose have been held vague. Legal aid is denied to a detainee and, therefore, the detaining authority should make his measures clear beyond doubt and not leave the detainee to his own resources to interpret the grounds.[39] Grounds were served on a detainee in the English language which he did not know. He asked for a Hindi version of the grounds which was not supplied to him. Quashing the detention, the court emphasized that to enable the detainee to make an effective representation, he should have knowledge of the grounds of detention. Communication envisages bringing home to the detainee effective knowledge of the facts and circumstances on which the order was based. To a person not conversant with the English language, the grounds must be explained in a language which he under-

[36] *Ram Singh* v. *State of Delhi*, AIR 1951 SC 270.

[37] *Ajit Kumar Kaviraj* v. *District Magistrate*, AIR 1974 SC 1917.

[38] *Ram Bahadur* v. *State of Bihar*, AIR 1975 SC 223.

[39] *Ramkishan* v. *State of Delhi*, AIR 1953 SC 318.

stands.[40] The Supreme Court has held that the ground served on a detainee that he was a man of 'desperate habits and dangerous character' is vague.[41]

Consideration of the representation: Art. 22(5) does not say as to whom the representation is to be made or what is to be done with it. The Supreme Court has, however, drawn the conclusion from the language of Art. 22(5) that the detainee's representation must be considered by the government before sending it to the advisory board. The court has argued that the detainee's right to make the representation would become illusory if the government were not obligated to consider it. Consideration of the detainee's representation by the government is an additional safeguard to the consideration of his case by the advisory board. It is quite possible that on considering the representation, the government may itself take the view that it is no longer necessary to keep the detainee in detention. In that case, it may release him forthwith and nothing will then be left to refer to the advisory board. The court has therefore ruled that Art. 22(5) is violated if the government merely forwards the detainee's representation to the advisory board without itself considering it first.[42] Further, government should consider the detainee's representation promptly and expeditiously. This principle has been derived from the phraseology of Art. 22(5). The fact that the earliest opportunity has to be afforded to the detainee to make a representation necessarily implies that as and when the representation is made, it is dealt with promptly,[43] and an undue delay in doing so would vitiate the detention. The reason being that the requirement to furnish the earliest opportunity to the detainee to make a representation will lose both its purpose and meaning, and it will be reduced to a farce and empty formality, if the government were to delay giving consideration to the representation after it has been submitted. The court has emphasized that when the liberty of a person is in peril, immediate action by relevant authorities is a *desideratum*.[44] The Court has however refused to prescribe a rigid time-limit for the purpose. It thus depends on

[40] *Harikisan* v. *State of Maharashtra*, AIR 1962 SC 911. Also see, *Chaju Ram* v. *State of Jammu & Kashmir*, AIR 1971 SC 263; *Bhola Bhutiya* v. *State of West Bengal*, AIR 1974 SC 2122.

[41] *Sasthi Keot* v. *State of Weat Bengal*, AIR 1974 SC 525.

[42] *Jayanarayan Sukul* v. *State of West Bengal*, AIR 1970 SC 675; *Haradhan Saha* v. *State of West Bengal*, AIR 1974 SC 2154; *Seik Sekawat* v. *State of West Bengal*, AIR 1975 SC 64; *Satya Deo Prasad* v. *State of Bihar*, AIR 1975 SC 367; *John Martin* v. *State of West Bengal*, AIR 1975 SC 775.

[43] *B. C. Dutta* v. *State of West Bengal*, AIR 1972 SC 2605.

[44] *Kanti Lal Bose* v. *State of West Bengal*, AIR 1972 SC 1623; *Durga Pada Ghosh* v. *State of West Bengal*, AIR 1972 SC 2420.

the facts and circumstances of each case whether the government considered the representation promptly or not. Even if there is delay in considering the representation on government's part, detention may not be declared bad if the government is able to satisfactorily explain the delay. But if the court finds government's explanation for the delay as vague and unsatisfactory,[45] it may hold the detention bad even if it was valid *ab initio*. Thus, an unexplained delay of 17 days in government considering a detainee's representation has been held to vitiate detention.[46] Even when the detainee's representation has been received after the advisory board has considered his case and held his detention to be justified, the government has been held to be still obligated to consider the representation. The reason for the proposition is that the government is not bound to accept the advisory board's opinion automatically in favour of continued detention, and it may still take the view, after considering his representation, that it was no longer necessary to detain him.[47]

While the Supreme Court has emphasized that consideration of the detainee's representation should be real, proper and not casual or mechanical,[48] it has refused to lay down that the government or the advisory board should pass a 'speaking order' disclosing the reasons for rejecting the representation.[49]

Confirmation of the detention order: Art. 22(4) lays down that no person is to be kept in detention for more than three months unless an advisory board has reported in favour of his detention.[50] From these wordings, the Supreme Court has spelled out the proposition that not only the advisory board should report within three months from the date of the detention order that in its opinion there is sufficient cause for the detention of the detainee, but even the government should itself confirm and extend the period of detention (beyond three months) within the three month time-limit. If the Board's opinion that there is sufficient cause for detention is received after three months from the date of detention, the detention will be illegal as it contravenes the mandatory provision of Art. 22(4). Also, failure on the part of the government to confirm the order

[45] *S.C. Bose* v. *District Magistrate*, AIR 1972 SC 2481; *Sudhir Dey* v. *State of West Bengal*, AIR 1972 SC 2623.

[46] *K.I. Singh* v. *State of Manipur*, AIR 1972 SC 438. Also *Binode Hembram* v. *State of West Bengal*, AIR 1972 SC 2378; *Madan Mohan* v. *State of West Bengal*, AIR 1972 SC 2400.

[47] *Pankaj Kumar* v. *State of West Bengal*, AIR 1970 SC 97; *B. Sundara Rao* v. *State of Orissa*, AIR 1972 SC 739.

[48] *Sk. Salim* v. *State of West Bengal*, AIR 1975 SC 602

[49] *Haradbana Saba's case, Supra* n. 71; *John Martin* v. *State of West Bengal*, AIR 1975 SC 775.

[50] *Supra*, Sec. II.

within three months will render the detention invalid as soon as three months elapse and any subsequent action by the government cannot have the effect of extending the period of detention beyond three months. It has been held to be mandatory under Art. 22(4) that government takes positive action on the board's report within the three month time-limit because it is only such action which determines whether the detention is to be terminated or continued. It has also been held to be necessary that the order of confirmation be in writing and be communicated to the detainee as the person whose freedom is in jeopardy is entitled to know the result of his representation. There is no justification for the order confirming detention and extending it beyond three months to remain in government files. But lack of communication to him is merely an irregularity and it does not invalidate an otherwise valid detention.[51]

Procedure established by law: Under Art. 21, a person may not be deprived of his personal liberty except only in accordance with the procedure established by law.[52] Therefore, in a matter of preventive detention, the administration must follow scrupulously and strictly the procedural norms laid down in clauses 4 to 7 of Art. 22, and the relevant law of preventive detention. The Supreme Court has emphasized that, as the matter relates to the liberty of a citizen who has been detained without a regular trial in a court, the authority concerned must proceed strictly in accordance with law. Even a slight deviation from compliance with the legal requirements to the disadvantage of the detainee would render his detention invalid. It does not matter whether the irregularity is of merely form or of substance. Since preventive detention affects an individual's right to freedom of his person, courts seek to interpret the law strictly, as far as possible, in favour of the affected individual. Hence, the relevant constitutional and statutory provisions, as interpreted by the courts, are treated as mandatory, and failure to observe even a single procedural norm vitiates the detention.[53] A few examples of the application of this principle may be cited here. If the relevant statute enjoins the advisory board to give its report within ten weeks from the date of detention, failure to do so will make the detention illegal.[54] It is illegal for the original detention order to straight away fix the period of detention, for the scheme of the constitutional provisions is that every case should be placed before an advisory board and the government could confirm the

[51] *Deb Sadhan Roy* v. *State of West Bengal*, AIR 1972 SC 1924; *Madan Malik* v. *State of West Bengal*, AIR 1972 SC 1878; *Satya Deo Prasad* v. *State of Bihar*, AIR 1975 SC 367.

[52] *Supra*, See. II, n. 18; See. IV.

[53] *Venkateswaraloo* v. *Superintendent, Central Jail*, AIR 1953 SC 49;

[54] *Dharam Singh* v. *State of Punjab*, AIR 1958 SC 152.

detention, and fix the period of detention beyond three months, only after the board holds the detention to be justified. Fixing the period of detention before the board has gone into the case is bound to prejudice the detainee.[55] When the law requires a board of three members, a board of two members is not properly constituted and a reference to such a board is no reference at all in the eyes of law.[56] If the advisory board opines that the detainee be released, the government is bound to release him. Even if the board advises against his release, the government can still release him if it so likes.

Interpreting s. 14 of MISA strictly,[57] the Supreme Court has held that when a detention order expires or is revoked, or the detainee is released, a fresh order cannot be issued on the very same facts on which the earlier detention order was based. A fresh detention order can be passed only when fresh facts have arisen after the revocation or expiry of the earlier order.[58] The same principle applies when the first detention order was revoked due to a technical defect, as 'revocation' includes cancellation of an order whether valid or invalid.[59] Similarly, this principle applies when the detention order is held illegal by a court and the detainee is released.[60] Non-confirmation of the detention order within three months amounts to its revocation. Thus, the word 'revoke' in s. 14 has been given a broad interpretation favourable to the detainee.

It is not necessary to fix the maximum period of detention while confirming the detention order for it will *ipso facto* be subject to the maximum period fixed in the Act.[61] But fixing the detention period in excess of what is authorised by law is bad.[61a]

[55] *Makhan Singh* v. *State of Punjab*, AIR 1952 SC 27.

[56] *Karamvir* v. *State of Bihar*, AIR 1954 Pat. 57.

[57] The section runs as follows: "The revocation or expiry of a detention order shall not bar the making of a fresh detention order . . . against the same person in any case where fresh facts have arisen after the date of revocation or expiry . . ."

[58] *Pradip Kumar* v. *State of West Bengal*, AIR 1974 SC 2151; *Bablu Hembran* v. *State of West Bengal*, AIR 1974 SC 2279.

[59] *Hadi Bandhu* v. *District Magistrate*, AIR 1969 SC 43; *Kshetra Gogi* v. *State of Assam*, AIR 1970 SC 1664; *Masood Alam* v. *Union of India*, AIR 1973 SC 897; *Har Jas* v. *State of Punjab*, AIR 1973 SC 2469.

[60] *Chotka Hembram* v. *State of West Bengal*, AIR 1974 SC 432; *Baidya Nath* v. *State of West Bengal* AIR 1974 SC 1155.

[61] *Ujagar Singh* v. *State of Punjab*, AIR 1952 SC 350; *Suna Ullah* v. *State of Jammu & Kashmir*, AIR 1972 SC 2431; *Milan Banik* v. *State of West Bengal*, AIR 1974 SC 1214; *Golam Hussain* v. *State of West Bengal*, AIR 1974 SC 1336.

[61a] *Venkateswaraloo* v. *Superintendent, Central Jail*, AIR 1953 SC 49.

In some cases of preventive detention before the courts some administrative laxity has been revealed. It has come to light in some cases that the administration has not acted with due care, caution and sense of responsibility in passing the detention orders.[62] The Supreme Court has adversely commented on this state of affairs. In one case, the validity of the detention was challenged on the ground that the representation of the detainee had not been considered by the State Government within a reasonable time. On behalf of the government, the deputy collector asserted that the representation had been considered 'fully, rightly and sympathetically'. Later on, it transpired that the representation had not been considered by the government by the time this assertion was made in the affidavit and so the assertion was false and misleading. The court condemned this irresponsible attitude of the concerned administrative officer in strong terms. The court deprecated the cavalier attitude which at times is adopted by the executive authorities in matters of personal liberty.[63]

The safeguards contained in Art. 22 and MISA are mostly of a procedural nature as the substantive question, whether a person whould be detained or not, lies within 'administrative discretion' and outside judicial purview. The courts have been able to give some element of relief to persons detained in preventive detention by emphasizing that procedure must be strictly followed by the administrative authorities. The need to do so has been emphasized by the Supreme Court in the following words:[64]

> "... the gravity of the evil to the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the Constitution and the laws. The history of personal liberty is largely the history of insistence on observance of procedure. And observance of procedure has been the bastion against wanton assaults on personal liberty over the years. Under our Constitution, the only guarantee of personal liberty for a person is that he shall not be deprived of it except in accordance with the procedure established by law. The need today for maintenance of supplies and services essential to the community cannot be over-emphasized ... But whatever be the impact of the maintenance of supplies and services ... when a certain procedure is prescribed by the Constitution or the laws for depriving a citizen of his personal liberty, we think it our duty to see that that procedure is rigorously observed, however strange this might sound to some ears."

[62] *Dwarika Pd.* v. *State of Bihar*, AIR 1975 SC 134.

[63] *Satya Deo Prasad* v. *State of Bihar*, AIR 1975 SC 367.

[64] *Prabhu Dayal* v. *District Magistrate, Kamrup*, AIR 1974 SC 183, 199.

Detaining authority to file affidavit: The issuing of a preventive detention order being a matter of subjective satisfaction of the detaining authority, the Supreme Court has emphasized that when a detainee moves a petition for *habeas corpus* challenging his detention, and the court issues the *rule nisi*, the counter-affidavit on behalf of the state should be made by the authority on whose subjective satisfaction the detention order was made. If for a sufficient reason, to the court's satisfaction, the affidavit of such an authority cannot be furnished, then the affidavit should be sworn by some responsible officer who has personally dealt with or processed the detainee's case in the government secretariat. An affidavit from an officer who at no time has personally dealt with the matter, and has therefore no personal knowledge of the detainee's case, but who depends merely on paper wisdom, is improper although it may not be fatal to the validity of the detention in a specific situation.[65] As the Supreme Court has emphasized, "Mechanical affidavits, miniaturising the files into a few paragraphs, by someone handy in the Secretariat cannot be regarded as satisfactory. This is not a mere *punctilio* of procedure but a probative requirement of substance."[66] But where subjective satisfaction of the authority is challenged on grounds of *mala fides*, colourable exercise of power, extraneous considerations etc., failure to file the affidavit by the detaining authority itself, taken in conjunction with other circumstances, may assume the shape of serious infirmity leading to a court declaration of the detention order as invalid.[67] The reason for the proposition is that 'subjective satisfaction' being a condition of mind is best established by the concerned authority's affidavit, and not by a stranger in the secretariat familiar with papers only. The court has emphasized that this should not be regarded as a mere formality when the subject-matter is personal liberty, and the more 'subjective' the executive's operation, the more sensitive should be the procedural insistence.[68]

Extra-legal judicial observations: From time to time, the Supreme Court has made some observations which, though they do not lay down any enforceable norms, are yet designed to further liberalise the law of preventive detention. For example, the court has consistently laid stress on the executive periodically reviewing the preventive detention cases so that a

[65] *Niranjan Singh* v. *State of Madhya Pradesh*, AIR 1972 SC 2215; *Shaik Hanif* v. *State of West Bengal*, AIR 1974 SC 679; *Bhut Nath* v. *State of West Bengal*, AIR 1974 SC 807; *Noor Chand* v. *State of West Bengal*, AIR 1974 SC 2120; *Dulal Roy* v. *District Magistrate*, AIR 1975 SC 1508.

[66] *Jagdish Prasad* v. *State of Bihar*, AIR 1974 SC 911, 914.

[67] *Mohd. Alam* v. *State of West Bengal*, AIR 1974 SC 917; *Asgar Ali* v. *District Magistrate*, AIR 1974 SC 1814.

[68] *Sadhu* v. *State of West Bengal*, AIR 1975 SC 919.

detainee is not kept in detention for a day longer than what may be absolutely necessary. There have been cases where detentions have continued over long periods of time for activities which could not be regarded as very serious. The court has therefore stressed the need for periodic review of detention cases. The court has pointed out that to put a man in prison on subjective satisfaction of possible prejudicial activity, and then to forget about him after the necessary statutory formalities have been completed, is not fair to constitutional guarantees. A democratic government should not only confine preventive detention to serious cases but also review periodically the need for continued incarceration of an individual detainee.[69] This is a necessary safeguard in view of the fact that in law there is no need to fix a maximum time-limit for detention in the detention order. MISA originally prescribed one year as the maximum period of detention, but when emergency was declared in 1971, this limit was raised to the end of the emergency and, thus, detention for periods longer than one year became possible. In some cases, detention has continued for two to three years.[70] A detention order without any defined duration is not *ipse jure* invalid. However, the court has shown uneasiness at prolonged detention – without review from time to time. Of course, the court has been careful to observe that periodical review of cases of detainees, though desirable, is not a legal obligation on the government and its failure to do so does not make detention invalid.[71]

Another point stressed upon by the Supreme Court is that the provision in the MISA regarding release of detainees on parole (s.15) should be put to good use by the government. The court has emphasized that long term detention can by itself be self-defeating and counter-productive, and, therefore, the persons detained without trial should be given a chance to reform themselves. Of course, this again is a matter for government to consider and is not an enforceable rule of conduct. But the court has stated that calculated risks by release of detainees for short periods may result in social gain.[72]

VI

As is clear from the above discussion, under the law of preventive detention, the range and magnitude of administrative control over the indivi-

[69] *Anil Dey* v. *State of West Bengal*, AIR 1974 SC 832.

[70] *Keshab Chandra* v. *State of West Bengal*, AIR 1974 SC 1739.

[71] *Samir Chatterji* v. *State of West Bengal*, AIR 1975 SC 1165; *Salesh Dutta* v. *State of West Bengal*, AIR 1974 SC 1816; *Golam Husain* v. *Police Commissioner*, AIR 1974 SC 1336.

[72] *Babulal Das* v. *State of West Bengal*, AIR 1975 SC 606; *Samir Chatterjee* v. *State of West Bengal, ibid.*

dual's personal liberty is very vast, and the range of judicial control is very restrictive, as the basic question, whether a person should be detained or not on the facts and circumstances of the case, lies within the scope of administrative discretion and beyond judicial review. There can therefore be no surprise if, in the discharge of this enormous power, the administration at times commits some mistakes. It is, therefore, desirable, in the interests of maintaining constitutionalism within the country, that the administrative power of preventive detention be subject to proper supervision and safeguards. It is obvious from the above review that the Supreme Court has been conscious of this need and has, accordingly, taken a somewhat broad view of its restricted powers, and has given whatever relief it can to the detained persons. The Supreme Court has thus played an active role in overseeing and restraining administrative action in the area under survey. The court has insisted that the procedure established by the Constitutional and statutory provisions concerning preventive detention be adhered to meticulously and scrupulously. It has interpreted the procedural norms strictly and any deviation from them has been held to vitiate detention. It has given a wider dimension and a liberal interpretation to the phraseology used in Art. 22 and in the relevant law in favour of the detainee. It has vigorously and creatively applied the well established principles of Administrative Law concerning control of administrative discretion to concrete factual situations and, in this process, these principles have themselves assumed a new dimension. At times, the position adopted by the court may appear to be too technical. The court may at times appear to be indulging in drawing over-fine distinctions and adopting hair-splitting arguments. But the court has to resort to this technique because it has to keep in mind the interests of the detainee and its own restricted power. When the facts seem bad on paper, and relief appears to be called for, the court has to adopt fine and subtle distinctions and rationalizations to bring the detainee's case within the range of an established legal principle and thus give relief to him. The court has only a limited manouvreability and only limited choices at its disposal, and it has made use of these as best as it can. The court has thus succeeded in quashing a number of preventive detention orders by invoking one ground or the other. The court has several times emphasized that preventive detention constitutes a serious inroad into personal liberty, and such meagre protection as the Constitution and the relevant law provide for against the improper exercise of power by the administration, must be jealously watched and safeguarded by the courts.

Although, on the whole, the Supreme Court has played its role of balancing 'personal freedom' and considerations of 'security' admirably well within the limitations of its power, the basic truth still remains that judicial review in the area of preventive detention is largely only marginal,

superficial and peripheral. The judicial 'ombudsmania'[73] is helpful so far it goes, but it does not go far enough, or deep enough, and operates on a limited canvas. It only touches the fringe of the problem and does not go to the root of the matter because the critical question – the administrative discretion to detain a person, is not, as such, subject to an objective assessment by the court. The court has succeeded in controlling this discretion only in a small measure, and mostly indirectly, by applying principles of Administrative Law but, in truth, these principles do not go far enough and the basic approach of law as yet is that administrative discretion is non-justiciable and non-reviewable on merits.[74] This is the overall constrictive and delimiting factor within which the court has to function and, howsoever, dynamic the judicial process, the court has always to keep in mind the over-all barrier which it cannot cross. The scheme of the Constitution is that the administrative decision to detain a person should be reviewed by the advisory boards and not by the courts, and the Supreme Court has always to keep this factor in mind. Although, in some cases, judicial review might come quite close to review on merits, yet that still is an exceptional and rare, and not a general, norm.

When the Preventive Detention Act was enacted by Parliament for the first time in 1950, it was thought that it would purely be a temporary measure, and that the law and order situation in the country would so improve in the near future as to obviate the need to resort to such a drastic invasion of the personal freedom of the individuals. Accordingly, the life of the enactment was restricted to one year in the first instance. But, due to one reason or another, this hope has not been realised, and the law of preventive detention has continued to exist on the statute book for all these years, barring a brief respite between the lapsing of the law in 1969 and the enactment of the MISA in 1971. Unfortunately, it appears that India will have to live with preventive detention for quite some time to come. It, therefore, becomes necessary to search for some meaningful safeguards for those who come to be confined in preventive detention. Judicial review as it operates at present, and even with the expanded dimension given to it by the Supreme Court, remains extremely limited and inadequate and cannot be solely depended upon to supervise administrative action in this area, and, therefore, some supplementary safeguards, besides the court procedure, are a great *desideratum*. The present-day procedural safeguards thus need to be greatly strengthened. It appears that the administration will keep within its own discretion the decision whether to detain a person

[73] The expression has been used by Justice Krishna Iyer in *Bhut Nath* v. *State of West Bengal*, AIR 1974 SC 806.

[74] *Supra*., n.53. Jain & Jain, *Principles of Administrative Law*, *supra*, n.43, at 379. Wade, *Administrative Law*, 87. Also, *Liversidge* v. *Anderson*, *op. cit.*, n.10.

or not. There may be some justification for this approach because of the nature of preventive detention which needs quick action and less than legal proof. But it does underline the need for strengthening the post-detention machinery of overseeing the administrative power so that it is used properly and is not misused. The first need is to strengthen the machinery of the advisory boards because it is upon their proper and effective functioning that the personal liberty of the detainees really depends. These boards, according to the constitutional scheme, are to stand between the detainee and the administrative power, but not much information is available regarding the working of these boards. There is no doubt that their proper and effective working is crucial if the detainees are to have any worthwhile protection against administrative excesses. Although the constitutional requirement is that these boards should be composed of experienced lawyers, yet not much information is available as to the quality of the persons who are appointed to these boards, and their efficacy remains doubtful, as is evidenced by the large number of cases in which the Supreme Court has quashed preventive detention orders after the same had been cleared by the advisory boards. These boards do not carry much credibility in the public eyes as they are regarded more as an appendage to the administrative apparatus rather than as independent entities looking into the matter of detention in an objective manner. Art. 22(7) only says that persons qualified to be appointed as High Court Judges be appointed to these boards, which only means that any lawyer of ten years' standing can be appointed. The only way to strengthen these boards and make their functioning more credible is to appoint sitting High Court Judges to them who, on account of the security of tenure guaranteed to them by the Constitution.[75] can bring an independent mind to bear on the administrative decision to detain a person.

Over time, the law of preventive detention has itself been amended to furnish better safeguards to the detainees. For example, to start with, a detainee had no right of being heard by the advisory board. But then, later on, such a right was conceded to a detainee and the boards were also authorised to hear the detainee if they thought that to be necessary in any specific situation even though the detainee might not have claimed such a right.[76] A rigid time table also came to be laid down for the administrative authorities to take the various steps in the post preventive detention procedure. However, these safeguards need to be further strengthened. Structurally, Art. 22 follows the model of Regulation 18B in England made at the time of the Second World War with one improvement. In England, the opinion of the advisory committee was not binding on the

[75] Jain, *Indian Constitutional Law*, n. 3, 252.

[76] *Supra*, Sec. III.

government, and the government could come to its own decision on the report of the committee.[77] In India, the advisory board's report has been made binding on the government insofar as, if the board recommends that the detainee be released, the government is bound to release him.[78] But there are some other beneficial aspects of the procedure followed in England which have not been adopted in India. For example, in England, particulars of the case against the detainee were communicated to him by the Chairman of the advisory committee. In India, it is done by the authority making the detention order. If the British procedure were adopted in India, it might obviate the complaints often made now that the grounds communicated to the detainee by the authority concerned were vague and insufficient. At times, the courts have accepted such contentions and adversely commented upon the prevailing state of affairs. Another norm followed in England was that although witnesses were not called while the detainee was present before the advisory committee, it could call in any person who, in its opinion, might be able to assist the committee, in elucidating the matter with which it had to deal. This assisted the committee to have its own independent enquiry and assessment outside the administrative machine, and to come to its findings about the facts on which the detention order was based. Further, in England, a counsel could appear before the advisory committee on behalf of the detainee. Besides, the advisory committee itself assumed on itself the obligation to "act as counsel in his defence by helping the detainee to bring out the full strength of the case he had."[79] These beneficial procedural norms need to be adopted in India as well. With such norms, the advisory boards can discharge their function more effectively and may even lessen the embarrassment which the administration has to face now when the court quashes any preventive detention order. If England could have followed these procedures during the war-time, there is no reason why India cannot follow them during peace-time. In Malaysia and Singapore, the detainee has the right to counsel,[80] but it is not so in India. This situation needs to be corrected, for it may be quite difficult for inarticulate detainees to draft their representations and marshal properly the facts and evidence in their favour, or put their case effectively before the advisory boards. No harm can arise if a lawyer appears on behalf of a detainee before the board. The Board consisting as it does of experienced professional lawyers will hardly feel embarrassed with the presence of a lawyer before it. It will minimise chances of mistakes both on the part of

[77] See, Cotter, *op. cit.*, n.10.

[78] See, *op. cit.*, nn. 47, 50, 51.

[79] Cotter, *Supra*, at 268 - 270.

[80] See, *Aminah* v. *Superintendent of Prisons*, [1968] 1 MLJ 92; *Assa Singh* v. *Menteri Besar, Johore*, [1969] 2 MLJ 30; and the case of *Lee Mau Seng* [1971] 2 MLJ 137

the administration as well as the advisory boards. It may be worthwhile in this connection to refer to the model presented by the Internal Security Act in the U.S.A.[81] Under this Act, a detainee has a right to consult a lawyer; he has a right to a preliminary hearing before a hearing officer appointed by the President and he can introduce evidence in his defence and cross-examine witnesses testifying against him. From the hearing officer, the detainee can take an appeal to the Board of Detention Review consisting of nine members appointed by the President. From the Board, the detainee could go to the Court of Appeals and, finally, to the Supreme Court. On comparison, the American law, even though having a restrictive range of operation will be found to provide much better safeguards to a detainee than does the Indian law with its much broader range of operation.

*M.P. Jain.

[81] *Op. cit.*, n.7.

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THE ADMINISTRATION OF MUSLIM LAW IN SABAH*

HISTORICAL INTRODUCTION

When William Pryer landed in Sandakan Bay on 11th February, 1878, he carried with him instructions from Baron von Overbeck which remained the guiding rule in the administration of British North Borneo. "It will be your duty," said Overbeck, "to cultivate friendly relations with the native authorities as well as with the people under your control, and any changes you may introduce should be effected gradually and with due regard to the existing customs and habits of the people. Conciliate them and secure their goodwill."[1]

The total population of Sabah at the end of 1970 was 654,943. Of these the Kadazans are the largest racial group consisting of about one-third of the total. The Muslims had arrived in Borneo after the earlier pagan tribes. It was the Malays who spread the faith in North Borneo although they themselves only settled in very small numbers on the west coast rivers. A larger Muslim community comprised of the Bruneis and Kedayans settled on the West Coast. These people had come from Brunei and enjoyed the racial prestige of their connection with a state with an ancient royal house. The largest Muslim group were the Bajaus who were settled on the east coast and in the Kota Belud area on the west. The Ilanuns and the Sulus originally from Southern Philippines also came to settle in North Borneo. Up the eastern rivers there were small scattered villages of Orang Sungei, people of the Dusun stock who had become Muslims. A few other minor Muslim tribes were scattered along the coasts.

The Muslims in British North Borneo before Merdeka were widely dispersed and numbered about 100,000 in all. They had little organization beyond that of the chief who controlled a few riverine villages. Over him was the absentee deputy of the Sultan of Brunei on the west coast or the Sultan of Sulu on the east. The early efforts of the British North Borneo Company in national administration have been thus described[2] :

> "North Borneo was verging on anarchy when the Europeans arrived It was the immemorial custom of the Muslims and the pagans to acknowledge the authority of a headman or chief. The Bajaus did

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[1] K.G. Tregonning, *A History of Modern Sabah, 1881–1963*, University of Malaya Press, Kuala Lumpur, 1967, p. 103.

[2] *Ibid.*, p. 107–108.