ROLE OF JUDICIARY IN SAFEGUARDING PERSONAL LIBERTY VIS-À-VIS PREVENTIVE DETENTION LEGISLATIONS IN INDIA

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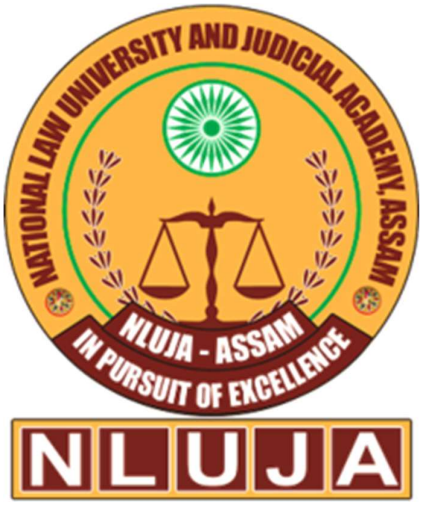

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SUPERVISOR CERTIFICATE

This is to certify that ROHAN SHARMA has completed his/her dissertation titled ***"Role of Judiciary in Safeguarding Personal Liberty vis-a-vis Preventive Detention Legislations in India"*** under my supervision for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M DEGREE PROGRAMME of National Law University and Judicial Academy, Assam.

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DECLARATION

I, ROHAN SHARMA, do hereby declare that the dissertation titled **"*Role of Judiciary in Safeguarding Personal Liberty vis-à-vis Preventive Detention Legislations in India"*** submitted by me for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M. DEGREE PROGRAMME of National Law University and Judicial Academy, Assam is a bona fide work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.

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1275- Statute of Westminster

1788- Constitution of the U.S.

1931- Statute of Westminster

1960- Canadian Bill of Rights Act

TABLE OF ABBREVIATIONS

1.	A.C.	Appeal Cases
2.	AIR	All India Reporter
3.	AFSPA	Armed Forces Special Powers Act
4.	APO	Assistant Passport Officer
5.	Art.	Article
6.	COFEPOSA	Conservation of Foreign Exchange and Prevention of Smuggling Activities
7.	CJI	Chief Justice of India
8.	Cri.	Criminal
9.	Cr.P.C	Code of Criminal Procedure
10.	D.PP	Director of Public Prosecution
11.	Dr.	Doctor
12.	ECHR	European Convention on Human Rights
13.	Govt.	Government
14.	H.C.	High Court
15.	Hon'ble	Honourable
16.	ICCPR	International Covenant on Civil and Political Rights
17.	IPC	Indian Penal Code
18.	J.	Justice
19.	J &K	Jammu and Kashmir
20.	MISA	Maintenance of Internal Security Act
21.	M.P.	Madhya Pradesh

22.	NSA	National Security Act
23.	OHCHR	Office of High Commissioner of Human Rights
24.	Ors.	Others
25.	PBMSECA	Prevention of Black-Marketing and Maintenance of Supplies of Essential Commodities Act
26.	PITNDPSA	Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act
27.	POTA	Prevention Of Terrorism Act
28.	SAFEMA	Smugglers and Foreign Exchange Manipulator Act
29.	S.C.	Supreme Court
30.	SCC	Supreme Court Cases
31.	SCR	Supreme Court Report
32.	TADA	Terrorist And Disruptive Activities (Prevention) Act
33.	UAPA	Unlawful Activities Prevention Act
34.	UDHR	Universal Declaration of Human Rights
35.	U.K.	United Kingdom
36.	U.N.	United Nations
37.	U.N. GA	United Nations General Assembly
38.	U.P.	Uttar Pradesh
39.	U.S.	United States of America
40.	U.T.	Union Territory
41.	v.	Versus
42.	W.B.	West Bengal

Chapter I- Introduction

"Liberty is itself the gift of the law and may by law (be) forfeited or abridged"[1].

1.1 Research Background

India, the "world's largest democracy", guarantees the "right of personal liberty" to the people under Art. 21 while also providing for "preventive detention" under Art. 22 of its Constitution. No civilized country has provided for preventive detention as an ordinary legislative power during times of peace. Preventive detention laws authorised to detain the detenu without trial, justified by suspicion or reasonable probability of the person committing an offence. Preventive detention is considered to be a severe invasion of the inviolable right to personal liberty recognized all over the world.[2]

While "Preventive detention" hasn't been defined authoritatively under Indian Law, it can be understood as detention without trial in order to incapacitate a person from committing any offence. The idea is to restrain a person to prevent him from committing any criminal act. In other words, it is the proactive step taken by the State authorities on the suspicion that a criminal act might be done by the concerned person (detenue), which might be prejudicial to the security of the state.

As of now, no law recognizes preventive detention in the USA. Even in England, it was only used during times of war. During World War I, specific regulations were enacted under the "Defence of the Realm Act", which allowed preventative detention as a war measure if the Home Secretary was satisfied, and they ceased to have force when hostilities ended. During World War II, the same thing happened. The British court upheld the laws, noting, "*Personal Liberty can be forfeited for national victory in war."*[3]

In India, the "life and personal liberty" of an individual are held in the highest regard, since we consider personal liberty to be the most important component of a person's dignity and happiness. The Indian Constitution safeguards the liberty of an individual.[4]

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[1] *A.D.M Jabalpur v. S. Shukla*, [1976] SC 1206 (Justice A.N. Ray)
[2] Alagumani R, 'Role of the supreme court of India on personal liberty under preventive detention' (2015)
[3] *Rex v. Holiday* [1917] AC 263
[4] Constitution of India 1950, Art. 21

Also, if there is a deprivation of liberty without trial in subject matters relating to preventive detention, subsequent protections are provided under Art. 22.

The written Constitution of India guarantees its citizens six fundamental rights with certain procedural safeguards. It also recognises the power of Parliament and state legislatures to pass preventative detention legislation[5] that allows the state to detain a person in prison without a trial or conviction, or even pending prosecution, moderating these rights. Such order of detention is made not by an independent judiciary but by an officer authorized by the executive.

After many sleepless nights, India's first Home Minister, Sardar Vallabhai Patel, also known as the "Iron Man of India", crafted the "Preventive Detention Act" of 1950, which was only supposed to be in effect for a single year. However, it continues till date under different names like, "National Security Act, 1980", "The Maintenance of Internal Security Act", 1971, "Prevention of Terrorism Act", 2002, "The Terrorists and Disruptive Activities (Prevention) Act",1985, "The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act",1974 and many more.

Thus, the Constitution allows an individual to be detained by State agencies without charge or trial for up to three months, even thereafter it may be extended for a certain period if the Advisory Board holds that there is a sufficient ground for such detention.[6]

Preventive detention laws are considered draconian because they call for holding people in jail for a set amount of time without a charge or even a trial. With time, many preventive custody orders were issued by the detaining authorities without adhering to the procedures outlined in the Constitution and the relevant preventive detention statutes. Before issuing the custody orders, the detaining authorities did not use their best judgement. In the end, the individual's freedom has been restricted. Prisons flooded in, also including many innocent people. These laws were used by men in positions of authority to intimidate political rivals. Individual liberty was in jeopardy under the guise of defending State interests.

The liberty of an individual is of paramount importance. Personal liberty has been guaranteed in Art. 21. In this very context, the present study becomes important, it would be endeavoured to study how the judiciary has decided cases involving

[5] Constitution of India 1950, Art. 22 (3)
[6] Constitution of India 1950, Art. 22 (3-7)

preventive detention orders to safeguard personal liberty. Only a thorough analysis of the concept of liberty and the necessity of preventive detention can help to determine if the judiciary has indeed safeguarded the value enshrined under Art. 21.

1.2 Statement of Problem

"Preventive Detention" laws authorise to detain the detenue without any trial, justified by "*mere suspicion or reasonable probability*" of detenue committing an offence. It results in an invasion of the basic right to personal liberty recognized in various countries.

Numerous preventive detention legislations were passed to curb the rights of people either for good measure (security of state, public order etc.) or with mala fide intent (to crush dissent, breach fundamental rights etc). In numerous cases, the Judiciary had to step in to safeguard the rights of persons against the Preventive Detention laws.

For instance, in Kartar Singh's case[7], the court was quite vigilant against arbitrary detention under TADA, and held that "*an activity which is sought to be punished under TADA must be such which cannot be classified as a mere law and order problem and cannot be tackled under the ordinary penal law.*" Thus, safeguarding personal liberty against the broad executive powers of imposing arbitrary detention.

On the other hand, in the Habeas Corpus case[8], the court by 4:1 majority held MISA to be valid and by its decision, allowed the high courts to be barred from their power to issue the writ of habeas corpus and to examine the legality of detention under the Act. The "right of personal liberty" was allowed to be blatantly infringed upon.

Indian Judiciary has adjudicated many such cases regarding the right of Personal Liberty vis-à-vis several Preventive legislations ("Preventive Detention Act 1950, MISA 1971, COFEPOSA 1974, NSA 1980, TADA 1985, POTA 2002" etc). This research seeks to critically analyse the role that the judiciary has played in safeguarding the right of personal liberty against such legislations and to identify any factors that might have influenced the judiciary's decisions of upholding the right or allowing it to be curtailed.

[7] *Kartar Singh v. State of Punjab* [1994] 3 SCC 569
[8] *A.D.M Jabalpur v. S. Shukla* [1976] SC 1206

1.3 Literature Review

i. In his book "***The Indian Constitution- Cornerstone of a Nation***"[9], Granville Austin gave insights into the political and social situation prevalent at the time of making of the Constitution. He put forward the views of the makers on the topic of Preventive Detention. He highlighted the irony of makers putting "preventive detention" into the Constitution and that too within the fundamental rights chapter despite the fact that it gave them a difficult time in their movement against the British colonizers.

ii. Pannalal Dhar, in his book "***Preventive Detention Under Indian Constitution***"[10] discuss in detail about the concept of preventive detention and personal liberty in the first chapter, while discussing about the history of personal freedom, the author mentioned all key aspects beginning straight from the Magna Carta till date. He deals with preventive detention and how it is enforced upon Indian citizens, and he also provides a few guiding principles to apply it and to its possible abuse.

iii. The senior journalist Kuldip Nayar in his book "***Emergency Retold***"[11] discussed about the, courageous judgment delivered by Honourable Justice Jagmohan Lal Sinha of the Allahabad High Court, and about the emergency declared by the President of India after his historical judgment. The author is a popular journalist, who worked in The Indian Express during emergency; the author himself was incarcerated for about seven weeks. He documented the efforts taken by the then private secretary of the Prime Minister of India "to bribe, induce and threaten 'the strange' justice Jagmohan Lal Sinha of the Allahabad High Court, who could not be tempted and would not submit to the executive's pressure to delay the judgment."

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[9] Granville Austin, *The Indian Constitution- Cornerstone of A Nation* (Oxford University Press, ed. 34, 2019)
[10] Dhar Pannalal, *Preventive Detention under Indian Constitution*, (New Delhi: Deep & Deep Publications, 1986)
[11] Kuldip Nayar, *Emergency Retold* (Konark Publishers Pvt. Ltd 2013)

iv. In his book "***Introduction to the Constitution of India***"[12], Dr D.D. Basu provided the meaning of Preventive Detention by differentiating it from Punitive detention. He explained in some depth the History of Preventive Detention Laws in India and made a comparative study of the reasons for adopting such laws in various countries. He shed light upon the Legislative Power to enact Preventive Detention Acts and their Constitutional validity as determined by the Judiciary.

v. The next important treatise relevant for my study was Prof. Ujjwal Kumar Singh's "***The State, Democracy and Anti-terror Laws in India***"[13] which is a discourse on the anti-terror laws of India and how these laws have impacted the people in general. This book breaks new ground as it provides systemic research on the impact of state responses to terrorism and provides a theoretically informed analysis of the politics of India's anti-terror laws. Here the author argues that "*extraordinary laws have ramifications for people's lives, political institutions, the rule of law and democratic functioning and show how such laws assume 'normalcy' and acquire a place of permanence in state practices*"; and he also examines the ways in which such extraordinary laws manifest dominant configurations of political power and ideology. This work was important for the researcher to understand the historical and political background of the security legislations of India, which is a critical part of the present study. This work has focussed only upon two important legislations, the TADA and POTA and not treaded on other national security legislations and judicial decisions. The present research work shall cover other statutes as well and analyse them in legal context.

vi. Dr Priti Saxena in her book, "***Preventive Detention and Human Rights***"[14], discusses in detail about the absolute violation of Human Rights under Preventive Detention laws. Her work therefore becomes significant in the present scenario where there seems to be an apparent conflict between human

[12] Dr. Durga Das Basu, *Introduction to the Constitution of India,* (Lexis Nexis Butterworths, Wadhwa, Nagpur), ed. 20th (2010)
[13] Ujjwal Kumar Singh, *The State, Democracy and Anti-terror Laws in India,* (ISBN: 9780761935186, SAGE Publishing ed. 1 2007)
[14] Saxena Priti, *Preventive Detention and Human Rights*, (New Delhi: Deep & Deep Publications, 2007)

rights (especially that of personal liberty) and preventive detention. She has discussed and explained the subject from its right perspective. The relevant case laws have been discussed and updated with critical moments with a special focus on how the rights were violated. Her work has helped the researcher to identify the violation of the right of personal liberty under specific preventive detention laws.

vii. Another work worth mentioning is Dr Sharanjit's book entitled "***Anti-terror Laws in India – Legislative developments under compulsions and restraints***"[15]. This book traces the journey of the special security legislations enacted to counter the threat posed by terrorism in India, from the colonial times to the present. This book has been instrumental for the researcher in formulating the fourth chapter of the present dissertation which has focused on the need for various preventive detention legislations. The book also focuses on the human rights aspects of the preventive detention laws as the author has made a sincere effort to analyse the important provisions of preventive detention legislations made to impact human rights. However, the book fails at the key aspect of this research that the analysis of the judicial attitude towards these provisions, which entrench upon human rights is not covered. The present research shall attempt to fill this vacuum.

viii. In his book "***Constitutional Law of India***"[16], Dr J.N. Pandey explained the various preventive detention legislations discussed in this research paper. He threw some light on the judgements of the Supreme Court in lieu of the Preventive detention Acts and explained the necessity of such provisions. He also discussed in depth the Safeguards available in our Constitution for protecting personal liberty against both ordinary and preventive detentions.

ix. M.C. Jain Kagzi in his book "***Indian Administrative Law***"[17] stated that the object of Prevention detention is to prevent any anti-social elements from doing

[15] Dr Sharanjit, *Anti-terror Laws in India – Legislative developments under compulsions* (Rage Publications ed. 1 2014)
[16] Pandey, J.N., *Constitutional Law of India* (41st edn, Central Law Agency 2004)
[17] M C Jain Kagzi, *Indian Administrative Law* (ISBN: 9789350353967, Universal Law Publishing Co. ed. 7 vol 1 2014)

any harm to the society and protect the State against sabotage, violent activities organized in secret which are intended to produce public disorder and economic crisis. A person can be punitively detained only after a trial and conviction, but he is put under preventive detention without any trial. The basis for "preventive detention" is the "subjective satisfaction" of the competent authority to the effect that if the man is at large, he is likely to act in such a way as to harm society.

x. In his book "***Indian Constitutional Law***"[18], Prof. M.P Jain gave a brief definition of Preventive Detention and explained the various Constitutional Provisions providing for such detention. He also explained various central and state laws made in pursuance of the preventive detention scheme. He discusses the case laws relating to the topic which provide a deeper insight into making this research work. He has done a case law analysis of all safeguards given under Art. 22 which helped the researcher to identify the court's position in identifying Court's position in dealing with such laws.

xi. The District Judge S.S. Lal, in his great work "***Preventive Detention in India***"[19] has done complete fundamental research on several enactments of preventive detention legislations. It contains fundamental principles to understand the basic concept of the preventive detention laws and gives a general overview of the Indian application of Preventive detention.

xii. James H. Noyes mentioned in his thesis "***Preventive Detention: A Problem for Indian Democracy***"[20] about the implementation of the preventive detention legislations in the Republic of India. This research is based on the timeline of independence and focuses on the implementation of the Preventive Detention Act, 1950 and its effects in India. He discussed about the role of judiciary and executive authorities in protecting the personal liberty of the subject regarding preventive detention cases immediately after the "Sovereign Democratic

[18] MP Jain, *Indian Constitutional Law* (LexisNexis 7th ed. 2016)

[19] Lal S.S., *Preventive detention in India*, (Delhi: Bharat Law House, 2000)
[20] James H. Noyes, *Preventive Detention: A Problem for Indian Democracy* (2017)

Republic of India" came into existence. He also gives various guiding principles that the Indian State should apply immediately to ensure a balance between fundamental rights and security of the nation.

xiii. Desai. A.R, in his book **"*Violation of Democratic Rights in India*"**[21], explained in detail about the preventive detention laws and how they are in clear violation of the idea of the rule of law. He discusses the importance of fundamental rights and how they are a key to ensuring a vibrant democracy. He also analysed the various preventive detention laws and their incompatibility with the idea of the rule of law and democratic rights.

xiv. Alagumani, R in his thesis "***Role of the Supreme Court of India on personal liberty under the preventive detention laws: a content analysis study***"[22] has done research on the impact of the various preventive detention laws on personal liberty and has identified in what situations, if any, an entrenchment on personal liberty can be justified by such laws in the interests of national security and integrity. This work has greatly inspired the researcher to formulate a vital chapter of this work and identify various suggestions to protect personal liberty.

xv. Justice Devadas P., a retired judge of Madras H.C in his thesis **"*Judicial Review of Preventive Detention Orders in India: A Study,*"**[23] has endeavoured to study judicial review of "preventive detention orders" to safeguard the individual liberty also keeping in view the interest of the State. He has worked to analyse and trace the judicial trends in "preventive detention jurisprudence" and to determine how far the Indian Judicial system has been successful in safeguarding the liberty of individual against such laws.

xvi. Pradyumna K. Tripathi, in his article *"**Preventive Detention: The Indian Experience***"[24], has sketched, the experience of India with the administration

[21] A.R. Desai, *Violation of Democratic Rights in India* (Bombay Popular vol 1 1986)
[22] Alagumani R, *Role of the Supreme Court of India on personal liberty under the preventive detention laws: a content analysis study* (Tamil Nadu National Law University, Department of Law, 2016)
[23] Justice Devadas P. *Judicial Review of Preventive Detention Orders in India: A Study* (2012)
[24] Pradyumna K. Tripathi, *Preventive Detention: The Indian Experience*, 2015

of a statute somewhat comparable with the preventive detention legislations. While foreign experience is rarely transferable in full, it may perhaps shed light on the possible course of future developments. The Constitution of India, like that of the United States, expresses a resolve to preserve a free society by protecting the liberties or fundamental rights of its individual member. The fundamental rights have been severely constricted by the evolution of judicial policy towards the preventive detention laws, which verges on total abandonment of the unfortunate individuals who happen to fall under their shadows. The preventive detention legislations in India are used to curtail the personal liberty and we can learn a lot in this regard from the U.S. experience.

xvii. Arvind Verma in his article, **"*Policing of Public Order in India*"**[25] explained about the maintenance of order and the crucial function of the Executive. While talking about the necessity of Preventive detention, he mentioned about communal, economic, linguistic, caste, class and ethnic conflicts and their social and political implication. He reiterates the nature of order maintenance problems in the country, the socio-political reasons behind them and the ways in which the executive is dealing with these. He discusses the maintenance of public order by executing preventive detention laws, which are in absolute violation of personal liberty of the victims. He discussed about some of the innovative measures that the Indian Executive have developed to deal with frequently occurring problems. In his work, his sole focus has been on the executive's policy while completely disregarding the judicial role in safeguarding od basic human rights. This research shall attempt to cover this gap.

xviii. In his autobiography "***Neither Roses nor Thorns"***[26]**,** Justice Khanna, has revealed that he knew that his dissenting judgement in the ADM Jabalpur case had cost him the chair of CJI. He discusses the situation of the days of emergency and in doing so makes a point of highlighting the importance of independence of judiciary and judicial integrity of judges.

[25] Arvind Verma, *Policing of Public Order in India*
[26] Justice H.R Khanna, *Neither Roses nor Thorns*, (Eastern Book Company 30th anniversary ed. 2019)

xix. J.S. Mill, in his work **"*On Liberty*"[27],** described a broader perspective of Liberty. He discussed the origin of the idea of liberty because of the need of protection from political tyranny. He finds that liberty being an indispensable right, if breached, should justify a rebellion by the people. He also goes on to discuss the notion of 'Preventive Detention' albeit not expressly. He suggests limiting the liberty using the 'Harm Principle', which can easily be understood using the popular phrase, "*The freedom of my fist ends at the tip of your nose".*

xx. Dr Shashi Tharoor, in his well-received work, "***An Era of Darkness: The British Empire in India*"[28]**, describes in gritting and intricate details about the horrors of colonial India. It focuses on the damage caused to the native people by the advent of the British into the subcontinent. It lays emphasis on various arbitrary and draconian measures imposed by the British to ensure the superiority of the British empire. His work has been of great help in the research as it gave details into various Preventive Detention laws passed in the British era which was useful in writing the third chapter of this dissertation.

Most of the literature gives a heavy focus on the impact of various preventive detention laws and the executive's role in imposing such legislations is given primacy. It lacks in the respect that, there is no substantial coverage of the judiciary's role in adjudicating over various preventive detention laws regarding the right of personal liberty. The present research shall seek to fulfil this research gap.

[27] John Stuart Mill, *On Liberty* (Longman Green 57th issue 2007)
[28] Dr. Shashi Tharoor, *An Era of Darkness: The British Empire in India* (Aleph Book Company; 1st ed. 2016)

1.4 Aim(s)

Based on the research gap identified in the selected literature, the researcher has set the following aim(s) of this research.

1. To understand the role of the judiciary in safeguarding the right of personal liberty against various preventive detention legislations.
2. To identify various factors which might have affected the Judiciary's decisions in such cases.

1.5 Objectives

In order to achieve the aforementioned aim(s), the researcher has identified the following objectives of this research work:

1. To understand the idea of 'liberty' and its limits.
2. To identify how the right of personal liberty has been understood under the Indian Constitution.
3. To understand the notion of preventive detention and the purpose behind it.
4. To determine the role of the Indian Judiciary in safeguarding personal liberty under various Preventive Detention Legislations.
5. To do a critical analysis of Judicial decisions regarding personal liberty in such cases.

1.6 Scope and Limitations

This research tries to explore the approach of the Supreme Court of India in determining the question of "personal liberty" under various preventive detention legislations.
This research seeks to streamline these cases in a manner which highlights the importance given to personal liberty.
The Scope is restricted to analysing the decisions passed by the judiciary regarding personal liberty.
The researcher was constrained by the limitation of time. Moreover, a substantial part of the research was done using online research materials and readily available books.

1.7 Research Questions

In an attempt to achieve the aim(s) of this research, the researcher has set the following research questions for this dissertation:

i. What is Personal Liberty and what are its limits?

ii. What is Preventive Detention and whether preventive detention laws can be used to breach the right of Personal Liberty?

iii. What is the role played by the Supreme Court in safeguarding "personal liberty" against various "preventive detention" laws?

iv. What are the factors affecting the judicial decisions regarding personal liberty under such legislations?

1.8 Research Methodology

Since the present research is primarily based on an analysis of SC judgments, the researcher has done a Legal and Doctrinal research. It explores, analyses, and compares the Supreme Court decisions affecting personal liberty across various Preventive Detention Legislations from the independence till today.

Researcher has employed "Explanatory Research Design" while writing this dissertation. The research focuses on determining the scope of "Personal Liberty" while referring to the views of various jurists and the judgments given by the court. It studies the need for Preventive Detention Laws and analyses the Supreme Court Judgements regarding personal liberty under various preventive detention laws.

In doing so, the researcher has relied on primary data such as the various acts passed by the Parliament and different international instruments. This research heavily relies on the judgments delivered by the Supreme court. The researcher has also used secondary data sources such as books and articles written by various writers and scholars and various web sources such as journals and other published works.

1.9 Chapterisation

To effectively achieve the aim, the research has been divided into five substantive chapters.

Chapter I- Introduction

The first chapter being an introductory one, contains a general idea about the topic. In this chapter, the researcher seeks to conceptualize the notions of Liberty and Preventive Detention. It aims to give the reader a light understanding about the notions of "Personal Liberty" and "Preventive Detention" to the reader. It highlights the aims and objectives of the study, and formulates certain research questions whose answers will be sought after in the coming chapters. It also gives the reader a brief idea about the various stages in which the researcher seeks to answer the research questions by briefly explaining the methodology employed by him. Furthermore, the sources, literature used, scope and limitations of the study are also mentioned and reviewed. It sets the tone which will be followed in this research work while focusing on the key aspect of "Liberty".

Chapter II- Personal Liberty under Indian Constitution

The second chapter elaborately discusses the concept of Liberty in general. It explains the broader scope of Liberty while referring to the works of various jurists like J.S. Mill and Jean Rousseau and provides the justifiable limits to the idea of personal liberty. It also gives a special focus on how the right of personal liberty has evolved over the years, from being limited to a narrow understanding of mere freedom from arrest, to a wider amplitude of covering a variety of rights. It also includes various international instruments that discuss the right to personal liberty.

Chapter III- Delineating Preventive Detention

The third Chapter provides the meaning of Preventive Detention and seeks to give justifications for the use of such detention by using various sources like judgments, books and essays. It also traces the historical development of preventive detention in India from the British Period till today. It also highlights the relevance of preventive

detention in today's times. It also contains a discussion on meaning and scope of preventive detention as compared to other forms of detention. Finally, international conventions and bodies are mentioned that lay general guidelines for "Preventive Detention" to be followed by various countries.

Chapter IV- Preventive Detention Legislations and Role of Judiciary

The fourth Chapter highlights how the Indian Courts have dealt with the right to personal liberty while dealing with Preventive Detention Legislations. It begins by explaining various types of detention under Art. 22 and the constitutional safeguards available. It then moves to discussing in detail the various Preventive detention laws passed by the Parliament. It focuses on key factors like the intent of Parliament behind such legislations, the ongoing situation of the country, the effect of such laws and the decisions of courts in dealing with the matters of personal liberty. Finally, it concludes by analysing Preventive Detention laws in light of safeguards available in cases of preventive detention under the Constitution.

Chapter V- Conclusion and Suggestions

The Fifth Chapter gives a conclusion of the dissertation and tries to answer the research questions set at the outset of this research. It briefly highlights the key points of understanding both ideals of liberty and preventive detention. It gives an analysis of judicial decisions regarding preventive detention legislations to determine if the right of personal liberty has been protected. It also makes an attempt to identify various factors that may have influenced the judiciary's stance on the importance of personal liberty. Finally, the researcher attempts to provide various suggestions which can be employed in safeguarding personal liberty in cases of preventive detention laws in the future.

Chapter II-Understanding Personal Liberty

"The Spirit of man is at the root of article 21"

-K. Iyer J.[29]

2.1 Concept of Liberty

"The ideal of liberty has made its appeal to man in all ages; and in the name of liberty, men have been performed great acts of heroism as well as despicable acts of crime. Even today there are very few ideals, which can move men more readily than the idea of liberty. Liberty is the essential quality of human life."[30]

Liberty is considered as the "greatest possession of man". Even among animals there is an urge to live freely and a captive bird or animal attempts to shatter the cage or chains which captivates it in order to live in an atmosphere of its own liking. "Among human beings, the urge to acquire freedom from restraint artificially imposed has been the commonest feature of the long history of the human race."[31] The inner urge for freedom is a natural phenomenon of human society.

Man loves that to which he has become habituated, respect for the life, liberty and property of everyman is today not merely a norm for decision or a policy of the state but has actually become a principle of the living law. Liberty is one of the most essential requirements of the modern man. It is said to be '*delicate fruit of a future civilization*'.[32]

Without some liberties, which give him the ability to do as per his own free will, the person cannot reach his full potential. Liberty is as essential to man as bread and air provided it's not at the cost of another's liberty.

Liberty of life and personal freedom are the focal points of civil liberty. This focal point of liberty sustains other liberties because without liberty of life and personal freedom no other civil liberty is possible. Life and personal freedoms are the prized assets of an individual, which are basic and primary.[33]

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[29] *Maneka Gandhi v. Union of India* [1978] SCR (2) 621
[30] E. Asirvatham, *Political Theory*, (10th edn) 168.
[31] Sharma, B.M. and Chaudhury*, C.P. Expanding Dimensions of Freedom.*
[32] John, E.E.D, 'Essays on Freedom and Powers'.
[33] J.S Mill, *On Liberty* Chapter II

2.1.1 Liberty and Individualism

The concept of civil liberty is essentially rooted in the philosophy of individualism. According to this doctrine, the highest development of the individual and the enrichment of his personality are the true function and end of the state. It is only when the individual has reached the highest state of perfection and evolved what is best in him that society and the state can reach their goal of perfection. The state exists for the benefit of the individual.[34]

This concept is entirely opposed to the ideas, which have led to the growth and rise of fascists and dictatorial states. The fascist doctrine preaches the supreme importance of the state. There the individual and his activities have significance only in so far as they assist the existence, the needs and the activities of the state. It would not be an exaggeration to state that civil liberties as understood in an experiment with ourselves, think differently from neighbours without danger to our happiness being involved their in. We are not free unless we can form our plan of conduct to suit our own character without social penalties.

Liberty may also be defined as the affirmation by an individual or group of his or its own essence. It seeks to require the presence of three factors, "a certain harmonious balance of personality; it requires on the negative side the absence of restraint upon the exercise of that affirmation and it demands on the positive side, the organization of opportunities for the exercise of a continuous initiative."[35]

One cannot talk about the concept of Liberty without mentioning the contribution of John Stuart Mill. Mill was born on May 20th, 1806, in London. His father James Mill, was an ardent reformer and personal friend of Jeremy Bentham, the famous utilitarian philosopher. James Mill was determined to mould John into a well-educated leader and an advocate of his reforming ideals.

To this end, Mill was given an extremely rigorous education from a young age. He learned Greek at the age of three, Latin at eight, and read Plato's dialogues in the original language before his tenth birthday. He was also tutored by some of the brightest

[34] Paras Diwan, *Does our Constitution need a Second Look*, p.68.
[35] H.J. Laski, *Encyclopaedia of the Social Sciences*, p.190.

minds of his day, including Jeremy Bentham, economist David Ricardo, and classicist, George Grote.[36]

In his celebrated essay "*On Liberty*", he begins by explaining the origin of concept of liberty. He points out that, "*the struggle between Liberty and Authority is the most conspicuous feature in the portions of history with which we are earliest familiar, particularly in that of Greece, Rome, and England. But in old times this contest was between subjects, or some classes of subjects, and the Government*."[37] He implies that by 'liberty', in a broad sense he meant protection against the tyranny of the political rulers.

He emphasized the need of liberty stating that, "*the rulers were conceived (except in some of the popular governments of Greece) as in a necessarily antagonistic position to the people whom they ruled. Their power was regarded as necessary, but also as highly dangerous; as a weapon which they would attempt to use against their subjects, no less than against external enemies. To prevent the weaker members of the community from being preyed on by innumerable vultures, it was needful that there should be an array or civil rights or liberties*."

Thus, the aim of patriots was to set limits to the power which the ruler should be suffered to exercise over the community; and this limitation was what they meant by liberty. It was attempted in two ways.

- Firstly, *"by obtaining a recognition of certain immunities, called political liberties or rights, which it was to be regarded as a breach of duty in the ruler to infringe, and which, if he did infringe, specific resistance, or general rebellion, was held to be justifiable."*
- And secondly, was the "*establishment of constitutional checks, by which the consent of the community, or of a body of some sort, supposed to represent its interests, was made a necessary condition to some of the more important acts of the governing power."*

While talking about the broader aim of liberty, Mill also sets up certain limitations on the idea of liberty itself. Mill gave what is known as the **"**harm principle**"** as an

[36] Paul Meany, (Libertarianism March 20th 2020) https://www.libertarianism.org/columns/introduction-johnstuartmillsliberty.
[37] John Stuart Mill, *On Liberty*, Chapter I

expression of the idea that the right to self-determination is not unlimited. Essentially, the right to self-determination is the right of a people to determine its own destiny. In particular, the principle allows a people to choose its own political status and to determine its own form of economic, cultural and social development. The importance lies in the right of choice, so that the outcome of a people's choice should not affect the existence of the right to make a choice. In practice, however, the possible outcome of an exercise of self-determination will often determine the attitude of governments towards the actual claim by a people or nation.

Thus, by Harm Principle, Mill means that an action which results in doing harm to another is not only wrong, but wrong enough that the state can intervene to prevent that harm from occurring.[38] Some have described this as *"The freedom of my fist ends at the tip of your nose".* This means that Liberty is not unlimited and is heavily determined by the effects it has on others. In the chapter entitled "*Of the Liberty of Thought and Discussion,*"[39] Mill argues in favour of freedom of speech and personal liberty in the vast majority of situations, barring a few key exceptions such as when an individual incites immediate violence. This has been discussed in depth in the next chapter.

Harold J. Laski takes the same line and argues that "*Liberty is essentially an absence of restraint*."[40] According to Locke, *"the idea of Liberty is idea of a power in any person to do or forbear any particular action according to the determination or thoughts of the mind."*[41]

Those who hold that an individual's Freedom lies in his ability to do as he pleases, look upon the coercive regulation of conduct by government as curtailments of individual Liberty. Those who hold that a person's freedom lies in his ability to will as he ought, they regard the obligations imposed by law as no infringement of liberty.[42]

All throughout these discussions, what seems to be of the permanent essence of freedom is that the personality of each individual should be so unhampered in its development, whether by authority or by custom, that it can make for itself a satisfactory harmonization of its impulses. Restraint is felt as evil when it frustrates the

[38] J.S. Mill, *On liberty* Chapter V
[39] J.S. Mill, *On liberty* Chapter II
[40] H.J. Laski, *Liberty in the Modern State*
[41] Locke, *An Essay Concerning Human Understanding*
[42] Lord Acton, 'Essays on Freedom and Power'

life of spiritual enrichment. Liberties are opportunities which history has shown to be necessary for the development of personality.[43]

Liberty always demands a limitation on political authority; power as such when uncontrolled is always the natural enemy of freedom. The broader the discretion, the greater the chance of its abuse. Where discretion is absolute man has always suffered. Absolute discretion is more destructive of freedom than any of man's other inventions. And also, absolute discretion, like corruption marks the beginning of the end of liberty.

According to Lord Justice Denning, Liberty means "*Freedom of every law-abiding citizen to think, what he will, to say that he will and to go where he will on his lawful occasions without let or hindrance from any other person*." He also limits this liberty on the argument that, it must be matched with social security by which he meant the peace and good order of the community in which he lives.[44]

2.1.2 Liberty and Democracy

The aim of government is, not to rule nor to restrain by fear or to extract obedience but contrary wise, to free everyman from fear, so that he may live in possible security. In other words, the aim of state is to strengthen his natural right to exist and to work without injury to himself or others. In fact, it seeks to achieve liberty to be enjoyed by each and every individual in the country. In every type of modern society, a body politic or a government which does not give a minimum guarantee or a promise for the honour of a liberty is not acceptable.

In a democratic country, "the democratic sprit gives a great importance to the individual. There must be constant readiness to permit everyone to experiment with his own life and to work his own way of salvation. Everyman wants to think his own thoughts, dream his own dreams and do his own needs". The main function of the democratic government is to safeguard liberty. Which should not be controlled unless its exercise becomes antisocial or undermines the security of the state. *"In fact, the greatest heritage of democracy to mankind is the right to personal liberty."*[45]

[43] Political Science, 'Rights and the State', https://www.politicalscienceview.com/rights-and-the-state/
[44] Lord Denning, *Freedom Under the Law*
[45] Dr. Paras Diwan, *Does our Constitution need a Second* Look, 68.

If the liberty of an individual or a section of the people is sacrificed the majority cannot remain unaffected. *"Every time there is trespass up in the citadel of freedom, its very foundation is weakened and more and more such trespass is tolerated, weaker becomes the whole edifice, till one day it collapses giving place to dictatorship and fascism while democracy lies in ruins."*[46]

As such the concept of personal liberty has been secured to all the people residing within the country in accordance with the spirit of Indian democracy. Of course, not only the Indian democracy, virtually almost all the democratic countries of the world provide in the provisions of their constitutions recognizing, encouraging and emphasizing on the protection of personal liberty of the people. As a result of which the ultimate goal of such democracies, i.e., the welfare of the nation, will be established.

2.1.3 Meaning and Definition of Personal Liberty

As discussed earlier, liberty of an individual is an inseverable part of basic human requirements and is requisite for the proper development of persons as civilized human beings. For this to be achieved, the idea of 'liberty of individual' which is often referred in legal terms as concept of 'personal liberty' needs to be properly defined and understood.

Personal liberty in simplest of terms means; "*the liberty of an individual to do his or her will freely except for those restraints imposed by law to safeguard the physical, moral, political, and economic welfare of others."*[47]

According to Merriam Webster, Personal liberty can be defined as, "*the freedom of the individual to do as he pleases limited only by the authority of politically organized society to regulate his action to secure the public health, safety, or morals or of other recognized social interests*."[48]

And it also gives a definition of Individual liberty as, *"the liberty of those persons who are free from external restraint in the exercise of those rights which are considered to be outside the province of a government to control."*[49]

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[46] R.L. Bhat, *Personal Liberty: A Conceptual Analysis* (Vol. 5.)
[47] Dictionary, 'Personal Liberty' https://www.dictionary.com/browse/personalliberty
[48] Merriam Webster, 'Personal Liberty https://www.merriamwebster.com/dictionary/personal%20liberty
[49] Merriam Webster, 'Individual Liberty' https://www.merriamwebster.com/individual%20liberty

These definitions suggest that the meaning of personal liberty is quite straightforward. One may be inclined to believe that personal liberty of a person is nothing more than the sheer freedom of any person to act according to his will without breaching any express limitations specified by the sovereign. These express limitations being reasonable restrictions imposed on civilians for the purpose of ensuring public order and safety of citizens and State, and any other restrictions which the State deems necessary.

Although it may appear so from these definitions, the idea of Personal Liberty is far from simple. To truly understand its vastness and complexity, one needs to dive deeper into the plethora of cases decided by the Indian Judiciary and also by some foreign courts.

Primarily it may mean freedom from arrest and detention, however at a profound level it implies a positive right which allows people a broader freedom to freely do any positive act or omission.

The true scope of Personal liberty is discussed at length later in this chapter. Its evolution and its application in Indian context. The way it developed from a narrow right protecting only against any unnecessary physical restraint by the government to being a positive right which gave various freedoms and liberties that are to be understood in addition and in synchrony with other fundamental rights especially under Article 14 and 19.

One may understand Personal Liberty as a right which allows every person, to live their life on their own terms, with no unreasonable interference from others. A successful democracy can only be the one that guarantees its citizens the right to protect their own life and liberty.

2.2 Origin of Personal Liberty as a Right

2.2.1 English Origin

England is treated to be the mother of democracy. "*Magna Carta was the seed which subsequently flowered in that country, which made every English House a castle."*[50] The expressions "Law of the land" as used in Magna Carta and "due process of Law" finding place in the Statute of Westminster, however, simply mean the absence of any arbitrary power of the executive. But the same has not affected in any way the power of the Parliament. The guarantee of fundamental rights in the English constitution lies in the good sense of the people and in the system of representative and reasonable government which has been evolved.[51]

In England, it is not open to a court to invalidate a law on the ground that it seeks to deprive a person of his life or liberty contrary to court's notions of justice or due process.[52]

For the most authoritative pronouncement on this question in recent years, we must refer to Lord Wright's observation in, Liversidge v. Anderson.[53] "*All the courts today and not least this House, are as jealous as they have ever been an upholding the liberty of the subject. But that liberty is a liberty confined and controlled by law, whether common law or statute*". As to how personal freedom is maintained in England as against the executive, the words of Magna Carta are clear enough, viz., that "*no man can be deprived of his personal freedom save by the law of the land."*

Though there is no constitutional guarantee safeguarding the freedom, it is safeguarded by the ordinary law itself, which means the common law itself. Thus, most of the safeguards which are included in the American guarantee of 'due process' as will be discussed hereafter, are ensured in England by common law. However, if the legislature alters or modifies these common law principles, as it has, in many respects, the individual cannot challenge the constitutionality of such legislation. before a court of law. These broad common law safeguards of personal liberty in England may now

[50] R. Chintamani, 'A critical study of personal liberty under Indian Constitution' (2005), 21
[51]Citizen's Advice, 'Personal Liberty' https://www.citizensadvice.org.uk/civil-rights/human-rights/what-rights-are-protected-under-the-human-rights-act/your-right-to-personal-liberty
[52] Library, 'Magna Carta' https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/-.html
[53] [1942] A.C. 206 (260).

be noticed. If anybody's personal freedom is interfered-with without lawful justification, he can-

a) Regain his freedom through the ordinary courts by means of the writ of 'habeas corpus'; or,
b) sue the person who has arrested or detained him unlawfully, for damages for false imprisonment, or prosecute him criminally for assault. To such an action brought by a citizen, 'Act of State' is no defence.[54]

The courts can, however, interfere only on the ground of absence, excess or abuse of authority, but cannot revise decisions lawfully taken by the Executive, on the ground that the judges are of a different opinion. Of course, in order to. make an executive action lawful, it must be in conformity not only with the substantial provisions but also with the procedural requirements laid down by the law.

2.2.2 Personal Liberty in US

Article 21, under the Indian constitution has been greatly inspired by the American constitution, the 5th amendment (1791) to which constitution states, *"No person shall be deprived of his life, liberty or property, without due process of Law*"[55]. Similar is the expression used in the 14th amendment. These two provisions are conveniently referred to as the 'due process clauses.' Under the above clauses the American judiciary claims to declare a law as bad, if it is not in accord with 'due process', even though the legislation may be within the competence of the legislature concerned.

While in England, all the Parliament enacts is 'Law of the land', a legislative enactment, in the U.S.A., is not 'law' unless it is in conformity with 'due process'.[56]

"The US constitution as enacted, it had no Bill of Right because it was felt that if the powers that were conferred on the Government did not authorize to do something, for example, depriving the subject of any fundamental right, it was unnecessary to restrain its hand from assuming such powers."[57]

[54] *Entick v. Carrington,* [1765] 19 St Tr. 1030
[55] The due process Clause has been Adopted in Sec. 1(a) of p-5 the Canadian Bill of Rights Act, 1960.
[56] *Murray's Lessee v. Hoboken Land & improvement. Co.* [1856] 18. How. 272.
[57] Rout Chintamani, 'A critical study of law relating to personal liberty under Indian Constitution' (2005)

2.2.3 Canadian Perspective

Section 1 (1) of the "Canadian Bill of Rights Act", 1960, has adopted the 'Due Process' clause from the American constitution. But the difference in the Canadian set-up is due to the fact that this Act is not a constitutional instrument to impose a direct limitation on the Legislature but only a statute for interpretation of Canadian Statutes, which again, can be excluded from the purview of the Act of 1960, in particular cases, by an express declaration made by the Canadian parliament itself (Sec. 2).

The Canadian Supreme Court has held[58] that *"the Canadian Court would not import 'Substantive reasonableness' in to Sec. 1 because of the un-salutary experience of substantive due process in the U.S.A.; and that as to 'procedural reasonableness', Sec 1. of the Bill of Rights Act only referred to the legal process recognized by Parliament and the courts in Canada."*

The result has been in Canada, that the 'due process clause' has lost its utility as an instrument of judicial review of legislation and it has come to mean practically the something as whatever the legislature prescribed, much the same as 'procedure established by law" in Article 21 of the constitution of India, as interpreted by A.K. Gopalan v. State of Madras.[59] It is discussed in length in the later part of this chapter.

2.2.4 International Charters

A. **"Universal Declaration of Human Rights", 1948**.- The UDHR seeks to give general guidelines regarding the right of personal liberty of all persons across all countries. It demands equality for all by establishing of independent judicial organs that can decide the question of detention without being influenced by the executive. The relevant provisions are mentioned below.

   Art. 3 of the Declaration provides "Everyone has the right to life, liberty and security of persons".

   Art. 9 provides - "No one shall be subjected to arbitrary arrest, detention or exile". Clause 10 says - "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal. In the determination of his rights and obligations and of any criminal charge against him".

[58] *Curr. v. R* [1972] SCR 889
[59] [1950] SCR 88

B. **"International Covenant on Civil and Political Rights" – 1966**. -The ICCPR requires that the civil rights of people must be protected. It established the right of personal liberty as one of the many forefronts of civil rights. It secures liberty rejecting arbitrary detention and allowing detention only in accordance to the lawful procedure.

Art. 9(1) of the "United Nations covenant on Civil and Political Rights", says – "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".

C. **"European convention on Human Rights", 1950**.

This convention contains a most elaborate and detailed codification of the rights and safeguards for the protection of life and personal liberty against arbitrary invasion, in various articles.[60]

Art. 2 (1) "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of necessary force such as,

(a) In defence of any person from unlawful violence.

(b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained.

(c) In action lawfully taken for the purpose of quelling a riot or insurrection."

Art.3 – "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Art. 5 - (1) "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. The lawful detention of a person after conviction by a competent court.

b. The lawful arrest or detention of a person for non-compliance with the lawful order of a court."

[60] Year Book of European Convention on Human Rights, 385; Year Book, 256.

2.3 Personal Liberty- Indian Context

The people of India, under the Leadership of Mahatma Gandhi launched nonviolent struggle to achieve self-government and fundamental rights for themselves. Though some militants took to violence also, the majority of the movement was carried out peacefully without violence. Lokmanya Tilak advocated that "*the freedom is the birth right of Indians for which they will have to Fight."*

"The 'Government of India Act', 1919 failed to provide any fundamental rights to the people. The Nagpur Session of the Congress demanded repeal of all repressive laws. On the basis of the report of Sapru Committee, some of these laws were repealed. In 1930, Congress Working Committee gave a call for the attainment of 'Purna Swaraj'. The British Government adopted more repressive measures. Karachi Session of Congress in 1931 adopted a detailed programme of 'Fundamental Rights and Duties'.[61]"

But again, 'the Government of India Act', 1935 did not contain a declaration of fundamental rights. Rather, more repressive measures were adopted to crush the liberties of the people during the Second World War.

Under the Cabinet Mission Plan of 1946, Constituent Assembly was established to frame the Constitution of India. It was a breath of relief for the people as they believed that finally they would be entitled to basic fundamental rights including the most important right of Personal Liberty.

2.3.1 Drafting of Article 21

"The Constituent Assembly got the privilege and responsibility to draft the constitution for the people of India after a long freedom struggle. It was but natural to expect them to frame a constitution, which guarantees freedoms and liberties to all. It was not only a moral expectation but also a binding obligation assigned to them."[62]

B.N. Rau, the Constitution Advisor, in his note to the members of the constituent Assembly, suggested that "*provision relating to personal liberty should neither be vague nor a meaningless guarantee against the oppressive Laws*".[63] K.T. Shah, former

[61] B.M. Sharma, *Expanding Dimensions of Freedom.*
[62] Rout Chintamani, 'A critical study relating to personal liberty under Indian Constitution' (2005) 69
[63] B. Shiva Rao, *The Framing of India's Constitution - Select Documents*

member of the constituent assembly, pleaded for empowering the courts to protect the personal liberty of all persons, citizens as well as non-citizens. The Constituent Assembly elected an Advisory Committee on fundamental rights, which constituted several sub-committees.

B.N. Rau, prepared a draft constitution. With reference to "Personal Liberty" the draft clause 16 provided, *"No person shall be deprived of his life or personal liberty without due process of law, nor shall any person be denied equality before the law within the territories of the federation."*

After a careful scrutiny of the draft, the Drafting Committee prepared a revised draft constitution and submitted it to the constituent Assembly. "*No person shall be deprived of his life or personal liberty except according to procedure established by law nor shall any person be denied equality before the law or the equal protection of the law within the territory of India".*[64] Thus, in the revised draft, the phrase, "without due process of law" was replaced by the phrase "except according to procedure established by law".[65]

2.3.2 Article 21 of the Indian Constitution

Article 21 of the Indian Constitution declares: *"No person shall be deprived of his life or personal liberty except according to procedure established by law."*

This enshrines the high value of human dignity and the worth of human person. "*The spirit of man is at the root of Article 21. Absent of liberty, other freedoms are frozen."*[66]

Article 21 provides the protection to against deprivation of life and personal liberty to every person, whether a citizen or not. "The right guaranteed by this article is, however, not an absolute right to life or personal liberty but a right not to be deprived of life or personal liberty without the procedure established by law. On the one hand, it recognizes the right of the state to deprive a person of his life or personal liberty and on the other side, it requires that such a deprivation cannot take place except according to procedure established by law and that procedure must be just, fair and reasonable.

[64] Revised Draft Constitution, Art. 15
[65] V.K. Bansal, *Right to Life and Personal Liberty in India*
[66] *J.G. Varghese v. Bank of Cochin*, [1980], SC. 740 at p.475. (Krishna Iyer, J.) Also, see; *Maneka Gandhi v. Union of India* [1978] SC. 597.

Thus, the state's authority to deprive an individual of his right to life or personal liberty is subject to the following of a 'just, fair and reasonable procedure' prescribed by a valid law. The law also must not be arbitrary or unreasonable."[67]

It is a protection, which is both substantive and procedural. "*Article 21, though apparently appears as a shield operating negatively against executive encroachment over something covered by that shield, in fact, it is the legal recognition of both of protection or the shield as well as of what it protects which lies beneath that shield."* Article 21 now is not confined to procedural protection only; it extends to the substance of the law.[68]

Article 21 provides protection not only against executive action but also against legislative action. "*What this article requires is first that for depriving a person of his life or personal liberty, there must be a legal authorization for the purpose, and the authority must strictly follow the prescribed legal procedure for the purpose."*[69]

2.3.3 Scope of Article 21

The words "Personal Liberty" under Article 21 if interpreted widely are capable of including the rights mentioned in Article 19. But in Gopalan's case[70], the Supreme Court took a very bleak view and interpreted these words very narrowly. The Court took the view that "*since the word 'Liberty' is qualified by the word 'Personal' which is of narrowed concept and therefore it does not include all that is implied in the term liberty."* So interpreted, it means "nothing more than the liberty of the physical body-freedom from arrest and detention from false imprisonment or wrongful confinement."

2.3.3.1 A.K. Gopalan's Case 1950

The meaning of the words personal liberty came up for consideration of the Supreme Court for the first time in "A.K. Gopalan v. Union of India" in 1950. In that case the petitioner, A.K. Gopalan, "a Communist leader was detained under the Preventive Detention Act, 1950. The petitioner challenged the validity of his detention under the Act on the ground that it was violative of his right to freedom of movement under article

[67] Alagumani R, 'Role of the supreme court of India on personal liberty under preventive detention'
[68] *T. Sareetha v. T. Venkata Subbaiah*, [1983] AP, p.356
[69] *Makhan Singh v. State of Punjab* [1964], SC. 173.
[70] *A.K. Gopalan v. State of Madras* [1950], SC.27.

19(l)(d) which is the very essence of personal liberty guaranteed by Article 21 of the constitution.

He argued that the words 'Personal Liberty' include the freedom of movement also and therefore the Preventive Detention Act, 1950 must also satisfy the requirement of Article 19(5), in other words, the restrictions imposed by the detention law on the freedom of movement must be reasonable under Article 19(5) of the constitution."[71]

Rejecting both the contentions, the Supreme Court held that "*the 'personal liberty' in Article 21 means nothing expressing more than the liberty of the physical body, that is, freedom from arrest and detention without the authority of law."*

This was the definition of the phrase "personal liberty" given by Prof. Dicey, according to him "*personal liberty means freedom from physical restraint and coercion, which is not authorized by law"*[72]. But by qualifying the word liberty, the Court said, "the import of the word 'personal liberty' is narrowed down to the meaning given in English law to the expression 'liberty of the person'."

The majority took the view that Article 19 and 21 deal with different aspects of liberty. Article 21 is guarantee against deprivation of personal liberty while Article 19 affords protection against unreasonable restrictions on the right of movement.[73]

In Gopalan's case, the Supreme Court interpreted the law' as 'state made law' and rejected the plea that by the term law in Article 21 natural law should be understood. Fazal Ali, J. however, in his dissenting judgment held that *"the Act was liable to be challenged as violating the provisions of Article 19."* He gave a wide and comprehensive meaning to the words 'personal liberty' as consisting of "freedom of movement and locomotion." Therefore, according to him, *"any law which deprives a person of his personal liberty must satisfy the requirements of both the Articles 19 and 21 of the constitution."*

[71] Writing Law, *AK Gopalan's case, https://www.writinglaw.com/ak-gopalan-vs-state-of-madras-case-explained/*
[72] JSTOR, 'The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science'
[73] J.N. Pandey, *Constitutional Law of India* (34th ed.), p. 190.

2.3.3.2 Domiciliary Visit – *"Invasion of Personal Liberty"*

In "Kharak Singh v. State of UP"[74] the Supreme Court held that "*the expression life and liberty was not limited to bodily restraint or confinement to prison only but something more than mere animal existence."*

In that case the petitioner, "Kharak Singh, had been charged in a dacoity case but was released, as there was no evidence against him. Under the UP Police Regulations, the police opened, a history sheet for him and he was kept under police surveillance which included secret picketing of his house by the police, domiciliary visits at night and verification of his movements and activities."[75]

Allowing the petition, Supreme Court held that *"the domiciliary visits of the policemen were an invasion on the petitioner's personal liberty. By the term 'life' as used here something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limits and faculties by which life is enjoyed."*

"It is true that in Article 21 the word liberty is qualified by a word personal but this qualification is. employed in order to avoid overlapping between those incidents of liberty, which are mentioned in Article 19. An unauthorized intrusion into a person's home and the disturbance caused to him is the violation of the personal liberty of the individual." Hence, the Police Regulation authorizing domiciliary visits was plainly violative of Article 21 as there was no law on which it could be justified and it must be struck down as unconstitutional.

But in Govind v. State of M.P. [76] the Supreme Court held that "the M.P. Police Regulations 855 and 856 authorising domiciliary visits were constitutional as they have the force of law. These regulations were framed by the Government under Sec.46(2)(e) of the Police Act."

The petitioner challenged the validity of those Regulations on the ground that they were violative of his fundamental right guaranteed in Article 21, which also includes the right of privacy. The Supreme Court held that *"Regulations 855 and 856 have the force of law and, therefore, they were valid".*

[74] [1963] SC. 1295
[75] J.N. Pandey, *Constitutional Law of India* (34lh ed.), p. 196.
[76] [1975] SC. 1379

2.3.3.3 Maneka Gandhi's Case

In case of "Maneka Gandhi v. Union of India"[77], the court gave the view- that *"personal liberty' under Article 21 of the widest amplitude."* Protection under Article 19 is also included unlike in the case of Kharak Singh. Gopalan case judgement was overruled in this case. Here, the SC said that "*Articles 19 and 21 are not watertight compartments. The idea of personal liberty in Article 21 has a wide scope including many rights, some of which are embodied under Article 19, thus giving them 'additional protection'."*

The court further held *"a law that comes under Article 21 must satisfy the requirements under Article 19 as well. That means any procedure under law for the deprivation of life or liberty of a person must not be unfair, unreasonable, or arbitrary."*

Maneka Gandhi's case showed how liberal tendencies had influenced the supreme court in the matter of interpreting fundamental rights, particularly Article 21. A great change had come about in the judicial attitude towards the protection of personal liberty after the traumatic experiences of the emergency period when personal liberty had reached its nadir, as was seen in case of Shivkant Shukla.[78] In this case Article 21 as interpreted in Gopalan's case[79] could not play any role in safeguarding personal liberty against harsh detention laws. Since Maneka's case Supreme Court has shown great sensitivity to the protection of personal liberty.[80] The Court has re-interpreted Article 21 and overruled the previous decision which gave a narrow meaning to personal liberty.

In this case, under Section 10(3)(c) of Passport Act, the Passport authority impounded Maneka's passport as central government deemed it necessary in the interests of "sovereignty and integrity of India, the Security of India, friendly relations with foreign country and interests of general public". In response, Maneka filed a writ petition challenging the order on ground of violation of her fundamental rights under article 21.

[77] [1978] AIR 597
[78] *A.D.M Jabalpur v. Shivkant Shukla*, [1976] SC 1206
[79] *A.K. Gopalan v. State of Madras* [1950] SCR 88
[80] Rout Chintamani, 'A critical study relating to personal liberty under Indian Constitution' (2005) 103

Justice Bhagwati pronouncing the leading opinion said that *"one of the major reasons that impounding of her passport was null and void was because it was made without affording her an opportunity of being heard in her defence."*

The Court laid down, a number of propositions seeking to make Article 21 much more meaningful than hitherto.

(1) The Court reiterated that the proposition that *"Articles 14, 19 and 21 are not mutually exclusive. A nexus has been established between these three Articles. This means that and law depriving a person of personal liberty has to meet the requirements of Article 19 as well*." Also, the procedure established by law in Article 21 must answer the requirements of article 14 as well.
According to K. Iyer J, "*no Article in the constitution pertaining to fundamental rights is an island in itself. Just as a man is not dissectible into separate limbs, cardinal rights in a constitution have a synthesis"*

(2) The expression "Personal Liberty" under Article 21 was given an expansive interpretation. The Court emphasized that "Personal Liberty is of 'widest amplitude covering a variety of rights which go to constitute the personal liberty of man. Some of these attributes have been given a distinct status of fundamental rights and given additional protection under Article 19.
'Personal Liberty ought not to be read in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt under Article 19."

The attempt of courts should be to expand the reach and ambit of Fundamental Rights rather than attenuate their meaning and content by a process of judicial construction. Some of these attributes have been raised to the status of distinct fundamental rights and given additional protection under Article 19.

(3) The most significant and creative aspect of Maneka's case is the reinterpretation by the court of the expression "procedure established by law" used in Art. 21. The court now gave a new orientation to this expression.
"Article 21 would no longer mean that law could prescribe some procedure, however arbitrary or fanciful, to deprive a person of his personal liberty. It now

means that procedure must satisfy certain requirements in the sense of being just, fair and reasonable. The procedure cannot be arbitrary, unfair or unreasonable."

The concept of reasonableness must be projected in procedure contemplated by Art. 21. The court has now assumed the power to adjudge the fairness and justness of procedure established by law to deprive a person of his personal liberty.

Thus, essentially court has held that Art. 14,19 and 21 are not mutually exclusive, but are necessarily inter-linked. In words of Bhagwati J. "*The principle of reasonable which legally as well as philosophically is an essential element of equality or non-arbitrariness pervades Art. 14 like a brooding omnipresence."*

Thus, procedure in Art. 21 must be "Just, Fair and Reasonable" and not "arbitrary, fanciful or oppressive", otherwise, it would be no procedure at all and requirements of Art. 21 would not be satisfied.

The result of this decision can be best understood by the words of Iyer J. *"This makes the words procedure established by law as used in Art. 21 by and large synonymous with 'Procedural Due Process' in the USA".*

2.4 Personal Liberty- Post Maneka Gandhi

Article 21 of the Indian Constitution, which had been laid dormant for nearly three decades, was brought to life by the landmark decision of the Supreme Court in Maneka Gandhi's case[81]. Since then, Art. 21 has been on its way to emerge as the Indian version of American concept of due process. It has become the source of many substantive rights and procedural safeguards of the people.

Article 21 uses four major expressions, "*viz; 'life', 'personal liberty', 'law', and 'procedure established by law*'." Art. 21 assures every person "right to life and personal liberty". The term "personal liberty" has been given a very wide amplitude covering a variety of rights which go to constitute personal liberty of a citizen. Its depravation shall only be as per relevant procedure prescribed in the relevant law, but the procedure has to be just, fair and reasonable.

2.4.1 Interpretation of Personal Liberty

The expression 'Personal Liberty' under Art. 21, "has been given a liberal interpretation. It does not mean merely the liberty of the body, i.e., freedom from physical restraint or freedom from arrest within bounds of a prison. 'Personal Liberty' is not used in a narrow sense but has been used in Art. 21 as a compendious term to include within it all those variety of rights which a person goes to make up personal liberty of a man. *"Liberty of an individual has to be balanced with his duties and obligations towards his fellow citizens".*[82]

In case of "Kharak Singh vs State of U.P."[83] in which it was held that "*night domiciliary visits of Police constitute an infringement of personal liberty of an individual enshrined in Art. 21*." In this case, the Minority view expressed by Subba Rao J., adopted a much wider concept of personal liberty. He differed from the majority view that Art. 21 excluded what was guaranteed by Art. 19. He pleaded for an overlapping approach, that both Art. 19 and 21 are not excluding, but overlapping, each other.

He said- "*No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal*

[81] *Maneka Gandhi v. Union of India* [1978] SCR (2) 621
[82] *M.C Mehta v. Union of India* [2003] SC 3469.
[83] [1963] SC. 1295

liberty' in Art.21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty have many attributes and some of them are found in Art. 19.

If a Person's fundamental right under Art. 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Art. 19 (2) so far as the attributes covered by Art. 19 (1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction. within the meaning of Art. 19 (2) of the Constitution."

Over the course of time, the view of Subba Rao, J., has become the accepted view.[84] Agreeing with the approach of minority in Kharak Singh, Bhagwati, J., observed in Maneka Gandhi, that the expression 'personal liberty' in Art. 21 is of the 'widest amplitude' and covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental, rights and given additional protection under Art. 19(1). Thus Articles 19(1) and 21 are not mutually exclusive.

Right to personal liberty must also mean a life free from encroachments unsustainable in law.[85] Any law interfering with personal liberty must satisfy a 'triple test'.

i. A procedure must be prescribed.
ii. The procedure must withstand the test of one or more fundamental rights conferred under Art. 19 which may also be applicable in a given situation; and
iii. It should also be compatible w.r.t right of equality (protection against arbitration) under Art. 14.

In the coming years, the horizon of personal liberty has expanded to include a variety of rights. It now includes a "woman's right to make reproductive choices[86], a Detenue's right to socialize with family members[87] or to publish books and reading materials[88], a right to travel abroad"[89] and many other similar rights.

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[84] *State of W.B. v. Ashok Dey* [1972] SC 1660., *Haradharan Saha v. State of W.B*, [1974] SC 2154, *John Martin v. State of W.B.* [1975] SC 775, *Maneka Gandhi v. Union of India* [1978] SC 597
[85] M.P. Jain, *Indian Constitutional Law,* (7th ed.) pp. 1126
[86] *Suchita Srivastava v. Chandigarh Administration* AIR 2010 SC 235
[87] *Francis Coralie v. U.T. of Delhi* AIR 1981 SC 746
[88] *State of Maharashtra v. Prabhakar Pandurang* AIR 1966 SC 424
[89] *Satwant Singh v. A.P.O* AIR 1967 SC 1836

2.5 Constitutional Freedoms and Personal Liberty

Article 21 along with Articles 14 and 19 forms the "Golden triangle of the Fundamental rights"[90] and these three articles stand as the gateway to the heaven of freedom into which Rabindra Nath Tagore wanted his country to awake from the abyss of unrestrained power. "These three articles afford to the people of this country an assurance that the promise held forth by the preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights. The interplay of diverse articles of the constitution guaranteeing various fundamental rights has gone through multiple transformations. There are many different views about the relationship of these provisions of the constitution."[91]

One such view is based on the assumption that these articles of the constitution are inter-linked and inter-dependant. A.K. Gopalan's case[92] provided the first opportunity to the Supreme Court to consider the question of interrelationship between Article 21 and 19 where it held that "these articles deal with quite different subjects and cannot be read together, because.

Firstly, Article 19 is available only to citizens, whereas Article 21 applies to aliens as well;

Secondly, Article 19 deals with restrictions, whereas Article 21 covers the case of deprivation;

Thirdly Article 21, the most important of our fundamental rights - the right to life, which is absent in Article 19;

Fourthly the six freedoms guaranteed under Article 19 may be included under the general head liberty especially, if it is given the extended meaning as given to it by the American Supreme court under the 14th Amendment.

But in our constitution the word liberty has been qualified by the adjective 'personal' and that makes the all-important difference and restricts its meaning and differentiates its scope from the rights under Article 19(1)."

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[90] *Maneka Gandhi v. Union of India* [1978] AIR 597
[91] Chintamani Rout, 'A critical study relating to personal liberty under Indian constitution.' (2005) 97.
[92] *A.K. Gopalan v. State of Madras* [1950] SC.27.

Thus, "Article 21 speaks about personal liberty in general terms whereas Article 19 protects some of the important attributes of personal liberty by confining its protection to citizens. The reach of Article 21 is wider because it protects non-citizens also."

The relationship of Articles 21 and 19 had also come up first for consideration in a meaningful way in Kharak Singh v. State of UP[93] in which it was stated that:

"On the other hand, (we) consider that 'Personal Liberty' is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the 'Personal Liberties' of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'Personal Liberty' in Article 21 takes in and comprises the residue."

If Article 21 were to cover freedoms mentioned in Article 19, the result would be that though Article 19 has conferred these on citizens, even non-citizens could claim those freedoms, as Article 21 applies to every person, be he a citizen or not. This could not at all have been the intention of the founding fathers. To put it differently, whether a law operating in the field of Article 21, has also to satisfy the requirement of Article 19, wherever it is attracted.

A negative view was taken in this regard, in "A.K. Gopalan v. State of Madras"[94], in which it was stated by Patanjali Shastri, J. that "*Article 19, guarantees to the citizens the enjoyment of certain civil liberties while they are free, while Articles 20 to 22 secure to all persons - citizens - and non-citizens - certain constitutional guarantees in regard to punishment and prevention of crime. Different criteria are provided by which the measure legislative judgments in the two fields and a construction, which would bring within Article 19 imprisonment in punishment of a crime, committed or in prevention of a crime threatened would make a reduction and absurdum of that provision."*

In state of Maharashtra v. Prabhakar[95], the constitution Bench illustrated that there are five distinct lines of thought in the matter of reconciling Articles 21 and 19, namely,

[93] [1963] SC. 1295.
[94] [1950] SCR 88
[95] [1966], SC.424.

(1) if one loses his freedom by detention, he loses all the other attributes of freedom enshrined in Article 19;

(2) personal liberty in Article 21 is the residue of personal liberty after excluding the attributes of that liberty embodied in Article 19;

(3) the personal liberty included in Article 21 is wide enough to include some or all of the freedom mentioned in Article 19, but they are two distinct fundamental rights and a law to be valid shall not infringe both the rights;

(4) the expression 'Law' in Article 21 means a valid law and, therefore, even if a person's liberty is deprived by law of detention, the said law shall not infringe Article 19; and

(5) Article 21 applies to procedural law; whereas article 19 to substantive law relating to personal liberty."

However, no opinion one-way or the other was however expressed.

Also, in "Satwant Singh v. D. Ramarathnam"[96], the constitution Bench accepted "the right to travel abroad" as a part of the right conferred by Article 21 while stating that *"Article 19(1) (d) would not apply to foreign travel as this Article speaks of free movement throughout the territory of India."*

Thus, now, it is well settled law that Article 14, 19 and 21 are inter-connected and therefore, the law passed under one of these articles may be tested for its validity under the other two articles.

[96] [1967] SC. 1836.

2.6 Concluding the Chapter

Liberty which is often referred to as the "*greatest possession of mankind*" is seldom understood in its true form. The true idea of Liberty is rooted into the philosophy of "individualism". Individualism aims to ensure that the individual as a person attains the highest development possible because the benefit of all individuals is the most important goal of the State. Liberty essentially requires two key aspects, viz, absence of restraint and freedom of choice. State must strive towards ensuring these two aspects.

J.S. Mill points out that Liberty (as against Political Tyranny) can be achieved by two ways, viz, recognition of civil rights and establishment of constitutional checks. If these two are not maintained by the rulers, a rebellion would be justified.

However, he also warns that there should not be an absolute liberty with an individual. It should be limited by the "harm principle" which restricts liberty when it causes an unjust harm to any others. As it is popularly said, *"the freedom of my fist ends at the tip of your nose".*

Liberty as a right finds its origin into magna carta and was subsequently developed by the Statute of Westminster. With the passage of time, it came to be recognized as a right almost all over the world. The democratic governments often work to achieve the goal of individualism. Almost all democracies have secured certain rights and freedoms to its citizens which are often enforceable against the State. For instance, "the 5th Amendment of the U.S. Constitution and the Art. 21 of the Indian Constitution" provide for the right of liberty. Many different international instruments such as UDHR, ICCPR and ECHR advocate for the protection of Liberty across the globe.

The Art. 21 secures the right to personal liberty and allows it to be curtailed only by the *"procedure established by law*". It seeks to protect the individual against arbitrary arrest and detention by the State. It provides protection to all persons (both citizens or non-citizens).

In India, the meaning and scope of personal liberty has considerably widened over the years. During the early days of independence, liberty was narrowly interpreted to mean only freedom from arrest and detention.[97] With time, the Court has broadened the

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

horizon of liberty by declaring that "personal liberty" includes a variety of rights[98], including the rights given under Art. 19. Court was also of the view that Liberty could not be curtailed by just any law, it should be "Just, Fair and Reasonable" and not "arbitrary, fanciful and oppressive".

To achieve this broad idea of personal liberty, the courts have established what is known as the "Golden Triangle" of fundamental rights. It requires that any law which is made to curtail liberty must satisfy a test of Art. 14, 19 and 21 of the Constitution. Art. 14 restricts arbitrary actions of the State. While 19 and 21 together give a broader dimension to Liberty of Individuals.

The effect is that, Liberty has gained a wider meaning to include a variety of rights such as right to travel abroad, reproductive choices of women, rights of detenues to meet family members etc.

Although they are sometimes used interchangeably, "Liberty" and "Freedom" as given under Art. 19 and 21 are two different aspects. First of all, Art. 19 applies only to citizens whereas 21 applies to all persons. Secondly Art. 21 speaks about Liberty in general terms whereas 19 gives specific instances of Freedoms. Thirdly, Liberty is a broader term which encompasses all rights specific given under Art. 19 and all the residue freedoms.

Thus, Liberty is a broader term that includes many different rights which help an individual to reach his full potential.

[98] *Maneka Gandhi v. Union of India* [1978] SCR (2) 621

Chapter III- Delineating Preventive Detention

"There is nothing more foreign to a civilized and democratic system than preventive detention."

- Robert Bourassa

3.1 Detention: A Contrast Against Personal Liberty

"Detention" refers to the act of confining a person within four corners. It is keeping a person in a secluded place like a jail as against one's will and wish. Basically, detention is opposed to one's personal freedom. Keeping a person in jail is depriving him of his liberty. It is dishonouring and denying him of one of the most basic freedoms. It is antithesis of civil liberty.[99]

Detention is the "process whereby a state or private citizen lawfully holds a person by removing their freedom or liberty at that time. This can be due to (pending) criminal charges preferred against the individual pursuant to a prosecution or to protect a person or property. Being detained does not always result in being taken to a particular area (generally called a detention centre), either for interrogation or as punishment for a crime (at prison)."[100]The process of detainment may or may not have been preceded or followed with an arrest.

Any form of imprisonment where a '*person's freedom of liberty is removed'* can be classified as detention, although the term is often associated with persons who are being held without warrant or charge before any have been raised. The term 'detained' often refers to an *immediacy* when someone has their liberty deprived, often before an arrest or pre-arrest procedure has yet been followed."

For example, a shoplifter being pursued and restrained, but not yet informed they are under arrest would be classed as "detained".

According to International Principles, "Detained person" means "*any person deprived of personal liberty except as a result of conviction for an offence*"[101] and 'Detention' means "*the condition of detained persons as defined above".*[102]

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[99]Alagumani R, 'Role of the supreme court of India on personal liberty under preventive detention' 220
[100] Global Security, *Glossary*, https://www.globalsecurity.org/military/library/policy/army.htm
[101] Body of Principles of OCHCR, Principle (b)
[102] Body of Principles of OCHCR, Principle (d)

3.1.1 Detention and arrest

Many a times Detention and Arrest are used simultaneously. However, they are completely different terms. The main difference between detention and arrest is whether a person is charged with a crime or not.

"In case of a person being detained, he is not formally accused of committing a crime but is simply restricted and kept in police custody on a reasonable suspicion. During the time in custody, he is questioned or investigated by the police authorities. After the police questioning, the person detained would be released."[103]

The situation would be entirely different if a person was arrested. A person can only be arrested if he is charged for a crime and once, he is arrested and has to be produced before a magistrate within the next 24 hours.[104]

In certain situations, an initial detention may lead to an arrest. For example: *"a person is detained by police authorities on suspicion of possession of drugs which he is then found on him, leading to an arrest*."[105] Thus, detention may be seen as a "lesser form of arrest."

During the time a person is kept in custody, he would have access to safeguards under Art. 22 such as the right to consult a lawyer of his choice and to be defended by a legal practitioner of his choice.[106] And the right to not be detained for more than 24 hours.

Once a person is detained, although he may have not undergone any monetary loss, his personal liberty and right to life is curtailed. Such a situation under the Indian law is considered a civil wrong for which compensation may be sought.

In one such instance, "when an MLA of Jammu & Kashmir was detained by the police when he was going to attend the assembly session, his detention was considered to have deprived him of his constitutional and fundamental right to life (Article 21) guaranteed under the Constitution and the Supreme Court directed a compensation of Rs50,000 for the violation."[107]

In case of an arrest, as a right, the person arrested will have to go a step further and seek bail (as a right under the law) from the court for the offence that he is charged with.[108]

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[103] **Priyanka Mittal,** There's a world of difference between arrest and detention' The Hindu (6 June)
[104] Constitution of India 1950, Art. 22 (2)
[105].**Priyanka Mittal,** There's a world of difference between arrest and detention, The Hindu (6 June)
[106] Constitution of India 1950, Art. 22 (1)
[107] *Bhim Singh v. State of Jammu and Kashmir* [1986] SC 494
[108] Code of Criminal Procedure 1973, s. 437

3.2 Preventive Detention- Meaning and Definition

"Preventive detention" is detention by way of "preventive measure". It is an advance/anticipatory measure.[109] If a person remaining at large becomes prejudicial to the interest of the State/Public, then, as a precautionary measure, he will be detained in pursuance of a law authorising his such detention. This detention is called "preventive detention" and law authorizing such detention is called "Preventive Detention Law."

He will be detained in jail for a specific period as authorised under the preventive detention law. Upon such arrest, the arrested person becomes a 'Detenu'. There's no need for framing of charges against him. He need not be tried for an offence. So, it is detention without a charge, without trial. Thus, it is draconian in nature. In India, preventive detention is constitutionally permitted.[110]

John Stuart Mill holds, "all restraint qua restraint is evil". However, he does not advocate for an unfettered liberty of an individual. In his essay '*On Liberty'*, Mill has given two maxims to determine the extent of individual liberty.[111] The maxims are,

- Firstly, "*that the individual is not accountable to society for his actions, in so far as this concern the interests of no person but himself."*
- And secondly, "*that for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social or to legal punishments, if society is of opinion that the one or the other is requisite for its protection."*

In context of Preventive Detention, he declares, "*the proper limits of what may be called the functions of police*"; which determine, how far liberty may legitimately be invaded for the prevention of crime, or of accident. It is one of the undisputed functions of government to take precautions against crime before it has been committed, as well as to detect and punish it afterwards.

Still, he has the view that the preventive function of government is far more liable to be abused, to the prejudice of liberty, than the punitory function. Nevertheless, "if a public authority, or even a private person, sees any one evidently preparing to commit

[109] *Commissioner of Police v. Anita* [2004] sew 4750
[110] Constitution of India 1950, Art. 22 (3)
[111] J.S Mill, *On Liberty* Chapter V

a crime, they are not bound to overlook it until the crime is committed, but may interfere to prevent it."[112]

He gives an example that, "if poisons were never bought or used for any purpose except the commission of murder, it would be right to prohibit their manufacture and sale. They may, however, be wanted not only for innocent but for useful purposes, and restrictions cannot be imposed in the one case without operating in the other."

Again, it is a proper office of public authority to guard against accidents. In another example, if either a public officer or anyone else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there was no time to warn him of his danger, they might seize him and turn him back without any real infringement of his liberty; for *'liberty consists in doing what one desires,'* and he does not desire to fall into the river.

He also talks about the rights of society. The right inherent in society, to ward off crimes against itself by antecedent precautions, suggests the obvious limitations to the maxim, that purely self-regarding misconduct cannot properly be meddled with in the way of prevention or punishment. He states "*Drunkenness, for example, in ordinary cases, is not a fit subject for legislative interference; but I should deem it perfectly legitimate that a person, who had once been convicted of any act of violence to others under the influence of drink, should be placed under a special legal restriction, personal to himself; that if he were afterwards found drunk, he should be liable to a penalty, and that if when in that state he committed another offence, the punishment to which he would be liable for that other offence should be increased in severity. The making himself drunk, in a person whom drunkenness excites to do harm to others, is a crime against others*."

Thus, it is evident that even though Mill holds the broader idea of Liberty in highest regard, he also understands the need for intrusion into liberty via Preventive Detention. He provides that in cases of Social Harm preventive measures may be enforced to prevent such harm. Simply put, he believes that 'one should be prevented from violating the liberty of another'. Also, in other cases where a person acts in a way that is

[112] J.S Mill, *On Liberty* Chapter V

prejudicial to his own interest and the interest of State, he can be prevented and strict legal measures can be taken against him for repeatedly continuing such acts.

While "Preventive detention" hasn't been defined authoritatively under Indian Law, it can be understood as "*detention without trial in order to incapacitate a person from committing any offence. The idea is to detain a person to prevent him from committing any criminal act."*[113]

It means "*detention of a person without any trial or conviction by a court, but merely on suspicion in the mind of an executive authority. It is fundamentally and qualitatively different from imprisonment after trial and conviction in a criminal court*."[114]

In other words, it is the proactive step taken by the State authorities on the suspicion that a criminal act might be done by the concerned person (detenue) which might be prejudicial to the security of the state. "*The bare suspicion or reasonable probability of detainees committing some conduct likely to harm society or risk the government's security justifies such detention, not criminal conviction, which can be justified only by some appropriate legal evidence*."[115]

ln Murst Patwa v. Province of Bihar[116], a Full Bench of Patna H.C. explained the phrase "preventive detention" as under: "*In our opinion, the phrase 'preventive detention' means detention, not, as in the case of ordinary imprisonment in respect of the actual commission of an illegal act, but detention in reasonable anticipation that some illegal act or acts may otherwise be committed"* (Note: "in the context of Item I of List II in Sch. 7 Government of India Act, the illegal act must be one connected with the maintenance of public order. A further limitation upon the nature of the illegal act is provided by S.2{J) of the Act, which requires that they must be such as are not only prejudicial to the maintenance of public order but prejudicial also to the public safety.")

According to Adam Klein and Benjamin Wittes, preventive detention includes "any detention of a person by state or federal authorities that is,

i. not pursuant to conviction of a crime and
ii. undertaken in order to prevent some future harm.

[113]Alagumani R, 'Role of the supreme court of India on personal liberty under preventive detention' (2017) 123
[114] MP Jain, *Indian Constitutional Law*, (7th ed. 2016) 1187
[115] *Liversidge v. Anderson* [1942] AC 206
[116] [1969] Patna (FB) 368

Preventive detention may occur within the criminal justice system or outside of it, and the harms it seeks to avoid include harm to individuals, to the state, or even to the subject of detention himself."[117]

In other words, we include under the rubric of preventive detention any situation in which government locks up an un-convicted person (or a person who has completed his or her criminal sentence) to prevent some future harm either to a person or to some important governmental interest. The arbitrary powers of the military under laws like AFSPA offer some of the most vivid - though far from the only - examples of preventive detention authorized in Indian law.

The "U.N. Centre for Human Rights" and the "U.N. Crime Prevention and Criminal Justice Unit" has further clarified this definition, describing it as applying to *"a broad range of situations outside the process of police arresting suspects and bringing them into the criminal justice system".*

The "International Committee of Red Cross" favours the term "internment," which it defines as "*deprivation of liberty ordered by the executive authorities when no specific criminal charge is made against the individual concerned*."[118]

M. Louis Joinet, the renowned academic of the "U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities", uses the term "administrative detention." In the Sub-Commission's report, he provides the following definition of administrative detention: *"Detention is considered as 'administrative detention' if, de jure and/or de facto, it has been ordered by the executive and the power of decision rests solely with the administrative or ministerial authority, even if a remedy a posteriori does exist in the courts against such a decision. The courts are then responsible only for considering the lawfulness of this decision and/or its proper enforcement, but not for taking the decision itself*."[119]

However, detention is not restricted to detaining a person in prison for crimes to be committed within internal boundaries.

[117] Adam Klein and Benjamin Wittes, *Preventive Detention in American Theory and Practice*
[118] John Mathew, 'Standard Minimum Rules for the Treatment of Prisoners', (ICJ Memorandum) (2006)
[119] Louis " legal vacuum", Constitutional and Legislative Framework (2009) pp. ll-22.

It even includes any detention made for national or international concerns. In international context, 'Preventive detention' is "deprivation of liberty ordered by executive authorities because of national security concerns for

(i) pre-trial detention when terrorism or terrorism-related criminal charges are pending or will ultimately be brought before a court of law;

(ii) immigration detention when measures are being taken to control immigration, asylum, deportation, or extradition, through court, administrative, or other proceedings; or

(iii) national security detention when no specific criminal charge is made against the individual concerned, and judicial review is limited to review of the detention, not the underlying suspected offence. Although under some circumstances pre-trial and immigration detention may be employed on security grounds, it is only the third category of national security detention that may truly be considered as purely national-security specific preventive detention."[120]

Thus, "Preventive detention" is a form of precautionary action, is which, the 'detenue' is arrested prior to committing an offence with idea of preventing the commission of such offence. It is to be employed on the sole responsibility of the executive government whose discretion is final, no recourse being permitted to court of law by way of review or justification of such action except on allegations of mala fides or irrational conduct.

[120]https://openyls.law.yale.edu/bitstream/handle/20.500.13051/5695/0Stella_Burch_Elias_Columbia_Article_Chartsl.pdf?sequence=2&isAllowed=y

3.3 Preventive Detention and Punitive Detention

Detention is clubbed under two distinct categories i.e., “Preventive Detention” and “Punitive Detention”. 'Punitive detention' is intended to inflict punishment on a person who is found by the judicial process to have committed an offence. However, 'preventive detention' is not inflicted as a way of punishment at all. It is intended to prevent a person from indulging in conduct injurious to the society.

The power of preventive detention has been recognized as a necessary evil. It is tolerated in a free society in the larger interest of security of the State and maintenance of public order. It is a drastic power to detain a person without trial and there are many countries where it is not allowed to be exercised except in times of war or aggression. It must always be remembered that preventive detention is qualitatively different from punitive detention and their purposes are different.

In case of the punitive detention, the person concerned is detained by way of punishment after he is found guilty of a wrong doing as a result of a trial where he has the fullest opportunity to defend himself, while in case of preventive detention he is detained merely on suspicion with a view to preventing him from doing harm in future and the opportunity he has for contesting the action of the Executive is very limited.
In India, *“no one shall be deprived of his life or personal liberty except according to procedure established by law.”*[121] Thus, if a person is to be imprisoned for his alleged commission of an offence, there must be a trial. It must be fair, just and reasonable, otherwise it would be opposed to democratic value.[122]
Under the Indian law, in contrast to the word 'punitive,' the term 'preventive' is employed.[123] It does not foster a punitive approach, but rather a preventative one.

“While the goal of punitive custody is to punish a person for what he has already done, the goal of preventative detention is to apprehend a man before he does something and prevent him from doing it”.[124]

[121] Constitution of India 1950, Art. 21
[122] *Maneka Gandhi v. Union of India* [1978] SC 597
[123] Constitution of India 1950, Art. 22 (3)
[124] Dr. J.N. Pandey, *Constitutional Law of India*, (56th ed. 2019), p.380.

The purpose of Preventive Detention is "*not to Punish but to intercept to prevent the Detenu from doing something prejudicial to the State*."[125]Elaborating on this, it can be said that, *"It is a preventative action that has nothing to do with an offence, whereas criminal proceedings are used to penalise someone for committing a crime."*[126]

In view of the distinctive character of preventive detention, which aims at not punishing the individual for a wrong done by him, but at curtailing his liberty with a view to preventing his injurious activities in future, in Sampat Prakash v. State of Jammu & Kashmir[127] the Supreme Court said that *"the restrictions placed on a person preventively detained must, consistently with the effectiveness of detention, be minimal."*

Similar stance is shown by many foreign judges across various judgments. For instance, Lord Justice Finlay in Rex v. Holiday[128] while explaining the term 'preventive detention' said: "*The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence."*

And likewise, Lord Justice McMillan in Liversidge v. Anderson[129], explaining the phrase 'preventive detention' said that *"it is an anticipatory measure and does not relate to an offence".*

Lord Justice Goddard, in Woolmington v. Director of Public Prosecution[130] said that *"the core of the Anglo-Saxon Criminal Jurisprudence rests on the principle that guilt alleged against a person has to be proved beyond all reasonable doubts*."

Even now, this is the position of common law in England. Indian criminal Jurisprudence has also wedded to this basis of English Criminal Law except with some tinkering.

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[125] *Ankul Chandra Pradhan v. Union of* India [1997] SC 2814
[126] *Alijan Mja v. District Magistrate, Dhanbad* [1983], SC 1130
[127] [1969] SC 956. Also see *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* [1981] SC 746 and *Dropti Devi & Anr. v. Union of India* [2012] 6 SCR 307
[128] [1917] AC 263
[129] [1942] A.C. 206.
[130] [1935] A.C 462.

A person should be served with a charge, it must be proved with sufficient evidence. He must have liberty to get the aid and advice of a lawyer of his choice to meet the charges.

He must be given sufficient opportunities to test the veracity of the prosecution witnesses through the touchstone of cross-examination. He must be heard fully before he is convicted.[131]

Thus, there must be full observance of principles of natural justice before punishing a person for his commission of an offence as prescribed under the law of Crimes.

Hence, detaining a person after such a full-fledged trial is "punitive detention". But these elements are not available in a preventive detention.

[131] Devadass P, 'Judicial Review of Preventive Detention Orders in India A Study' pp 32

3.4 Historical Development of Preventive Detention Jurisprudence in India

3.4.1 Pre-Independence Era

> *"The sun never set on the British empire, an Indian nationalist later sardonically commented, because even God couldn't trust the Englishman in the dark"*[132]
>
> -Dr. Shashi Tharoor

The law of "preventive detention" has now been codified in Art.22 of the Constitution of India.[133] However, it finds its roots deep within the dark and difficult days of Indian colonial history.

Origin of Preventive Detention in India can be found in colonial legislation(s) which were no doubt enacted and applied by the British government from the time of First Governor-General Warren Hastings in the British-Indian colony to curb protests by the locals and safeguard the colonial interests of the British which included safeguarding their trade routes, protecting their property and officers, preventing uprising among the natives and the ultimate goal of ensuring domination over its territory. History of preventive detention laws in India could be traced as early as in 1793.

The East India Company Act, 1793, provided that "it shall and may be lawful for the Governor of Fort William to issue warrant under his hand and seal, directed to such peace officers and other persons as he shall think fit for securing and detaining in custody any person or persons suspected of carrying on mediately or immediately any illicit correspondence dangerous to the peace or safety of any of the British settlements or possessions in India with any of the Princes, Rajas or Zamindars or any other persons or persons having authority in India or with the commanders, Governors or Presidents of any factories established in East Indies, by an European Power or any correspondence contrary to the rules and orders of the said company or of the Governor-General in Council at Fort William."

Next is "The Bengal State Prisoners Regulation", 1818 (Regulation III of 1818). Its preamble stated that "in the interest of public tranquillity and security of the State it may be necessary to place 'under personal restraints individuals against whom there may not be sufficient ground to institute any judicial proceeding or that cause may not

[132] Dr. Shashi Tharoor, *An Era of Darkness: The British Empire in India* (2016) 25
[133] Constitution of India 1950, Art. 22 (3)

be advisable but in such cases of detained persons the grounds of such determination should from time to time come under Revision and the affected persons have the right to bring to the notice of the Governor-General in Council all matters connected with the supposed grounds or with the manner of execution of the restraint order; that during detention the detenu will be confined according to his status with proper allowances for his wants and those of his family; that his properties shall during detention be attached and kept under the management of the Revenue authorities, etc."[134]

This Regulation applied to Bengal which included the then "Bihar, Orissa, U.P." and Punjab except a few scheduled Districts. Madras and Bombay had similar regulations in "Madras Regulation XI of 1819 and Bombay Regulation XXV" of 1827.

World War I brought out the need for a law such as "The Defence of India (Criminal Law Amendment) Act", 1915 to provide for "*special measures to secure the public safety and the defence of British India and for more speedy trial of certain offences."* It was provided in the Act that "the Governor-General in Council is authorised to make rules 'to empower any civil or military authority where in the opinion of such authority there are reasonable grounds for suspecting that any person has acted, is acting or about to act in a manner prejudicial to the public safety, to direct that such person shall not enter, reside or remain in any area specified in writing by such authority or that such person shall reside and remain in any area so specified, or that he shall conduct himself in such manner or abstain from such acts or take such order with any property in his possession or under the control as such authority may direct."[135]

The Defence of India Act was to expire shortly after the end of the First World War. The British Government had to come up with a new Legislation to counter the new tendencies. "Based on the recommendations of Justice Rowlatt, the Anarchical and Revolutionary Crimes Act, was passed in 1919, giving enormous powers to the Government to arrest and detain suspects without trial. Since the Act empowered the Executive to take very harsh measures the Act was called a Black Law. Violent movements were sufficiently controlled through the tough Regulations of the Government. **Rowlatt Acts,** (February 1919), legislation passed by the Imperial Legislative Council, the legislature of British India. The acts allowed certain political

[134] Bengal State Prisoners Regulation Act 1818, Preamble
[135] The Defence of India (Criminal Law Amendment) Act, 1915 S.2(1) (f)

cases to be tried without juries and permitted internment of suspects without trial. Their object was to replace the repressive provisions of the wartime Defence of India Act (1915) by a permanent law. The Rowlatt Acts were much resented by an aroused Indian public. All nonofficial Indian members of the council (i.e., those who were not officials in the colonial government) voted against the acts. Mahatma Gandhi organized a protest movement that led directly to the Massacre of Amritsar (April 1919) and subsequently to his non-cooperation movement (1920–22)."[136] The acts were never actually implemented.

Later on, "The Government of India Act", 1935 was passed. Under this Act, preventive detention was not a subject-matter of concurrent Legislative power. "Preventive detention under entry 1, List I was in respect of matters over which federal Legislature had exclusive jurisdiction and preventive detention under entry 1 List II was in respect of matters over which federal Legislature had exclusive jurisdiction and preventive detention under entry 1 List II was in respect of matters over which provincial Legislatures had exclusive Legislative power."[137] It gave ample powers of preventive detention to the British federal Government.

After this "The Defence of India Act", 1939 came during the beginning of Second World War to meet the war time emergencies, to ensure Public Safety and Defence of British India and for trial of certain offences. The Act dealt with "*the maintenance of public safety, public order, for securing defence of British India and efficient prosecution of the war and for maintaining supplies and services essential to the life of the community*."[138] It enacts that the rules may provide for or may empower any authority to make orders providing:- "The apprehension and detention in custody of any person reasonably suspected of being of hostile origin or of having acted, acting or being about to act, in a manner prejudicial to the public safety or interest or to the defence of British India, the prohibition of such person from entering or residing or remaining in any area and the compelling of such person to reside and remain in any area or to do or abstain from doing anything."[139]

[136] Britannica, Rowlatt Acts https://www.britannica.com/event/Rowlatt-Acts
[137] The Government of India Act, 1935, Scheme of the Act
[138] The Defence of India Act, 1939, S.2 (1)
[139] The Defence of India Act, 1939, S.2(2), Cl. (x)

After the Second World War, “The Defence of India Act” was repealed by the Government through the “Repealing and Amending Act, 1948”. However, the disturbed condition of the country soon after the partition necessitated several security measures to be taken.

The first half of the 20th century witnessed an increase in the revolutionary movement in India, with the birth of many underground groups pursuing the goal of independence through violent means. It marked the emergence of several legislations to contain the rising undesirable situation. ln the circumstances, the Government. had to pass various Legislations to control the uneasy situation prevailed in various parts of the country.

This historical background would show that from time to time the British Executive wanted extra powers to act in emergency situations. It was either an emergency due to war or civil strife consequent on the partition of country into India and Pakistan. The ordinance would continue because peace and tranquillity had not come to the normal level even after Independence.

3.4.2 Post Independence Period

Free India appointed a Constituent Assembly to frame India's Constitution. The country modelled itself after a liberal parliamentary democracy when it enacted its Constitution in 1950. A written constitution was to govern the country that guaranteed citizens certain fundamental rights such as "the right to life and liberty"[140], as well as procedural safeguards if they were arrested or detained by the state or executive authorities.[141]
In Art.22, preventive detention law has been codified. "*The law authorizing preventive detention has been made part of the Indian Constitution. It is remarkable that the Indian Constitution's founders, who were the ones who suffered the most as a result of the Preventive Detention Laws, would not hesitate to accord them constitutional validity, and especially within the part III of the Constitution that provides for Fundamental Rights*."[142]

The Government had to contain the rival disturbing forces, undesirable elements and certain political outfits and secure peace to the people. Subversive movements, abuse of personal liberty and absolute freedom of speech appeared to endanger the newly born Nation. This was taken note of by Members of the Constituent Assembly. There was no doubt a lot of discussion in the assembly and some felt that Art.22 may be omitted.

The genesis of Article 22 has connection with the genesis of Article 21 in the Indian Constitution. The darling of the Indian Constitution is Article 21. It seeks to protect the life and personal liberty of the individuals. It provides "*no person shall be deprived of his life or personal liberty except according to procedure established by law*."[143] Art. 21 reminds us the following clause in the 13th Century Magna Carta: "*No man shall be taken or imprisoned, disseized or outlawed, or exiled, or in any way destroyed save by the law of the land."*

It means that no member of the Executive shall be entitled to interfere with the liberty of a citizen unless he can support his action by principles of law. In short, no man can be subjected to any physical coercion that does not admit of legal justification. When, therefore, the State or any of its agents deprives an individual of his personal

[140] Constitution of India 1950, Art. 21
[141] AP Datar, *Datar on Constitution of India* (1st ed., LexisNexis Butterworths Wadhwa 2001).
[142] Granville Austin, *The Indian Constitution- Cornerstone of a Nation*., P.135.
[143] Constitution of India 1950, Art. 21

liberty, such action can be justified only if there is a law to support such action and the procedures prescribed by such law have been 'strictly and scrupulously' followed.[144]

Dr. Ambedkar, the Chairman of "Drafting Committee", assured that the substance of the American "Due process clause" was imbedded in Clauses (1) and (2) of Art.22 which directed grounds of detention to be furnished to the arrested persons and production within 24 hours before a Magistrate. A three-month period was fixed for "*reference to the Advisory Board"* specially created to test the case of each detenu according to a procedure to be prescribed by law.

Dr. B.R. Ambedkar agreed for extending the principle of communicating the grounds of arrest under ordinary criminal law to the arrest under preventive detention law. However, with an exception that not to disclose the grounds if it is against public interest. He had also agreed that the Parliament will be empowered to prescribe the procedure that the Advisory Board would follow the preventive detention law while dealing with the preventive detention cases. He also answered that there is no idea to prescribe indefinite period of detention and the period will be prescribed by the Parliament by law.

The Provisional Parliament passed the first preventive detention Act within a month of the inauguration of the Constitution, in February 1950. The Act expressly forbade the courts from questioning the requirement of any detention order issued by the Government. Subjective satisfaction of the Executive was the determining factor in each instance.[145]

The courts could not inquire into the truth of the facts that were presented by the executives as real grounds for detention.[146] The Nation was at the mercy of the Parliament and the Executive. This Authority given in hands of the Govt. of India was a potent threat to the liberty. However, it had been used cautiously, and the charge that is has been misused by the Executive has not been proved by anyone.[147]

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[144] *Ram Narain v. State of Bombay*, [1952] SCR 652
[145] O.H. Bayley*, Preventive Detention in India*, p. x.
[146] *Shibban Lal Saksena v. The State of Uttar Pradesh and Ors.,* [1954] S.C. 179.
[147] O.H. Bayley, *Preventive Detention in India,* 25

Parliament has routinely approved preventative detention statutes since India declared itself a Republic in 1950. Parliament passed the Preventive Detention Act 1950 shortly after the Constitution was enacted, but it expired in 1969.[148]

In A.K. Gopalan vs. State of Madras[149], while discussing this first Preventive Detention Act, Justice Mahajan said: "*Preventive detention is unknown in America. It was resorted to in England only during war time but no country in the world that I am aware of has made this an integral part of their Constitution as has been done in India. This is undoubtedly unfortunate…"*. The Constitutional provision authorizing preventive detention is available only in India.

In A.K. Gopalan, Hon'ble Justice Mukherjee said that the "The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence".

Hence, the principles of preventive detention, being duly approved by the constituent assembly were added into the Constitution and that too in the part considered as the Magna Carta of Indian Constitution. These provisions have been discussed countlessly after the enactment both by the legislative and the judiciary. However, their need cannot be neglected and thus their importance is discussed in the next part.

[148] The Preventive Detention Act 1950 was a temporary piece of legislation passed "to counter social unrest and insurgencies. Parliament did not seek subsequent extension of the Act and it ceased to have effect from 31 December 1969. 'Preventive Detention: Old Fears, New Dangers", Human Rights Features (30 September 2008) http://www.hrdc.net/sahrdc/hrfeatures/HRF188.htm, accessed 18 August 2011. Also see A. Faizur Rahaman,

[149] [1950 SC 27]

3.5 Need for Preventive Detention Laws

As of now, no law recognizes preventive detention in the USA. Even in England, it was only used during the times of war. During World War I, certain regulations were enacted under the "Defence of the Realm Act" which allowed preventative detention as a war measure if the Home Secretary was satisfied, and they ceased to have force when hostilities ended.

During World War II, the same thing happened. The British court upheld the laws, noting, "*Personal Liberty can be forfeited for national victory in war*."[150]

Preventive Detention laws are incompatible with the core principles of democracy, and they do not exist in any liberal and democratic country for the simple reason that they strike against the basic "right of personal liberty of an individual". Democratic countries like Britain, Canada and USA have used the provisions of Preventive Detention however, only during the time of war as a measure. India is the only country that has imbibed these rules as important components in the Constitution.

In India, the Constitution envisions the potential of a preventive detention statute. Despite the special focus on individual liberty, India has found it important to deploy preventative detention during peacetime due to the country's unpredictable law and order situation.

So far as India is concerned, the background factors responsible for genesis of preventive detention laws in India is different from other countries. The British traders in order to maintain their position and possessions in India, resorted to some repressive laws. The emergence of Nationalist movement, freedom struggle gave an impetus to the Britishers to resort to preventive detention laws to quell freedom movement. Many freedom fighters were jailed under the 'Oppressive Defence of India Act'.

When India attained Independence, there was surcharged atmosphere. Partition of India into two Nations resulted in large scale destruction of property and massacre and there was huge movement of people between the two nations - India and Pakistan.[151]

[150] *Rex v. Holiday* [1917] AC 263
[151] Devadass P, 'Judicial Review of Preventive Detention Orders in India A Study', pp 126.

After India attained Independence in 1950, its Republican Constitution was put to work. Preventive detention law came to be tested in the Court. The then situation was a challenge to the first Congress Government headed by Pandit Jawaharlal Nehru.

V. Swaroop said: "*It is worth noticing that our founding fathers of the Constitution - the victims of preventive detention in the days of British Imperialism introduced the provision for preventive detention in the Constitution even in peace times and they did it in the situations existing in the country at the time owing particularly to the large scale communal riots resulting in almost a war-like situation and owing to armed peasant struggle led by the communists in the then State of Telangana which they considered fatal to their class-interests. But they never wanted to make it a permanent featur*e."[152]

Freedom of the individual should be jealously guarded since it is a gift to humanity. It is the basis of Civil Liberty. Nothing should be allowed to endanger it. The danger to peaceful living may come within the country and also from external aggression, cross-border terrorism. In such circumstances, the Government has to take stringent measures as against evil forces and antinational elements.

The need of preventive detention for curbing personal liberty was explained beautifully in A.K. Gopalan's case.

In 1951, in A.K. Gopalan vs. Union of India[153], Hon'ble Justice Patanjali Shastri, Chief Justice of India, had to uphold the then Central preventive detention law, namely, the Preventive Detention Act, 1950 and refused to read the American Doctrine of "Due process" into Article 21 of India's Constitution.

This is because he was aware that India being at its infancy in the formation of a democratic polity and the turmoiled situation that persisted in many parts of India could hamper the country's future. There were problems from outside forces also.

[152] B. Uma Devi, *Arrest, Detention and Criminal Justice System*, (51 Edn. 2012) p.133, Oxford University Press
[153][1950] SC 27

Because of these reasons hon'ble Justice Patanjali Shastri, elaborating the need for such provisions said:

"*Preventive detention has been given Constitutional status. This sinister looking feature so strangely out of place in a democratic Constitution which invests personal liberty with the sacrosanctity of a fundamental right and so incompatible with the promises of its Preamble is doubtlessly designed to prevent an abuse of freedom by anti-social and subversive elements which might imperil the national welfare of an Infant Republic*."

He further elaborated that, "*It is in this spirit that Clauses. 3 to 7 of Art.22 should be construed and harmonized as far as possible with Art.21 so as not to diminish unnecessarily the protection afforded for the legitimate exercise of personal liberty*".

Thus, in free India, in 1950, the Preventive Detention Jurisprudence got cemented and it was judicially recognized. The present situation is also not far better than that. All over the world, there is increase of terrorist activities. There was a need of preventive detention when the constitution was enacted, and although the reasons may have somewhat changed, the situation still leaves a lot to be desired.

3.6 International Instruments Relating to Human Rights vis a vis Preventive Detention

Liberty of person concerns freedom from confinement of the body, not a general freedom of action.[154] Security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity. It guarantees those rights to everyone. 'Everyone' includes, among others, girls and boys, soldiers, persons with disabilities, lesbian, gay, bisexual and transgender persons, aliens, refugees and asylum seekers, stateless persons, migrant workers, persons convicted of crime, and persons who have engaged in terrorist activity.

Deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement[155]. Examples of deprivation of liberty include police custody, Arrigo, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport, as well as being involuntarily transported. They also include certain further restrictions on a person who is already detained, for example, solitary confinement or the use of physical restraining devices.

States parties have the duty to take appropriate measures to protect the right to liberty of person against deprivation by third parties. "*States parties must protect individuals against abduction or detention by individual criminals or irregular groups, including armed or terrorist groups, operating within their territory. They must also protect individuals against wrongful deprivation of liberty by lawful organizations, such as employers, schools and hospitals. States parties should do their utmost to take appropriate measures to protect individuals against deprivation of liberty by the action of other States within their territory*."[156]

The right to liberty of person is not absolute. Sometimes deprivation of liberty is justified, for example, in the enforcement of criminal laws. International law principles requires that deprivation of liberty must not be arbitrary, and must be carried out with respect for the rule of law.

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[154] *Wackenheim v. France*, para. 6.3.
[155] ICCPR 1966, Art. 12
[156] *Cañón García v. Ecuador*, paras. 5.1–5.2.

An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. *"The notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality*."[157]

More detailed principles and provisions are given under various international forums. In this part, provisions related to protection of human rights against the preventive detention dealt in the UDHR, ICCPR and other international instruments are discussed.

I) UDHR

The proclamation of the "Universal Declaration on Human Rights" of 1948 (herein after called as UDHR) is the most important international proclamation available for fundamental human rights. The UDHR is the first universal document and is referred subsequently in several declarations and recommendations of the United Nations since 1949.

The Constitution of India has adopted most of the UDHR principles in part III of the fundamental rights which are enforceable by the Indian Courts. In addition to this, the Indian Supreme Court established the right to life and personal liberty are the very wide jurisprudence for the protection of human rights. Even the State cannot deprive these rights without procedure established by law.[158] The following provisions of the UDHR dealt with the concept of "arbitrary detention" which was against the personal liberty. They are mentioned under-

a) "No one shall be subjected to arbitrary arrest, detention or exile."[159]
b) "No one shall be subjected to arbitrary interference with his privacy, family home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".[160]

[157] ICCPR 1966, Human Rights Committee, '*General comment No. 35 Article 9 (Liberty and security of person)'*
[158] Devadass P, Judicial Review of Preventive Detention Orders in India A Study, (2015) 232
[159] UDHR, 1948, Art. 9
[160] UDHR 1948, Article 12

II) ICCPR

"International Covenant on Civil and Political Rights" of 1966 (ICCPR) emerged from elements in the same was led to UDHR. "This covenant recognizes both civil and political rights as part of the inherent dignity of the human being. It considers that the human rights are inalienable and it cannot be surrendered. It holds that the State having duties to its subjects and to the community is under a responsibility to strive for the promotion and observance of these rights together."[161]

Various provisions talk about personal liberty and against arbitrary detention.

a) ICCPR recognized "the right of the State parties to take measures which derogate from the obligations under the Covenant for self-preservation of the State in the exigencies of the situation."[162] However, this exception is "subject to certain conditions like-
   i. other obligations under international law;
   ii. do not involve discrimination among the people;
   iii. do not derogate from the provisions of Articles 6, 7, 8, 11, 15, 16 and 18 of this Covenant."

b) "No one shall be subjected to torture or be cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".[163]

c) Also, under another article[164] it provides that-
   i. "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law;
   ii. Anyone who is arrested shall be informed, at the time of arrest of reasons, for the arrest and shall be promptly informed of any charges against him;

[161] Devadass P, Judicial Review of Preventive Detention Orders in India A Study (2015) 235
[162] ICCPR 1966, Article 4
[163] ICCPR 1966, Article 7
[164] ICCPR 1966, Article 9

iii. Anyone arrested or detained on a criminal charge shall be promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release;

iv. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful;

v. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation".

d) "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".[165]

III) UN OHCHR

The "Office of the High Commissioner for Human Rights" (OHCHR) is the leading UN entity on human rights. It has a unique mandate provided by the UN General Assembly to promote and protect all human rights for all people.

The Office's work encompasses three broad areas: human rights standard setting, monitoring and implementation. Substantive and technical support is provided to the various UN human rights bodies as they undertake their standard-setting and monitoring duties. Knowledge and awareness of all categories of human rights—civil, cultural, economic, political and social—are deepened through research and analysis. Experts are also deployed to field offices and other missions, including in circumstances of crisis, to help countries meet their human rights obligations.[166]

It provides a 'body of Principles' for the Protection of All Persons under Any Form of Detention or Imprisonment. These principles include-

a) "All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person".[167]

[165] ICCPR 1966, Article 10
[166] UN, OHCHR, https://www.ohchr.org/en/ohchr-homepage.
[167] OHCHR, Principle 1

b) "Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.[168]

c) Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.[169]

d) Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.[170]

e) Persons in detention shall be subject to treatment appropriate to their un-convicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.[171]

f) The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.[172]

g) A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.[173]

h) If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence".[174]

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[168] OHCHR, Principle 2
[169] OHCHR, Principle 4
[170] OHCHR, Principle 5(2)
[171] OHCHR, Principle 8
[172] OHCHR, Principle 9
[173] OHCHR, Principle 19
[174] OHCHR, Principle 20

i) "It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person".[175]

These basic human rights are also supported by many national and municipal laws. Most of the constitutions of the World, including India, have enshrined such provisions to protect human rights and to prevent police or executive arbitrary use of power.

In the present international polity, the importance of observing human rights became more an apriority condition in the field of international assistance and cooperation. As a consequence, like other countries. India is also giving much more importance to the human rights observance than before.

The result is the obligation of the police to be more restraint and careful in discharge of their duties by observing basic human rights in connection with arrest and detentions.[176]

Constitution is both the parent and guardian of the personal liberty which restricts the preventive detention through procedure established by law.

The Constitutional mandate under Art. 22 provides for two different categories of detention in India i.e., ordinary detention and preventive detention. There are various safeguards given in the constitution to the detenue for any proceedings under both of these types of detention.[177]

The check and balances in the procedural safeguards against the preventive detention are strictly supervised by the Supreme Court of India in various cases.

[175] OHCHR, Principle 21(1)
[176] Rout Chintamani, A critical study relating to personal liberty under Indian Constitution, (2005) 143
[177] Constitution of India 1950, Art. 22 (clause 1,2 and 4 -7)

3.7 Concluding the Chapter

Detention is the process of confining a person against his will and thus depriving him of his liberty. It is considered to be an "antithesis of civil liberty". Although detention and arrest are often used interchangeably, there is a key difference between the two. Arrest can only take place in accordance with the legally prescribed procedure but detention can happen even without it. For instance, a person may be detained on the suspicion of a crime, and later on arrested once a formal complaint is registered and criminal procedure has begun.

Preventive detention, provides for detaining persons in anticipation of commission of an offence. It is a precautionary measure that is used to protect the interest of the State. Such detention is usually without a trial or a charge and is usually based upon "reasonable suspicion or mere probability" of such offence. Thus, Preventive Detention is considered draconian in nature and a blot upon personal liberty.

J.S, Mill has given the situations where detention can be justified. He holds that an individual is liable for his action. If an individual acts in a way that is prejudicial to the interests of others, then he should be held accountable. He opines that liberty can be legitimately invaded for the prevention of crime and that the State is bound to prevent crime even if it results in some infringement of liberty. His argument is the as much as an individual has a right of liberty, the society also has a right to ward off crimes.

"Preventive Detention" is different from "punitive detention". Punitive detention is used to punish a person for the offence committed by him once he is declared guilty by the judicial process. Whereas, Preventive detention is used to protect the State from anti-social elements before the offence is even committed. It's used to intercept the detenue from doing anything prejudicial to the State.

Preventive Detention came with the advent if British into India. It was used as tool to safeguard colonial interests and curb local protests. Beginning with "The East India Company Act" of 1793 and "The Bengal State Prisoners Regulation" of 1818, preventive detention became deeply rooted into our dark colonial history. Preventive detention was blatantly misused by the British authorities to restrict the brave freedom fighters of India.

Ironically, the founding fathers introduced Preventive Detention into the Indian Constitution and that too into the Fundamental Rights chapter. In today's world, no democratic country provides for preventive detention into its constitution except India. The British and the Americans have used Preventive Detention only during war time for the limited purpose of national victory.

However, the Indian courts have justified the use of Preventive Detention during the early days of independence stating that it was necessary to protect the welfare of the new born state. The timeline of the newly independent country and the prevailing social situation because of the partition of Pakistan necessitated the need of Preventive Detention into India.

Many international instruments such as UDHR, ICCPR and the UN OHCHR have provided that in cases or arbitrary detention, various basic human rights and safeguards that must be secured to all persons detained under such laws. Most of these are already provided into by the Indian Constitution and various statutes. The Indian State must also work towards incorporating these safeguards.

Chapter 4- Preventive Detention Legislations and the Role of Judiciary

4.1 Detention under Indian Constitution

As per the Constitution, "*No person shall be deprived of his life or personal liberty except according to procedure established by law*."[178] This implies that there is no blanket protection against detention and a person can indeed be detained if his detention is brought about according to the "procedure established by law".

These procedural requirements are given under Article 22 of the Constitution. If such requirements are not met, then it would be in violation of the "right of personal liberty." Thus, simply put Article 22 gives us the various minimum safeguards that need to be incorporated in a law so that it becomes capable of authorizing the detention of any person.

Broadly speaking, Article 22 can be divided into two different segments:

(1) Detention of persons under ordinary criminal law, and

(2) Detention under preventive detention law.

The first two clauses of Art. 21 prescribe the procedure to be followed when person is detained under ordinary criminal law. Whereas the remaining clauses (3), (4), (5) and (6) deal with procedure for detention under "preventive detention law".

Since this research is primarily based on determining the role that judiciary has played in dealing with cases of personal liberty under various preventive detention laws, the first aspect of Art. 22 (clause 1 and 2) providing various safeguards against ordinary detention have been discussed in brief. And in the later segment,[179] the protection of personal liberty under preventive detention laws (as covered under Art. 22 clause 3-6) has been discussed in depth.

[178] Constitution of India 1950, Art. 21
[179] In Sub chapter 4.2

4.1.1 Is Article 22 exhaustive?

As discussed earlier, various clauses of Art. 22 provide certain procedural safeguards to be followed in the matter of any law providing for detention. Then the question arises, is art 22 exhaustive? i.e., if any detention law covers all the procedural safeguards given under art. 22, will it be considered a proper constitutionally valid law?

In this regard, the view of Court has changed over the course of time.

Firstly, in Gopalan's case[180] it was held that, "*a detenue cannot claim the freedoms guaranteed by Art. 19(1)(d) if it was infringed by his detention, and the validity of preventive detention is not to be tested in the light of the reasonableness of the restrictions imposed thereby on the freedom of movement, nor on the ground that personal liberty was infringed under Art. 21 otherwise than according to 'procedure established by law'*." Thus, court was of the view that Art. 22 gives exhaustive rules for any detention laws.

This view was shown wrong first in case of "R.C. Cooper v. Union of India"[181] and was later on altered in Maneka Gandhi's case[182]. Thus, after Maneka, "A *law relating to preventive detention must now satisfy not only the requirements of Art. 22 but also the requirements of Art 21."* In other words, the procedure prescribed under preventive detention law must be just, fair and reasonable under Article 14,19 and 21 of the Constitution.[183] Thus, Art. 22 is not an exhaustive code and any detention law must also satisfy the requirements of the golden triangle of fundamental rights.

[180] *A.K. Gopalan v. State of Madras* [1950] SCR 88
[181] [1978] SC 597
[182] [1970] SC 564
[183] Dr. JN Pandey, *Constitutional Law of India* 48th ed. Pp-299.

4.2 Constitutional Safeguards against Detention Laws

The first two clauses of Art. 22 guarantee various rights to a person detained under ordinary laws. These provide as follows,

- "*No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."*[184] and,
- "*Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate."*[185]

Thus, it can be inferred from these two clauses that four major rights are guaranteed to a person arrested or detained for any offence under an ordinary law. These rights are enlisted below.

a) Right to be informed of the grounds of arrest.
b) Right to consult and be represented by a lawyer of his own choice.
c) Right to be produced before a magistrate within 24 hours.
d) Freedom from detention beyond 24 hours except by order of a Magistrate.

These four rights guaranteed to any detainee are available to all persons, both citizens and non-citizens, but not to persons detained under preventive detention laws. These rights have been discussed briefly.

a) The right to be informed of grounds of arrest

It's required to ensure that the detainee knows the reason for his arrest, as it will enable him to prepare his defence. Art. 22 directs the detaining authorities to disclose the grounds of his arrest immediately without any unnecessary delay. The phrase "as soon as may be" is used which implies that earliest moment

[184] Constitution of India 1950, Art. 22 (1)
[185] Constitution of India 1950, Art. 22 (2)

without any unreasonable delay. However, conveying the grounds may be delayed, if it's justified by "reasonable circumstances"

In "Joginder Kumar v. State of UP"[186], the supreme court laid down guidelines for arresting a person during ongoing investigation.

The court held that, "*person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the police officer effecting the arrest that such arrest was necessary and justified*". The court laid the following guidelines,

i) An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where he is being detained.

ii) The police officer shall inform the arrested person when he brought to the police station of this right.

iii) An entry shall be required to be made in the diary as to who was informed of the arrest.

These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly. It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with. This right also finds a place under section 50 of Cr.P.C 1973.

b) The Right to be defended by a Lawyer of his own choice

This right originates from US Courts, which have declared that "*if a person is arrested, he must be afforded the opportunity to consult the lawyer of his own choice and if he is unable to employ a counsel, it's the duty of the court to provide him a lawyer*."[187]

Similarly, the courts in India are dutybound to provide the aid of a lawyer to any person arrested under ordinary laws.

[186] [1994] 4 SCC 260.
[187] *Powell v. Albama* 247 US 45.

In case of "Hussainara Khatoon v. Home Secretary, Bihar"[188], the supreme court has held that, "*This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provision of such lawyer*."

Thus, if free legal services are not provided the trial may be vitiated as being violative of Art. 21. However, this article is not available to persons who have been convicted by a competent court and detained.[189]

Free legal aid is also conceptualized under Section 304 of Code of Criminal Procedure, 1973.

c) Right to be produced before a Magistrate

Besides furnishing grounds of arrest and allowing the person to consult the lawyer of his choice, the arrested person has to be brought before a magistrate "within 24 hours of his arrest".

It can be extended beyond 24 hours only by way of judicial custody. This right has been substantiated under section 57 of CrPC.

d) No detention beyond 24 hours except by order of Magistrate

Art. 22 aims to give protection against the non-judicial acts (or executive actions) and applies to a person accused of a crime or offence of criminal nature or any act against the interest and safety of the State.

Thus, it's necessary that the arrested person is brought before the magistrate within the specified time to ensure a speedy trial. Also, if there is a failure to produce the arrested person within stipulated time, it would make the arrest illegal.

In case of CBI v. Anupam J. Kulkarni[190], the court provided exhaustive guidelines to be followed in case of arrest when investigations cannot be completed in 24 hours.

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[188] [1979] SC 1377
[189] *Keshav Singh v. Speaker of U.P. Assembly* [1965] All 349.
[190] [1992] 3 SCC 141.

"*When accused is brought before the Magistrate, he can authorize the detention in either police or judicial custody, but the total period cannot exceed 15 days. After 15 days any further remand can only be under judicial custody. There cannot be any subsequent police detention*."

This right has been given statutory backing under section 167 of CrPC.

Thus, these provisions ensure that the accused is at-least provided basic rights during the procedure of arrest. These rights secure a fair trial and prevent injustice as they are based upon the principles of natural justice.

4.3 Preventive Detention Laws in India

The Indian nation is ruled under a written constitution which guarantees its citizens with six fundamental rights with certain procedural safeguards. These safeguards are provided to the arrested person in the case of arrest and detention under Article 22(1) and (2) of the Constitution, but such rights are not extended to the person detained under Article 22(3). It provides, "*Nothing in clauses (1) and (2) shall apply,*

a) *to any person who for the time being is an enemy alien; or*
b) *to any person who is arrested or detained under any law providing for preventive detention."*[191]

Hence under the Indian Constitution, Article 22(3) recognizes the power of Parliament and state legislatures to pass preventative detention legislation that allow the state to detain a person in prison without a trial or conviction, or even pending prosecution, thus moderating the aforementioned rights.

Such order of detention is made not by an independent judiciary but by an officer authorized by the executive. The detainee, however, does have a right to seek judicial review of the Order on restricted grounds. Clauses (4)-(7) of Article 22 provide for the safeguards in accordance with such Preventive Detention laws.

The purpose of this chapter is to identify various preventive detention laws and analyse various case laws decided by the Judiciary regarding such preventive detention legislations. The researcher seeks to segregate the action taken into various criterion like, protecting the fundamental right of personal liberty or allowing it to be curtailed by the executive.

Preventive detention laws are made to meet external situation such as disturbance from foreign mercenaries, cross-border terrorists etc. It may also made due to meet the exigencies arising out of war time, such as "Maintenance of Internal Security Act", 1971 (MISA). In most of the countries even in England, preventive detention laws are of this category. In those countries, preventive detention laws are made to meet the dangers arose to the Nation during war time. It is mainly intended to deal with the

[191] Constitution of India 1950, Art. 22 (3)

international terrorists. All these type of preventive detention laws are intended to deal with war time emergency situation. In India Constitution, provision has been made to deal with enemy aliens.[192] It will cover foreigners also.

In Indian context, preventive detention laws are also made to meet the situation causing danger to the maintenance of public order. This is a peace time measure. It may encompass itself situations arising out of internal disturbance within the country. It may also arise out of communal violence, bloodbath, large scale terrorist activities. Preventive detention laws are resorted to meet such situation and contain violence arising out that when the ordinary criminal laws are not sufficient or appropriate to meet the grave situation. This kind of preventive detention laws are intended to operate during peace time.

In India, preventive detention laws to meet the situations arose even in peace time has been constitutionally permitted. This is a unique feature in the Indian scheme of preventive detention laws. No doubt, this is a disturbing feature which always comes under the adverse criticism of human rights activists and general public. But, the reasons for clamping preventive detention orders, even during the peace time cannot be stated to be completely vanished in India.

In a federal country like India with a large area and a huge population consisting of various religious and social interests resulting in continuous internal disturbance and an eternal enemy near the border, namely, Pakistan with its continued cross-border terrorism, having preventive detention laws also during peace time has become a necessary evil to be put up with.

Since independence a variety of preventive detention laws have been passed by the government. List of preventive detention laws made by the Parliament is given below:

1. Preventive Detention Act, 1950. Expired in 1969.
2. Maintenance of Internal Security Act (MISA), 1971. Repealed in 1978.
3. Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA), 1974.
4. National Security Act (NSA), 1980.

[192] Constitution of India 1950, Art. 22(3)(a)

5. Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act (PBMSECA), 1980.
6. Terrorist and Disruptive Activities (Prevention) Act (TADA), 1985. Repealed in 1995.
7. Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act (PITNDPSA), 1988.
8. Prevention of Terrorism Act (POTA), 2002. Repealed in 2004.

For the purpose of this chapter, the researcher has selected the first "preventive detention act, MISA, COFEPOSA, NSA and TADA" to analyse how the judiciary dealt with these laws. These Enactments have been selected because there is a plethora of cases, landmark and otherwise important, available with respect to these Acts to identify the role played by judiciary in safeguarding personal liberty.

Each section of this chapter covers various aspects like the timeline of passing the legislation, need of such legislation, case laws and judgments dealing with preventive detention.

4.3.1 Preventive Detention Act, 1950

The first Preventive Detention Act was passed on 26 February 1950, with a purpose to prevent anti-national elements from carrying out acts that are hostile to Nation's security and defence. The said act was supposed to end after the remaining 2 years in practice. But the time limit of the act was increased from time to time, and finally, after 19 years it expired in 1969.

The Act empowered the Central and State governments and certain officers under them to make orders of detention, if "*they were satisfied that it was necessary to detain a person with a view to detain a person to prevent him from carrying any act prejudicial to defence of India, the security of India or a state, the maintenance of public order or the maintenance of supplies or the services essential to the community*."[193]

In A.K. Gopalan[194] "A.K Gopalan was a communist leader who was mainly active in Madras Presidency (now called Kerala). A.K. Gopalan was the political opponent of

[193] Preventive Detention Act, 1950, S. 3
[194] *A.K. Gopalan v. State of Madras* [1950] SC 27

the government. Since December 1947, he was illegally detained several times and even after the court led him free, he was still kept under detention by the government. In 1950, he was again detained under the Preventive Detention Act, 1950. Then, A.K Gopalan filed a writ petition under Article 32 of the Indian Constitution challenging his detention under the Preventive Detention Act, 1950.

According to the Preventive Detention Act, 1950, the detainee is not given any reasons for his detention. Therefore, A.K Gopalan argued that this act is unconstitutional as it violates his fundamental rights under Article 19(1)(d), that is, the right to freedom of movement and Article 21, that is, the right to life and personal liberty."[195]

The validity of the "preventive detention Act" was challenged and it was held- "*The preventive Detention Act, 1950, except for section 14 thereof did not contravene any of the Articles of the Constitution and even though section 14 was ultra vires in as much as it contravened the provisions of Article 22 of the Constitution, as this section was severable from the remaining sections of the Act, the invalidity of Section 14 did not affect the validity of the Act as a whole and the detention of the petitioner was not illegal*."

Section 14 was struck down on the ground that is foreclosed the judicial inquiry of the legality of the detention under the said act. It was apparent that freedom of an individual did not qualify as provided under Article 21.

The Supreme Court, having taken a limited view of Articles 21 and 22, refused to entertain whether there were any inadequacies in the procedure provided by law. It was of the faith that each constitutional article was autonomous of each other. When the petitioner questioned the validity of his detention on the grounds that it violated his rights pursuant to Articles 19 and 21 of the Indian Constitution,[196]" the Supreme Court disregarded all the arguments that the detention could be justified merely on the ground that it was conducted in accordance with the 'legally established procedure.'

However, only Justice Fazal Ali was not favouring this judgment. He said that "*detaining someone without valid reasons, and justification for his detention is illegal and, hence, violative of Article 21*." After several years, in Maneka's case in 1978, the Supreme Court overruled this judgment and held the opinion of Justice Fazal Ali to be

[195] Writing Law, *AK Gopalan's case,* https://www.writinglaw.com/ak-gopalan-vs-state-of-madras-case
[196] J.N. Pandey, *Constitutional Law of India* (34lh ed.), p. 193.

correct. The court further stated that "Personal Liberty" under Article 21 of the Constitution has a wider scope.

In Kharak Singh v. State of UP[197], the court stated that "*personal liberty was not only limited to bodily restraint or enforcement."* Kharak Singh was charged in dacoity case but was released since there was no evidence available against him. However, the Police monitored his movements and activities even at night. The court laid down that an unauthorised intrusion into a person's home and disturbance caused to him thereby violated his right to personal liberty enshrined in Article 21."

In case of Maneka Gandhi[198], the court gave the view that *"the 'personal liberty' under Article 21 of the 'widest amplitude'. Protection under Article 19 is also included unlike in the case of Kharak Singh."*
Gopalan case judgement was overruled in this case. Here, the SC said that "*Articles 19 and 21 are not watertight compartments. The idea of personal liberty in Article 21 has a wide scope including many rights, some of which are embodied under Article 19, thus giving them 'additional protection'*." The court further held "*a law that comes under Article 21 must satisfy the requirements under Article 19 as well."* That means any procedure under law for the deprivation of life or liberty of a person must not be unfair, unreasonable, or arbitrary.

4.3.2 Maintenance of Internal Security Act (MISA), 1971

MISA ("Maintenance of Internal Security Act") was enacted in 1971 to ensure India's internal security. The Military Regime in Pakistan crushed its own people in East Pakistan, situate next to West Bengal. Mukthi Bhani, a freedom movement led by "Sheikh Mujibur Rahman" surfaced in East Pakistan. The Central Government in West Pakistan unleashed large scale violence on the people of East Pakistan. There was a complete blood-bath. Also, there was a huge influx of people from East Pakistan to India through our Eastern border. In the border area, there was a war like situation.

[197] [1963] SC. 1295
[198] *Maneka Gandhi v. Union of India* [1978] SCR (2) 621

In the circumstances, the Government led by Smt. Indira Gandhi enacted the notorious "Maintenance of Internal Security Act", 1971 20, popularly known as MISA. The Act was intended to meet the situation arose out of Indo-Pak war, 1971. The war was over. However, MISA was not over. The Act contained all the ·features of Preventive Detention Act, 1950. Foreigners were specifically brought under MISA.

It was seen as a contentious measure because it was routinely used to harass and arrest those who posed a threat to Congress's governance, including members of various opposition parties, social workers, and journalists. The legislation gained infamy for its disregard of legal and constitutional safeguards of civil rights, especially when going all the way down on the competition, and during the period of national emergency (1975–1977) as thousands of innocent people were believed to have been arbitrarily arrested, tortured and in some cases, even forcibly sterilized.

The 39th Amendment to the Constitution of India placed MISA in the 9th Schedule to the Constitution, thereby making it totally immune from any judicial review even on the grounds that it contravened the Fundamental Rights which are guaranteed by the Constitution or violated the Basic Structure. MISA was finally repealed after Janata Party won in 1977.[199]

In "Srilal Shaw v. State of West Bengal"[200], the petitioner was detained under the for illicit possession of railway property, the requirements of the "Maintenance of Internal Security Act", 1975, apply. The 1966, Railway Property (Unlawful Possession) Act was used to prosecute the detainee. However, the matter was not pursued because, according to the District Magistrate, the witnesses were afraid of losing their lives if they testified against Detenu, therefore the case was abandoned. The detention was held unconstitutional by the Supreme Court. The Court did, however, make an important point. It said, "*this is typical case in which for no apparent reason a person who could easily be prosecuted and punished under the punitive law is being preventively detained*."

[199] Saxena Priti. *Preventive Detention and Human Rights.* (Deep & Deep Publications) 99
[200] [1975] SC 393

"The Railway Property Act confers extensive powers to bring to book persons who are found in unlawful possession of railway property. But the courts will uphold the detention valid even on isolated grounds if they are so serious to affect the whole community."

In "Babulal v. State of West Bengal"[201], the Court upheld the detention of detenues under MISA valid on the ground that they were members of a gang which committed an organised dacoity in a running train equipped with firearms and putting innocent passengers to peril of life and property.

India's democracy was threatened at the time of the Emergency imposed on the country on 25th June 1975. At that time, we witnessed the darkest judgment by the Supreme Court in the **ADM Jabalpur v Shivkant Shukla**[202] case (also called the Habeas Corpus case). When Indira Gandhi's win in Lok Sabha was challenged by the Ahmedabad High court, Justice Sinha accused her of indulging in fraudulent activities to win the elections, barring her from elections for the next six years.

Indira Gandhi took this case to S.C., which only granted a conditional stay. So, she imposed an Emergency in the country on 26th June 1975. Former President Fakhruddin Ali Ahmed, declared no person can move to any court for the enforcement of rights which were suspended during the emergency.[203]

Political opponents, including A.B. Vajpayee and Morarji Desai, were arrested under the "Maintenance of Internal Security Act" (MISA), allowing no trial. They challenged the detention in High Courts and got support as well. The government again approached the Supreme Court to silence the H.C. in the ADM Jabalpur.

In "Habeas Corpus" Case, the constitutional validity of Section 16-A of the MISA (now repealed) was challenged. Detenue contended that it was violative of Article 226 in as much as it prevented the High Court from exercising the jurisdiction under the Article to issue writ of habeas corpus and examining whether the detention under the Act was based on proper satisfaction of executive authority or net.

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[201] [1973] SC 606
[202] [1976] AIR 1207
[203] Constitution of India 1950, Article 359(1)

By 4:1 majority, (Khanna, J., did not express any opinion on the subject) The Court held that Section 16-A, was constitutionally valid. The Court held that "*it was a rule of evidence, and it was not open either to the detenu or to the Court to ask for grounds of detention*", and with regard to personal liberty the court declared, "*Article 21 is the sole repository of rights to life and personal liberty against the State. Any claim to a writ of Habeas Corpus for enforcement of Article 21 becomes barred by the Presidential Order under Art. 359."*

In sum, Section 16-A did not affect the jurisdiction of the High Court under Art. 226. The jurisdiction to issue writs was neither abrogated nor abridged. It's just an evidence rule. As a result, when the detaining authority was attracted by Section 16-A and prohibited from disclosing the reasons for arrests, there was no basis for an adverse inference to be drawn against the authority as to whether this power was exercised in bad faith or without subjective satisfaction. Even if a detainee makes a direct argument that his custody was unlawful, the detaining authority's affidavit will be its response, and the judicial inquiry will be closed.

In his dissenting opinion, Justice H.R. Khanna favouring the right to life and liberty noted, "*without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning."*

The effect of the case was that the judiciary was barred from examining the legality of the orders of such detention. The decision of Supreme Court impliedly overruled several earlier decisions that claimed it had the authority to investigate the legality of any detention order for the reason that it was passed without subjective satisfaction of such authority, or that it was made in bad faith, or that it was not made for the purposes of the Preventive Detention legislation.[204]

4.3.3 Conservation of Foreign Exchange & Prevention of Smuggling Activities Act (COFEPOSA), 1974

COFEPOSA, or the "Conservation of Foreign Exchange and Prevention of Smuggling Activities Act", was enacted in 1974, and it called for "preventative detention" in order *"to retain and develop foreign currency while also deterring illegal commerce."*

[204] *Makhan v. State of Punjab* [1964] SC 381.

COFEPOSA acted as a back-up to MISA in 1971, and despite MISA's repeal in 1977, COFEPOSA remained in effect. Smugglers' incarceration periods were previously set at one year, after its enactment on July 13, 1984, they were doubled to two years.

The objective of the COFEPOSA Act has been stated in its statement of objects and reasons as provided: "An Act to provide for preventive detention in certain cases for the purposes of conservation and augmentation of Foreign Exchange and prevention of smuggling activities and for matters connected therewith. Whereas violations of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy and thereby a serious adverse effect on the security of the State."

This Act allows for pre-trial detention with object to prevent anyone from smuggling and behaving in a way that would jeopardise the conservation and expansion of foreign exchange.

The Act allows for preventative detention orders to be issued in two situations:

(a) to prevent violations of foreign currency laws, and

(b) to prevent activities of smuggling.

If the concerned authority believes any of the above scenarios exist, it can issue a preventive detention order.

In Attorney General of India v. Amrit Lal Prajivandas[205], the nine-judge bench unanimously held that "*during the period of emergency, the president is empowered to suspend the fundamental rights of people and a detenue has no locus standi to question the reasons or grounds of his detention*." It further held "*During that period the presidential order suspending the enforcement of fundamental rights was in operation, the State was empowered to make any law or take any executive action inconsistent with such rights*." Thus, the court upheld the validity of COFEPOSA and Smugglers and Foreign Exchange Manipulator Act 1976, (SAFEMA).

In Narendra v. B.B. Gurjal[206], The Court stated, - "*The constitutional safeguards embodied in Article 22(5) of the Constitution are available to a person detained under*

[205] [1994] 5 SCC 54.
[206] [1979] SC 420.

the Conservation of Foreign Exchange, Prevention of Smuggling Activities Act, 1974 (COFEPOSA).

Merely because there is no express provision in Section 8(b) of the (COFEPOSA) Act placing an obligation to forward the representation made by the detenu along with the reference to the Advisory Board, unlike those contained in The PD Act[207], 1950, and MISA, 1971,[208] it cannot be said that there is no obligation cast on the Government to consider the representation of the detenu before sending it to the Advisory Board."

"*The repeal of MISA and retention of the COFEPOSA does not imply that preventive detention can be freely used without any power of judicial review and without any checks and balances against persons engaged in anti-social and economic offences. The courts have always viewed with disfavour the detention without trial whatever be the nature of offence*."

The Court reaffirmed its earlier findings, holding that the government is obligated to consider the detainees' representations without waiting for the Advisory Board's opinion.

In "Kamlesh Kumar Ishwardas Patel v. Union of India",[209] it was held that "where an officer specially empowered by the Central Government under the COFEPOSA and the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988 (PITNDPS Act) has passed an order of detention, the detenue has a right to make a representation to the said officer" and the said officer is obliged to consider the said presentation and the failure on this part to do so results in denial of the right conferred on the person detained against order of detention.

Upholding the detenues right, the court declared, *"This right of the detenue is in addition to his right to make representation to the State Government. This right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention. And failure to do so will result in denial of the right of person to make a representation."*

[207] Preventive Detention Act, 1950, Section 9
[208] MISA, 1971, Section 10
[209] [1995] 4 SCC 51.

4.3.4 National Security Act (NSA), 1980

This is one more current major Central enactment in the field of preventive detention. It was passed on 27.12.1980, replacing the "National Security Ordinance" 1980. The statement of objects and reasons to the Act reads: "In the prevailing situation of communal disharmony, social tensions, extremist activities, industrial unrest and increasing tendency on the part of various interested parties to engineer agitation on different issues, it was considered necessary that the law-and-order situation in the country is tackled in a most determined and effective way. The anti-social and anti-national elements, including secessionist, communal and pro-caste elements and also other elements, who adversely influence and effect the services essential to the community pose a grave challenge to the lawful authority and sometimes even hold the society to ransom."

The President approved the National Security Ordinance in 1980, which provided for the preventive arrest of anyone involved for sectarian and caste disturbances, as well as other activities that jeopardised the country's security. The Ordinance, which has now become an Enactment, allows for imprisonment for up to 12 months but does not prevent the detainee from contesting his custody in court on grounds such as infringement of his fundamental rights. Within 10 days of his arrest, the detainee shall be informed of the reasons for his detention. He will have the ability to appeal his detention to the Advisory Board. It also allows for the arrest of a person in order to prevent him from conducting in any way that would jeopardise the Sta's security, public order, or supplies and services important to the community's survival.

In 1984, an Ordinance was passed to make the N.S.A. more effective. The 1984 Amendment Act isolates each of the grounds for detention and allows a person whose previous custody has either ended or been removed to be detained again.

The amendment was necessitated by the extraordinary situations prevailing in the State of Punjab due to Akali agitation.

The amendment limits the scope of judicial review of preventive detention laws considerably. It thus nullifies the effect of numerous decisions of the courts in which detention orders have been struck down on one of the several ground that detention was found to be *"vague, non-existent or, unconnected with the grounds on which detention supplied to detenu."*

In the NSA case,[210] the petitioner in the present case was Shri AK Roy who was a Marxist member of the Parliament, while the respondent was the Union of India. The case came into existence with the detention of A.K. Roy, a member of the Parliament, under the provisions of NSA for indulging in activities prejudicial to public order.

The Supreme Court was approached under Article 32 of the Indian Constitution whereby the validity of the National Security Ordinance, 1980, and certain provisions of the said ordinance were under-challenged.[211] The **main issue** in the case was: "*Whether or not the power to make an ordinance was a legislative power or whether it was an executive power masquerading as a legislative power*."[212]

By 4:1 majority the SC, held NSA valid, as acting in a manner "'prejudicial to the 'defence of India', 'security of India', 'security the State', and to 'relations with foreign power'."

While upholding the validity of the NSA and its predecessor Ordinance, the Court gave several directions with the aim at safeguarding the persons detained under such Act.

The Court gave the following directions:

(1) that his family members must be notified in writing of his incarceration and the location of his detention as soon as possible after his arrest:

(2) Unless unusual circumstances necessitate incarceration elsewhere, the detainee must be held in the place where he normally resides.

(3) that detainee has the right to keep his book and writing materials, eat his own meals, and have visitors from friends and relatives.

(4) He must be kept apart from others who have been convicted.

(5) He should not be subjected to punitive treatment, and he should be treated in accordance with civilised human dignity principles.

[210] *A.K. Roy v. Union of India* [1982] SC 710
[211] A.K. Roy case, https://www.indianconstitution.in/2021/09/a-k-roy-vs-union-of-india-case.html
[212] Jus Dicere, https://www.jusdicere.in/law-made-by-the-parliament-or-the-ordinance-passed-by-the-legislature-indian-constitution-keeps-them-at-par/

The majority, although disapproving of the government's delay in bringing the 44th amendment into force, held that it was unable to intervene. It said that the ability to modify the Constitution is distinct from the capacity to put the amendment into effect. The 44th Amendment required the Central Government to issue a notification to bring the amendment into effect. Because it has not been enacted, it is not a part of the Constitution, and thus the NSA is lawful, even though it does not provide for the establishment of the Advisory Board as required by the amendment. On this point, Tulzapurkar and Gupta, JJ., dissented from the majority and issued an order of mandamus to the Union Govt. to implement the modification.
Justice A.C. Gupta dissented by saying that "*the Parliament left it to the unfettered discretion of the Central Government when to bring into force any provision of the Amendment."* Act. According to him, when the Amendment Act got assent from the President the Central Government was under an obligation to bring into operation the provisions of the Act in reasonable time.

On this point, it is argued that the minority viewpoint is valid. The government must put the modification into effect in a fair amount of time. It appears odd that Parliament may pass an amendment that cannot be implemented at all. Section 3 of the 44th Amendment was designed to protect citizens from the government's abuse of the power of preventative detention by establishing Advisory Bodies that would be far more independent and impartial. The Central Government had failed to fulfil 'its' constitutional responsibility by failing to implement the 44th Amendment's provisions, and the majority had relinquished its power to provide mandatory directions to the government to implement the amendment. As a result, the petitioner was denied a crucial right: the right to have his representation reviewed by the Board as established under the 44th Amendment's provisions.

4.3.5 Terrorist and Disruptive Activities (Prevention) Act (TADA), 1987

In the year 1985 "Terrorist and Disruptive Activities (Prevention)" Act. TADA was enacted primarily to address specific acts of terrorism in Kashmir, western Punjab, and even sections of north-eastern India. The Act gives state governments broad powers, which in practise means local politicians and the police—powers that are likely to be abused.

There were numerous complaints about the Act's provisions being abused. It provided **"***An Act to make special provisions for the prevention of, and for coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto."*

TADA, was an Indian anti-terrorism law which was in force between 1985 and 1995 (modified in 1987) under the background of the Punjab insurgency and was applied to whole of India. "The act was originally only intended to last two years, but it was altered and reintroduced in 1987. It was assented to on 3 September 1987, and made effective in two parts from 24 May 1987 and 3 September 1987. This also had a sunset provision of two years from 24 May 1987. It was renewed in 1989, 1991 and 1993 before being allowed to lapse in 1995 due to increasing unpopularity after widespread allegations of abuse."[213] This Act is regarded as one of the most powerful and restrictive legislation enacted under the regime of preventive detention.

The goal of this legislation was to express that it was widely agreed based on experience that it is critical to not only enforce existing laws but also to make them stronger in order to successfully deter criminals and counter terrorism and other harmful Acts. "It was the first anti-terrorism law legislated by the government to define and counter terrorist activities.

The Act's third paragraph gives a very thorough definition of "terrorism". It provided "Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act."[214]

[213] Devadass P, 'Judicial Review of Preventive Detention Orders in India' (2005) 149
[214] TADA, 1987, Para 3.

4.1.5.1 Controversial Provisions

The Act was widely criticised by human rights organisations as it contained provisions violating human rights. The criticism is centred on the following facts: -

- Under this Act whoever advocates directly or indirectly for cession or secession in any part of India is liable to be punished.
- The Act provided that a person can be detained up to 1 year without formal charges or trial against him.
- Act provides that detainee can be in police custody up to 60 days which increases risk of torture. Also, the detainee need not be produced before a judicial magistrate, but instead may be produced before an executive magistrate who is an official of police and administrative service and is not answerable to high court.[215]
- The trial can be held secretly at any place and also keeps the identity of the witnesses' secret violating international standards of fair trial.
- The Act reverses the presumption of innocence of the accused under the Act. The person who is accused of committing a terrorist act where arms and explosives were recovered or made confessions to someone other than a police officer or provided financial assistance for the commission of the terrorist act or by suspicion that the person has arms or explosives or financial assistance to commit the terrorist act, then the person shall be presumed to be guilty unless contrary is proved.[216]
- A person making confessions to a police officer not below the rank of superintendent of the police can be used as evidence against him.[217]
- It bars persons accused under this Act to appeal except the Supreme court.[218]

The activists have claimed that the act gives power of Arbitrary detention to the State and thus deprives an individual of his most basic right of personal liberty.

[215] TADA, 1987, S. 20
[216] TADA, 1987, S. 21
[217] TADA, 1987, S. 15
[218] TADA, 1987, S. 19

In case of "Kartar Singh v. State of Punjab"[219] the ambit and scope of TADA was narrowed significantly by the SC and held that "*unless the crime alleged against an accused could be classified as a 'terrorist act' in letter and spirit he should not be charged under the Act and should be tried under ordinary penal laws by the regular courts."*

The Court held "*Section 3 of the Act operates when a person not only intends to overawe the government or create a terror in people etc. but also when he uses the arms and ammunition which results in death or likely to cause deaths and damages the property."*

In other words, the court declared that, a person becomes a terrorist (or is guilty of terrorist activity) when his intention, action and consequence all the three ingredients are found to exist together. Thus, an activity which is sought to be punished under Section 3(1) of TADA must be such which cannot be classified as a mere law and order problem and cannot be tackled under the ordinary penal law.

Another safeguard established by the court to prevent abuse of the Act was the right to a speedy trial for the accused[220], which is an important aspect of the basic right of life and liberty.[221]

Referring to state law enforcement authorities' violations of human rights. These crimes, according to the court, "*were committed in absolute disdain of humanitarian law and universal human rights, as well as in total defiance of the constitutional guarantee and human decency."*

The Court found that "*the Act did not provide the police a blanket power of indefinite imprisonment without trial",* and that a citizen should be allowed to bail if the police fail to finish their investigations within six months, which can be extended to a year with the authorization of a designated court and also held that mere membership of a banned organisation does not make the member liable for the punishment under this Act.[222]

[219] [1994] 3 SCC 569
[220] *Hussainara Khatoon & Ors v. Home Secretary, State of Bihar* [1979] SCR (3) 169
[221] Constitution of India 1950, Art. 21
[222] *Arup Bhuyan v. State of Assam* Criminal Appeal No(S). 889 of [2007]

Also, in Hitendra Vishnu Thakur's case[223] the supreme court held that, the Designated Court should not, without proper application of mind, charge-sheet or convict an accused under Section 3 of TADA simply because the investigating officer decides to include that section while filing the challan and that it is not open to the State to apply TADA to the ordinary problems arising out of disturbance of law and order or even to situations arising out of the disturbance of public order- a more serious type of crime alone would justify trial under TADA.

And also, the court held "*the proviso to Section 167(2) of the Code read with Section 20(4)(b) of TADA, therefore, creates an indefeasible right in an accused person on account of the 'default' by the investigating agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail. It is for this reason that an order for release on bail[224] read with Section 20(4) of TADA is generally termed as an 'order-on-default' as it is granted on account of the default of the prosecution to complete the investigation and file the challan within the prescribed period*."

As a consequence of the amendment, an accused after the expiry of 180 days from the date of his arrest becomes entitled to bail irrespective of the nature of the offence with which he is charged where the prosecution falls to put up challan against him on completion of the investigation.[225]

Thus, the court held that the petitioner, 'MLA of Maharashtra Legislative Assembly' who was accused under TADA, is entitled to be released on bail as the police have failed to complete the investigation within the prescribed period.

[223] *Hitendra Vishnu Thakur v. State of Maharashtra* [1994] 4 SCC 602
[224] CrPC 1973, of Section 167(2)(a)
[225] Para 20

4.4 Constitutional Safeguards against Preventive Detention

Although the Indian Constitution has recognized Preventive Detention as a 'necessary evil', it has also recognized few mitigating safeguards that try to prevent the misuse of such provisions. Clause (4) to (7) guarantee some safeguards to all persons detained under such laws.

a) Review by Advisory Board
b) Communication of Grounds
c) Right of Representation

These rights are available to all persons against whom proceedings or executive action is initiated under Preventive Detention laws. These rights have been discussed briefly along with cases decided by the judiciary regarding the protection of such rights.

a) Review by Advisory Board

Art. 22 provides that any detention given under the "preventive detention laws" shall be reviewed by "an advisory board". It provides, "*No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention*:"[226]. Thus, it's the duty of the advisory board to report its opinion to the govt. on whether such detention is justified or not. If it holds the opinion that such detention is not justified, the Govt. would be bound to revoke the detention order.

In Nand Lal v. State of Punjab[227] an order for detention was made under the PBMSECA, it was challenged on the ground that "the procedure adopted by the advisory board in allowing legal assistance to the State and denying such assistance to the detenue was both arbitrary and unreasonable and thus violative of Art. 21." The court viewed that although under Sec 11 of Act, the detenue had no right to legal assistance with the advisory board, but "*it did not preclude the board to allow such assistance."* Thus, the Advisory board hold the discretion to provide legal assistance or not, but such discretion should not be

[226] Constitution of India 1950, Art. 22 (4)
[227] [1981] SC 2041.

exercised arbitrarily. However, if no request for legal assistance is made by the detenue, then there cannot be denial of fairness of assistance is not provided.[228]

In case of Abdul Latif Abdul Wahab v. B.K. Jha[229], petitioner was detained under preventive detention law. Upon release, he was again detained after some days. An advisory board submitted its opinion within 2 weeks of second detention, but after 3 months of the first. It was held that the detention was illegal as it violated Art. 22(4) which requires opinion to be submitted within 3 months. The court ruled, *"requirement under Art.22(4) cannot be evaded by making successive orders for detention before expiry of three months. It's not sufficient to say that the procedural requirements have been complied with*."

b) Communication of Grounds

The Indian Constitution provides, "*When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order*."[230]

This clause gives two rights to the detenue:

i) To be communicated the grounds of arrest, and

ii) To be given opportunity to make representation.

The fifth clause of Art. 22 imposes an obligation on the detaining authority to furnish the detenue the grounds of detention "as soon as possible". These grounds should be clear and understandable to the detenue.

"Communication" is a strong word and it implies that sufficient information is given to the detenue to make him understand the situation and reasons for his arrest in a compelling and effective manner. "*If grounds are only verbally explained and nothing is left with him in writing in a language that he understands, then that purpose is not served*."[231]

In Shibban Lal v. State of U.P.[232], the petitioner was supplied with two grounds of detention. Later on, the detaining authority revoked one of the grounds. The

[228] *Smt. Kavita v. State of Maharashtra*, AIR 1981 SC 1641.
[229] [1987] 2 SCC 22.
[230] Constitution of India 1950, Art. 22(5)
[231] *Kubic Darusz v. Union of India* [1990] 1 SCC 568.
[232] [1950] SC 179

legality of detention was challenged. The State contended that; the remaining ground was sufficient to sustain the detention. The court held the detention was unlawful and said, "*to say that the other ground, which still remains is quite sufficient to enforce the order of detention, would be to substitute the objective judicial test for the subjective satisfaction of the executive authority which is against the legislative policy underlying the statute*." Thus, the person was freed from detention. However, contrarily in Shafique Ahmad's case[233], the court held that, "*even where one of the grounds was found to be bad and unsustainable, the detention under N.S.A would not be vitiated if any of the remaining grounds are valid."*

In "Kishori Mohan v. State of W.B".[234] and "Ram Bahadur v. State of Bihar"[235] it was held that "the grounds supplied to the detenue must not be 'vague', 'irrelevant' or 'non-existent'. If the grounds are vague or irrelevant to the object of legislation then the right of detenue is violated." Also, where the order of detention was based on distinct and separate grounds and "*if any of the grounds was vague, or irrelevant the entire order would fail."*

c) Right of Representation

The third right available with the detenue is that he should be given the earliest opportunity to make a representation against his detention order. This right is also provided under Art 22 as follows, "*as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order*."[236]

"Earliest Opportunity" of making a representation implies that there should be no inordinate delay or shortfall in supplying the detenue with the relevant materials required by him to make his representation against his detention order. The non-supply of relevant documents (and its copies) as relied on by the detaining authority will make the detention illegal.[237] Similarly, where the detaining authority supplied the copies after a long delay of 32 days after being

[233] *Shafique Ahmed v. District Magistrate, Meerut* [1990] SC 220.
[234] [1972] SC 1749.
[235] [1975] SC 223.
[236] Constitution of India 1950, Art. 22 (5)
[237] *Abdul Aziz v. Delhi Administration* [1981] SC 1389.

demanded by the detenue. It was held that, the copies were of no use to the detenue in making an effective representation because of the inordinate delay, as such there was a denial of opportunity in making a representation and therefore the detention was held to be illegal.[238]

In Jaynarain Sukul v. State of W.B.[239], the court held that "*the language of Article 22(5) makes it obligatory for the State Government to consider the representation of detenue as soon as it is received by it. The opinion of Advisory board is no substitute for the consideration of the representation by the government."*

Thus, where the detenue being detained under MISA made his representation against the order of detention and the State government confirmed the order of detention without considering his representation, it was held that the State govt. has failed in its obligation and that the confirmation of detention was in violation of Art 22 (5) of the Constitution.[240]

[238] *Khatoon Begum v. Union of India* [1981] SC 1077.
[239] [1979] SC 675
[240] *S.K. Sakawat v. State of W.B.* [1975] SC 64.

4.5 Concluding the Chapter

The Indian constitution envisions two different forms of detention viz, detention under ordinary criminal law and preventive detention. Art. 22 of the Indian Constitution provides various procedural safeguards for both these detentions. However, if a law providing for preventive detention covers these safeguards it does not mean that the detention would be valid. The procedure contemplated in law itself must "just, fair and reasonable".

Art. 22 gives four basic safeguards that must be given to all persons detained under ordinary laws. These include the right to be informed grounds of arrest, right to be consult a lawyer of his choice and to be produced before a magistrate within 24 hours. These rights are also manifested in various provisions of Cr.P.C. However, these rights are not available to a person detained under preventive detention laws.

This chapter identifies various preventive detention laws and how the judiciary has decided the cases w.r.t such laws on the question of personal liberty. The Indian parliament has passed several preventive detention legislations. This chapter focuses primarily on the first preventive detention Act, MISA, COFEPOSA, NSA and TADA.

The first "Preventive detention act" was enacted at the time of independence. A.K Gopalan was arrest under this act. The court in deciding the validity of the Act declared that the Act was valid. Court took a limited view of personal liberty and allowed it to be curtailed. Justice Fazal Ali's in his dissenting opinion highlighted the importance of personal liberty and declared the detention as illegal.

MISA which was passed during the Bangladesh Liberation War was seen as a notorious legislation as it was blatantly misused to harass the social workers and journalists. The courts had tried to maintain a balance between "personal liberty" and "national interest". During the National Emergency the court gave one of its darkest judgments. In habeas corpus case, the court upheld validity of MISA and the provision which prevented the court from checking into the validity of the detention order. Thus, the court allowed the executive broad powers of preventive detention which allowed the personal liberty to be curtailed. However, the minority opinion of Justice H.R Khanna had favoured the right of personal liberty.

COFEPOSA which was enacted as backup to MISA, was intended to curtail liberty in matters of breach of foreign exchange regulations. During the phase of emergency, the court took a strict position and prevented the enforcement of fundamental rights. Otherwise, the court was quite considerate of the right of personal liberty of citizens. Court declared it obligatory for the government to consider the right of representation of detenues and to mandatorily establish advisory board to advise on matters of preventive detention. Judiciary even gave respect to the other rights available to the detenue.

The NSA was enacted in 1980 to deal with the prevailing social tensions and communal disharmony especially in areas of Punjab. A.K Roy, an M.P. was detained under NSA. He challenged his detention in court. The court declared NSA valid while granting some basic rights to the detenues such as the right to be treated according to basic principles of human dignity, detention near place of residence, intimation of detention to the family members, access to own stationary and reading materials and to be kept apart from convicted criminals.

The Minority Judgment of Justice Tulzapurkar and Justice Gupta issued a mandamus to central government to implement the changes suggested in the 44th amendment. However, the said amendment (w.r.t Art. 22 has not been implemented till date). NSA is also the major act for Preventive Detention today.

TADA was brough about to address the rapidly increasing terrorist activities across the country. While discussing the scope of TADA, the court considerably narrowed the scope of the act by requiring various criteria to be fulfilled before a person is detained. The court also considerable limited the scope of arbitrary detention by reducing the period of imprisonment without trial. Thus, the court played a very active role in protecting personal liberty of people.

Art. 22 also gives certain safeguards in cases of preventive detention. These include "the right to review by advisory board, communication of grounds to detenue and the right of representation of detenue." For the most part, judiciary has manged to protect these rights and has been considerate of ensuring the right of personal liberty of people.

Chapter V- Conclusion and Suggestions

5.1 Conclusion

This research entitled ***"Role of Judiciary in Safeguarding Personal Liberty vis-à-vis Preventive Detention Legislations in India"*** was an attempt by the researcher to analyse how the honourable Supreme Court of India has handled the cases of "Preventive Detention" especially with regard to safeguarding personal liberty of all persons in India. This study focuses on the examination of various judgments, landmark and otherwise, to find out the stand of the Court in protecting the right of personal liberty. To that end, it aims to understand the various preventive detention laws passed in India since the dawn of independence covering through various phases of independent India most prominently being the Bangladesh Liberation War of 1971 and the period of National Emergency of 1975 and many more different situations.

The emphasis of this dissertation was not based on the broader role of Supreme Court of India in striking down any preventive detention legislations, but instead on the specific position of the Court in giving protection to personal liberty against such legislations.

As such, three theme of this dissertation have been identified, i.e., firstly discussing the scope of 'Liberty' and its ever-widening horizons. Secondly, understanding the concept of 'Preventive Detention' and its applicability in India and thirdly to know about the stance taken by the Supreme Court of India in deciding cases of preventive detention specifically on the issue of liberty.

5.1.1 Ideals of Liberty

"To renounce liberty is to renounce being a man, to surrender the rights of humanity and even its duties."[241]

Life and Liberty are one of the most sacred aspects of human rights across the globe. The right to liberty is considered inseparable from humanity itself. Liberty is the right of all people to move freely as per their own will without restraint i.e., right of movement and protection from unlawful detention.

Idea of civil liberty is deeply rooted in study of "individualism", which holds that the highest development of a person is the true end goal of any state.[242] Every human being has a desire for personal freedom. People want to plan and live their life in their own way, and to achieve that they need to be given certain liberty. However, the reality is *"Man is born free and everywhere he is in chains, as what man loses by social contract is his personal liberty and an unlimited right to everything."*[243]

In understanding liberty and its vast horizons, the contribution of **John Stuart Mill** becomes quite important. In his celebrated work 'On Liberty', he describes the origin of liberty, as being a means of "protection against the tyranny of political rulers"[244] as the rulers were in a position to use their power both against external enemies and even against their own subjects to supress the people's voices of displeasure.

Mill suggested that limitation on the powers of state can be achieved in two ways.

1) By recognition of social liberties. And as a consequence of deprivation of such liberties, a rebellion against the State would be justified.
2) By establishing a constitutional government which represents the interests of the society it serves.

Despite suggesting such measures, Mill holds the view that Liberty cannot be absolute. In that regard, he provides the **"**Harm Principle" which essentially limits the

[241] Rousseau: *Social Contract*, 182.
[242] Paras Diwan, *does our Constitution need a Second Look*, 68
[243] Rousseau: *Social Contract*, 182.
[244] JS Mill, *On Liberty* Chapter I

absolute right of people over anything that may affect others or even the State. Its best understood by the phrase used by Justice Oliver Holmes, J.S. Mill and even Abraham Lincoln that, "*The freedom of my fist ends at the tip of your nose*".

The democratic governments often work to achieve the goal of individualism. Almost all democracies have secured certain rights and freedoms to its citizens which are often enforceable against the State. For instance, "the 5th Amendment of the U.S. Constitution and the Art. 21 of the Indian Constitution" provide for the right of liberty.

Personal liberty in simplest of terms means; 'the ability of a person to do any act voluntarily as per his will except for those restraints imposed by law to safeguard the welfare of others. However, it's not so simple as it sounds. Primarily it may mean freedom from arrest and detention, however at a profound level it implies a positive right which allows people a broader freedom to freely do any positive act or omission which does not trespass on the rights of others.

Art. 21 secures the right of personal liberty. Such right is available with all persons even non-citizens. However, the right secured under Art. 21 is not an absolute one. On one hand, it recognizes that the state can indeed deprive a person of his right of personal liberty while requiring that such a deprivation cannot take place except according to "procedure established by law" and that procedure must be "just, fair and reasonable."

In the early days of independence, a very narrow view was given to the right of personal liberty. In Gopalan's case[245], the court declared w.r.t personal liberty that *"it means nothing more than the liberty of the physical body-freedom from arrest and detention from false imprisonment or wrongful confinement."* Such judgment was based on the incorrect view of Liberty.

The Court failed to safeguard the true scope of liberty which encompasses various rights, (including the right of expression as given under Art. 19). Arresting and detaining a person simply on the basis of his ideology or background is nothing short of arbitrary detention. Arbitrariness in any form strikes at the root of Art. 14 and 21. If the Court allows such detention on the mere ground that it is justified according to the

[245] *A.K. Gopalan v. State of Madras* [1950] SCR 88

prevalent law, then such precedent is bound to be misused. As was seen in case of MISA and COFEPOSA.

Fazal Ali, J. however, in his dissenting judgment gave a wide and correct meaning to the words 'personal liberty' as also consisting of the rights given under Art. 19. According to him, *"any law which deprives a person of his personal liberty must satisfy the requirements of both the Articles 19 and 21 of the constitution."*

He correctly held that for a law to deprive the "right of personal liberty", it must satisfy the test of both Art. 19 and 21. The implication of this statement is that liberty of persons cannot be compromised simply by making a law. Such law would even be required to satisfy Art. 19 which also includes the freedom of expression. Thus, the Parliament could not curtail liberty simply on the basis of having an adverse ideology or belief as it would directly violate Art 19.

Later on, in Maneka's case[246], the court gave accepted the view of Justice Fazal Ali and ruled that "personal liberty under Article 21 is of the widest amplitude." While overruling Gopalan's judgment, the court said that "*Articles 19 and 21 are not watertight compartments. The idea of personal liberty in Article 21 has a wide scope including many rights, some of which are embodied under Article 19, thus giving them 'additional protection'."*

The Courts had begun to understand the true scope of personal liberty. The view now was that any unjust laws cannot be allowed to curtail liberty. The liberty cannot be denied simply on the basis of any law. If that were to be allowed, the right of equality and the "principles of natural justice" would be left hanging. Liberty necessarily has to be construed to include both Art. 19 and 21 and thus must allow people to freely express their beliefs without the risk of being detained. Because if the people of a country that is the largest democracy in the world are not allowed to freely speak their mind or act according to their beliefs, then there is no true right of liberty in that country.

It implies that any law interfering with personal liberty must satisfy a 'triple test'.

i. A procedure must be prescribed.
ii. The procedure must withstand the test of one or more fundamental rights conferred under Art. 19; and

[246] *Maneka Gandhi v. Union of India* [1978] SCR (2) 621

iii. It should also be compatible w.r.t right of equality (protection against arbitration) under Art. 14.

Maneka Gandhi's case showed how liberal tendencies had influenced the supreme court in the matter of interpreting fundamental rights, particularly Article 21. A great change had come about in the judicial attitude towards the protection of personal liberty after the traumatic experiences of the emergency period when personal liberty had reached its nadir, as was seen in case of Shivkant Shukla.[247]

Although the true essence of Liberty cannot be sufficiently described in words, still we can try to identify some general principles of liberty. They can be briefly studied as follows:

1. Liberty does not merely mean freedom of body. It means a person's right to express themself in their own way. It can include a person's freedom of speech, ideology, beliefs, his or her lifestyle choices or anything else that they find best suited for themselves. It gives them the right and the power to disagree with others. It saves them from being compelled with the ideas of majority and allows them to be themselves. True liberty is achieved when a person is allowed to live their life as per their own desires without any unnecessary and unjust restraint.
2. Aim of Liberty is to achieve individualism. Only when an individual is given complete liberty, can they be expected to work at their fullest capacity. The extent of Liberty determines the true capability of any person. It facilitates new ideas and creativity which are essential for both the person as an individual and the whole human race as a group. Liberty is the tool of democracies to ensure that an individual undergoes maximum development.
3. Liberty is the natural right of all persons. Its present inherently in all humans by birth. Liberty is not a right given by the law, its only recognized by law as a right. Liberty exists even when no law exists. It should not be curtailed by law without an unnecessary justification.
4. Liberty is of ever-expanding dimensions. In today's world, there are certain other rights that are also included into the right of liberty. Right of sexual orientation, right of self-determination, right of reproductive choices etc. Many such rights continue to be recognized as a part of Liberty.

[247] *A.D.M Jabalpur v. Shivkant Shukla*

However, this doesn't mean that there should be an absolute right of Liberty. Adhering to Mill's Harm Principle, liberty should be curtailed if it violates another person's legitimate rights (any rights given by the law). Also, for the welfare of society, liberty may be invaded. If someone is planning to commit an offence against the state or doing any act that is detrimental to the public order, then it is the duty of State to apprehend him and prevent such misdeed from happening. But special care needs to be given to ensure that such person is indeed going to commit such an offence and objective evidence should be required to detain him. It must not be used to attack the liberty of political opponents or of social activists that continue to raise their displeasure against the State. Detention that is based solely upon the "subjective satisfaction" of the executive needs to be frowned upon by the judiciary and the society. It must in all cases be strictly scrutinized to ensure that not even a single person's liberty is violated for merely expressing his ideology or doing any act unfavourable to the Government.

Despite all the hiccups, the meaning and scope of personal liberty has considerably widened over the years in India. In the coming years after Maneka Gandhi, the horizon of personal liberty has expanded to include a variety of rights. It now includes a woman's liberty to make reproductive choices[248], a Detenue's right to socialize with family members[249] or to publish books and reading materials[250], a right to travel abroad[251] and many other similar rights.

[248] *Suchita Srivastava v. Chandigarh Administration* [2010] SC 235.
[249] *Francis Coralie v. U.T. of Delhi* [1981] SC 746.
[250] *State of Maharashtra v. Prabhakar Pandurang* [1966] SC 424.
[251] *Satwant Singh v. A.P.O* [1967] SC 1836.

5.1.2 Preventive Detention Summarized

Detention is a contrast against personal liberty. It means confining a person within four corners against their will and depriving them of their right of free and voluntary movement. Detention strikes at the root of "personal liberty" of an individual.

Any form of arrest or imprisonment can be directly classified under the heading of "detention". Detention can be both lawful and unlawful. An arbitrary detention i.e., one without a proper legal justification, is generally an unlawful detention. It is considered as one of the worst violations of human rights across the globe. It is imposed upon the whim and fancy of the Executive authority. It's generally used as a tool to silence the human rights activists and any voices of dissent that may be raised against the authority of the State.

"Preventive detention" is detention by way of 'preventive measure'. It's an anticipatory measure to prevent crimes before it happens. State's usually pass various preventive detention laws to allow the detention of persons without trial, in anticipation of an offence on the reasonable suspicion of the detaining authority.

Preventive Detention finds constitutional backing in India. Ironically, the founding fathers introduced Preventive Detention into the Indian Constitution and that too into the Fundamental Rights chapter. Using its special constitutional powers, the Parliament of Independent India passed the first 'Preventive detention Act' in February 1950, within a month of the enforcement of the Constitution. It prohibited the courts from questioning any detention order issued by the Governmen *"Subjective satisfaction of the Executive was the determining factor in each instance."*[252]

In today's world, no democratic country provides for preventive detention into its constitution except India. The British and the Americans have used Preventive Detention only during war time for the limited purpose of national victory.

The Constitutional provision authorizing preventive detention is available only in India. The reason for providing constitutional validity to the draconian preventive detention legislations in India are discussed by various people.

[252] O.H. Bayley, *Preventive Detention in India*, p. x.

V. Swaroop holds the view that "*our founding fathers of the Constitution - the victims of preventive detention in the days of British Imperialism introduced the provision for preventive detention in the Constitution even in peace times"*[253] because they wanted to control the existing situation prevalent in the country especially the communal riots between Hindus and Muslims after partition and probability of armed peasant rebellion in various states led by communists. However, he also believes that the founders didn't want to make preventive detention a lasting feature.

In A.K. Gopalan[254], Hon'ble Justice Mukherjee declared "*The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it."* He was of the view that preventive detention is needed to prevent prejudice to the State by detaining any suspicious persons on reasonable suspicion of the Executive.

Also, Hon'ble Justice Patanjali Shastri, Chief Justice of India, upholding the first "Preventive Detention Act" of 1950 declared that, "*Preventive detention has been given Constitutional status… is doubtlessly designed to prevent an abuse of freedom by anti-social and subversive elements which might imperil the national welfare of an Infant Republic*."[255] He was aware that India being at its infancy in the formation of a democratic polity and the turmoiled situation that persisted in many parts of India could hamper the country's future. There were also problems from outside forces and thus there was a necessity of having preventive detention provisions in India.

Thus, Preventive Detention is an abnormal constitutional power given under the Indian Constitution. It provides for a detention where a person is denied his liberty simply on the basis of "subjective satisfaction of the detaining authority". It is in absolute violation of the right of personal liberty as liberty includes a vast majority of rights. Detaining a person on the basis of 'subjective satisfaction' is indeed against the basic tenets of liberty.

There is no concrete justification for arbitrary detention. Where arbitrariness is involved, natural justice is diminished. Deprivation of liberty of persons on basis of their political stance (or any other unjust cause) under the guise of safeguarding national

[253] B. Uma Devi, *Arrest, Detention and Criminal Justice System* (Oxford University Press) 1 51 Edn. (2012) p.l33
[254] *A.K. Gopalan v. State of Madras* [1950] SCR 88
[255] Ibid.

interest and protecting public order is nothing but an insult to the framers of the Constitution. The framers gave us this right in hope that the people of India would not have to suffer what they went through in the pre-independence era at the hands of the British.

The State should only be allowed to enforce preventive detention in very specific situations with considerable limitations and safeguards. Some of these situations as identified in this research are.

1. During the times of war as used by the U.S and the British. Preventive Detention may be allowed if it could help to ensure the country's victory in war. For instance, MISA was used during the Bangladesh Liberation war. However, it continued to stay in force even when the war ended. Special care must be given to limit the application of such detention laws to only during war times. Also, such laws must be just and should not allow very broad powers that could be misused to openly violate Human Right.
2. Protection of State must be only on the basis of objective satisfaction of the detaining authority. Detention merely on the basis of subjective satisfaction would be nothing short of arbitrary detention. State must show objective evidence that is enough to compel a person to be detained. Detention on mere subjective satisfaction should be absolutely prohibited.

   For instance, in a case[256], the detention under MISA was justified as the detainees were members of an organized dacoit group. It is sufficient reason to justify their detention. Whereas when political enemies of the government are detained, its generally in pursuit of a political vendetta. In such cases, hard evidence must be shown which sufficiently proves that actions of such people were detrimental to the State and not just to the Government itself. Holding of peaceful protests and rallies against Govt. schemes is within the right of liberty of people and it cannot be used to detain a person as it does not threaten the State.
3. To protect the public order. For instance, in cases of high communal violence as was prevalent during the times of partition. Public order must be clearly defined. The element of subjective satisfaction should be minimal. State must

[256] *Babulal v. State of West Bengal* [1973] SC 606

> reasonably show that any actions of the individual actually affect the public peace and is not merely a disguise to curtail liberty. There must be a rational nexus between the act of person and the suspected outcome. Public order can only be violated when there is a serious threat to life and property of the individuals or the State. When there is direct threat to the society, the ground of public order should be used. Otherwise, its just a tool to curtail people's liberty and further the governmental agenda.

Thus, preventive detention laws must be used only in a handful of extreme cases. But that is not the case today. Preventive detention is openly being misused for curtailing liberty of ordinary people for the simple reason that they've raised their concerns against the State's policies. Such detention is in complete contravention with the right of personal liberty. In some cases, preventive detention could be allowed, but arbitrary detention should not be allowed in any case.

5.1.3 Judicial position on safeguarding liberty against Preventive Detention

The Indian Constitution guarantees personal liberty under Art. 21 of the Constitution and certain procedural safeguards under Art. 22. A combined reading of the two suggests that even though there is a right of personal liberty given to Indian citizens, such right is not an absolute one and can be denied if such detention is as per the "procedure established by law" provided that such procedure is "Just, Fair and Reasonable".

The first two clauses of Art. 22 give various rights to a person detained under ordinary detention laws. However, such safeguards are not provided to people detained under "*preventive detention laws or enemy aliens*".[257]

Article 22(3) recognizes the power of the government to pass preventative detention legislations. This provision gives the Government an unprecedented and extraordinary power of detention which is often misused to curtail the right of personal liberty. This research work aims to analyse how the Judiciary has tackled the issue of personal liberty under various "preventive detention laws".

Starting with the first "Preventive Detention Act, 1950", which was enacted with a view to allow the State to detain any "anti-national elements" who may attempt to carry hostile act towards the country.

Under this Act, A.K Gopalan was detained several times as he was a political opponent of the government. In his case the courts took a narrow view that even though Sec. 14 of the Act was in contravention with Art. 22 of the constitution, the detention of A.K Gopalan was not unlawful.

Court considered both articles 21 and 22 as being separate and autonomous to one another. Personal Liberty could be curtailed by preventive detention laws as long as it complied with the "legally established procedure". Justice Shastri even went on to justify the preventive detention laws by calling them a necessity for the *"national welfare of the infant republic"*.[258] It was evident that individual liberty was not one of court's primary concerns. Courts would allow personal liberty to be curtailed even in

[257] Constitution of India 1950, Art. 22(3)
[258] *A.K. Gopalan v. State of Madras* [1950] SCR 88

case of a bad law (unjust, unfair and unreasonable). This resulted in the detenue being detained merely on the subjective satisfaction which as already discussed marks the beginning of arbitrariness and the end of justice.

However**, Justice Fazal Ali** in his strong voice of dissent raised concerns against such preventive detention. He was of the opinion that any detention without a valid justification (i.e., any arbitrary detention) was unlawful and in contrast with the right secured under Art. 21 of the Constitution.

Even though his voice was in the minority at that time, later on his opinion was held to be correct. He understood the true scope of the right of Personal Liberty.

In Maneka Gandhi's case[259], the court overruling A.K. Gopalan declared that *"that 'personal liberty' under Article 21 of the widest amplitude".* Court had started to realize the importance of right of personal liberty. They expanded its scope and held that Art. 21 is of a very wide horizon which also encompasses rights given under Art. 19 as well. Finally, courts also made it difficult to make laws for arbitrary detention as any law made to deprive a person of his liberty had to be "Just, Fair and Reasonable".

So, although under the first "Preventive Detention Act, 1950", the Court allowed liberty to be curtailed, it later realized its mistake and overruled its earlier decision to give primacy to the right of liberty. It can be justified also because India was no longer "*an infant republic"* at time when Maneka's case was decided. The view adopted in Maneka was correct because it removes arbitrariness from the law and thus allows for the establishment of a more prudent and justified legal system in which people's liberty cannot be curtailed simply because they have a different opinion than the government about any subject matter.

Talking about the "Maintenance of Internal Security Act" of 1971 (MISA), which was enacted to ensure India's security during the Bangladesh Liberation War. Because of the war, there was a large influx of people from Bangladesh in India which also posed a security threat to the nation.

However, MISA continued even after the war and was regularly used to arrest and harass those who raised their voices against the political tyranny of Indira Gandhi. MISA was also placed in the 9th Schedule which made it immune from judicial scrutiny.

[259] *Maneka Gandhi v. Union of India* [1978] SCR (2) 621

In dealing with MISA, there were two different positions of courts, moderate in pre-emergency era and conservative during the emergency period. The valuation of right to liberty was also different is both these cases.

In the pre-emergency era, the Court was somewhat considerate of personal liberty of people. It only sought to enforce detention in extreme cases. For instance, in Srilal Shaw's case[260], the court expressly ruled the detention under MISA unlawful holding that, when a punitive law is available[261] which is sufficient to easily prosecute and punish a person, any preventive measures should not be used. While on the other hand in an extreme case[262], where the detainees were a member of an organized gang indulged in armed dacoity, their detention was upheld to prevent them from endangering innocent lives.

This approach of the court was sensible and justified. The personal liberty was decided on a case-to-case basis and preventive detention was allowed in the most extreme cases. In other cases, the judiciary suggested giving primacy to ordinary laws that do not arbitrarily deny a person of his "right to liberty."

However, this approach of the Court changed when the emergency was imposed by the then P.M Smt. Indira Gandhi. This marked the beginning of perhaps the most-darkest days of independent India. MISA was blatantly used to curtail liberty and "*thousands of innocent people were believed to have been arbitrarily arrested, tortured and in some cases, even forcibly sterilized*."[263]

Sec 16-A of MISA prohibited the Courts from exercising its constitutional power to issue the "writ of Habeas Corpus" under Art. 226 and determining the validity of detention. This provision was challenged in the court. By overwhelming majority of 4:1, the courts declared that the law was valid holding that*, "it was a rule of evidence, and it was not open either to the detenu or to the Court to ask for grounds of detention."* And w.r.t personal liberty, the court further held that *"Article 21 is the sole repository of rights to life and personal liberty against the State. Any claim to a writ of Habeas Corpus for enforcement of Article 21 becomes barred by the Presidential Order under Art. 359."*

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[260] *Srilal Shaw v. State of W.B.* [1973] SC 606
[261] Railway Property Act, 1966
[262] *Babulal v. State of West Bengal* [1973] SC 606
[263] Saxena Priti. *Preventive Detention and Human Rights*. (Deep & Deep Publications.) pp. 99

In a period when liberties were being trampled, Justice HR Khanna stood up to the Emergency and the Prime Minister herself. Expressing his strong dissent, he roared as a protector of liberties, "*without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning*."

He understood the importance of personal liberty in its true context. By recognizing the need of giving 'sanctity' to life and personal liberty, he highlights that the Judiciary needs to tread carefully in such cases. Since Life and Liberty hold utmost importance, using the positivist approach of merely deciding the case based upon the written law would be in violation of the basic principles and ideas enshrined in the constitution.

Justice Khanna instead focused on a naturalist approach of law, which gives a wider protection to the right of personal liberty as it recognizes that the right of liberty is inherent in all persons even without being expressly given by the constitution. He emphasized that the right of liberty cannot be taken away even with the authority of law, as this right is "*not the creation of the Constitution*", it had always existed and was only recognized under Art. 21.

Although the majority of judges decided the case as per the correct position of the existing law, Justice H.R. Khanna recognized a wider scope of the right of personal liberty based on the view that this right in inherent in every human being and thus cannot be taken away even by the authority of the law. His position was later declared to be correct. Alas, his sole dissent in the case fell on deaf ears of the majority of the judges and thus wasn't enough to uphold the importance of personal liberty.

The effect of the case was that the judiciary was barred from examining the legality of the orders of such detention. In these dark times, even the courts had abandoned the people, leaving them hopeless and confined to the mercy of the State. Even till this date it is recognized as the lowest phase of Indian judiciary.

Jumping on to "The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act" of 1974 (or COFEPOSA) which was enacted to deter economic offences. It called for preventative detention in order to retain and develop foreign currency while also deterring illegal commerce. It was enacted as a backup for MISA. And similar to MISA in habeas corpus case, the judiciary was also heavily influenced by the enactment of the emergency.

For instance, in Attorney General of India v. Amrit Lal Prajivandas[264], the nine-judge bench unanimously denied the detenue from questioning his detention holding that, "*during the period of emergency, the president is empowered to suspend the fundamental rights of people and a detenue has no locus standi to question the reasons or grounds of his detention*." The court siding with the State was of the view that during the period of emergency, State can make laws that prevent the detenue from challenging his detention. When emergency is imposed, the President can suspend the enforcement of fundamental rights. If as a result, the detenues rights are violated, he cannot question such violation. This decision thus allowed the people to be detained in prison at the mercy of the State and also stripped them of their "right of making a representation" and knowing the grounds of arrest.

However, once the emergency was over the Court inclined towards a more liberal stance. It started to give due importance to personal liberty and especially the safeguards available in cases of preventive detention.

In Narendra v. B.B. Gurjal[265], The Court declared that, - "*The constitutional safeguards embodied in Article 22(5) are available to a person detained under the Conservation of Foreign Exchange, Prevention of Smuggling Activities Act, 1974 (COFEPOSA)."*

And strengthening its position as a protector of safeguards, the Court in Kamlesh Kumar's case[266] held that the detenue had a "right to make his representation" to the officer specially empowered by the Govt. "*in addition to his right to make representation to the State Government".*

Thus, since COFEPOSA did not deal with any heinous offences as such, the importance of personal liberty was highlighted by the Court's decisions of upholding the constitutional safeguards especially in the post-emergency era.

The "National Security Act" (NSA), came in force in 1980 when the president gave approval to the "national security ordinance". However, some four years later another ordinance was passed to make NSA more effective. It had a crippling effect of nullifying many decisions of court where detention was struck down on the grounds of being "*vague, non-existent or unconnected*". It also considerably restricted the scope of judicial review of preventive detention legislations.

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[264] [1994] 5 SCC 54.
[265] [1979] SC 420.
[266] *Kamlesh Kumar Ishwardas Patel v. Union of India* [1995] 4 SCC 51

A.K. Roy, a member of the Parliament, was detained under the provisions of NSA for indulging in activities 'prejudicial to public order.' In the NSA case[267], he challenged his detention and the validity of the Act. The court took a mixed stance in this case, and upheld the constitutional validity of the NSA holding that "*Act was neither vague nor arbitrary in it provisions providing for detention of persons on certain grounds."* It meant that the State now had vast powers that allowed in to curtail personal liberty on grounds that were questionable to say the least.

However, Court gave several directions that assured at least some safeguards to the detainees. These directions included the following.

i. Detainee's family must be quickly notified of arrest and location of detention.
ii. He must be detained near his place of residence.
iii. He should be allowed access to books, notebooks, his own meals and visits from friends and family.
iv. He must be kept separate from convicted persons.
v. He must not be mistreated or beaten up and must be treated according to basic human dignity.

These directions ensured that there were at least some concerns about the conditions of detainees. Although the liberty of detainees was not guaranteed, but these directions guarantee a more humane detention. The detainee's personal liberty was not considered a major issue at the cost of providing for a more humane detention.

Another issue of the NSA case was about the enforcement of the 44th Amendment. The 44th Constitutional Amendment was passed in 1978, well before the NSA case. It provided for changes in Art. 22 which required the establishment of an advisory board before which the detenue could make his representation. In a way, it was necessary step to help detenues achieve their liberty. However, the provisions of this amendment were not brought into force.

In Ak Roy's case, the majority disapproved of the incident and declared that it was "unable to intervene". While Tulzapurkar and A.C Gupta, JJ, raised their voices of dissent and they issued an "order of mandamus" to the federal government to bring about the said modification. They declared, "*The Central Government had failed to*

[267] *A.K. Roy v. Union of India* [1982] SC 710

fulfil 'its' constitutional responsibility by failing to implement the 44th Amendment's provisions."

Here the minority viewpoint supports personal liberty as they favoured the provisions of the 44th Amendment which supported the Detenue's right of representation before the board. It was clear that the amendment was designed to protect citizens from abuse of powers under preventive detention laws. Thus, it's a sign of relief that judiciary secured certain rights for the detainees, however it still lacked behind in securing their right of personal liberty.

Personal Liberty was given secondary importance while 'public order' was given primacy. The term Public Order is vague and allows the executive to curtail liberty of persons who raise their voices against the government under the garb of maintaining public order. The argument of safeguarding the 'public order' is used to safeguard the executive's own interests. Our Constitution secures a variety of rights to the citizens such as the right of expression under Art. 19 (which also includes the right to protest). As previously discussed, detaining a person based on their opinion or their ideological differences with the government is nothing but an arbitrary detention. The detention based upon the ground of 'Maintenance of Public Order' should require some specific criteria to be fulfilled in order to bring such detention into effect. It must be shown how the actions of an individual have affected the Public Order. Mere cases where the people have raised their voices of displeasure or have peacefully protested against any executive order should not be considered enough reasons for imposing detention to maintain Public Order.

The outcome is that there has been a spate of recent cases, in which different State governments have invoked the stringent provisions of the NSA to detain citizens for questionable offences.[268] Just last year, Allahabad H.C. called out the blatant misuse of NSA while quashing an overwhelming majority of preventive detention orders.[269] The situation is that NSA is imposed on a regular basis to arbitrarily detain people in the name of protecting Public Order. Until the grounds of detention are not made more

[268] Rocky Singh, 'What is the NSA?' (The Hindu) https://www.thehindu.com/news/national/what-is-national-security-act/article26292232.ece

[269] Kaunain Sherrif, '94 out of 120 orders quashed, Allahabad H.C. calls out abuse of NSA in UP' (The Indian Express) https://indianexpress.com/article/express-exclusive/national-security-act-uttar-pradesh-police-detentions-cow-slaughter-ban-7260425/

concrete, it is feared that the present situation would continue and the liberty would be curtailed at the mercy of the State.

Later on, in the year 1985 "Terrorist and Disruptive Activities (Prevention) Act" (TADA) was enacted primarily to address specific acts of terrorism in various parts of the Indian subcontinent. It gave a very broad definition of terrorism and included provisions in blatant violation of fundamental rights such as allowing arbitrary detention and minimalizing the safeguards available with a detainee, while also making the process of defending himself more stringent and complex.

In landmark case of "Kartar Singh v. State of Punjab"[270] the ambit and scope of TADA was narrowed significantly by the SC as the court declared that "*Section 3 of the Act operates when a person not only intends to overawe the government or create a terror in people etc. but also when he uses the arms and ammunition which results in death or likely to cause deaths and damages the property".*

Thus, court declared that in order to declare a person as a 'terrorist' a state must show that his 'intention, action and outcome' exist together. It made it even difficult for the State to detain persons arbitrarily. One cannot and should not be declared a terrorist solely on the basis of his 'intention'. Unless he does an overt act in furtherance of such intention, it cannot be said that such person is a terrorist. The wide definition under TADA was misused regularly by declaring people as terrorists on basis of "the subjective satisfaction" of the State. The Judiciary curbed its misuse by giving specific conditions to be satisfied before imposing TADA. It was a huge sign of relief for the people as now their liberty could not be arbitrarily curtailed.

Court strictly protected personal liberty under preventive detention laws by declaring that TADA cannot be imposed on citizens if the situation can be tackled under the ordinary penal laws. Also, in another case[271], it was declared that all detainees would be entitled to bail if the police did not complete investigation in stipulated time.

Thus, in dealing with TADA, court understood that the Act was indeed too harsh and as such it took extensive consideration in safeguarding personal liberty of all persons charged under the Act.

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[270] [1994] 3 SCC 569

[271] *Hitendra Vishnu Thakur v. State of Maharashtra* [1994] 4 SCC 602.

Finally, the Indian constitution also envisions certain safeguards that must be ensured to all the detainees. Clause (4) to (7) guarantee the certain safeguards to all detainees like, "*Review by Board, Communication of grounds and right of representation"*

These rights are available to all persons against whom proceedings or executive action is initiated under Preventive Detention laws. For the most part, judiciary has exercised enough caution and ensured these rights of the detenues are not denied.

This has ensured that the detainees are provided ample security and their right of personal liberty has been steadily enforced and not blatantly ignored.

5.2 Inferences and Trend Analysis

It is an understatement to say that the position of judiciary has fluctuated over the period of time, especially regarding the importance of personal liberty. In dealing with cases of preventive detention, there are three major yardsticks that can be used to understand the rational and give some weight to the position of the judiciary.

These yardsticks being the timeline of independent India, necessity of preventive detention legislations and finally the emergency phase. These factors have played a key role in affecting the stance of judiciary. Of course, this is not a hardbound fact and many a times, the court might have acted adversely to the written inferences. The idea of this segment is to briefly identify and analyse the trend of judiciary's stance on personal liberty in these different situations.

These yardsticks that give a general idea about the trend of personal liberty, are analysed below briefly.

1) **Timeline of Independent India**

   In the early days of independence, the stance of courts on personal liberty was quite restrictive, the courts understood the need of preventive detention legislations and allowed in to be curtailed in the name of safeguarding the "infant republic".[272]

   This position changed as time progressed. As independent India grew older, its constitutional values grew bolder. The judiciary realized that to truly achieve the dreams of a Democratic Republic, the constitutional values; especially that of life and liberty need to be protected and promoted. This view was evident from court's position in Maneka Gandhi and Kartar Singh's case.

2) **Necessity of the Law**

   Need for the preventive detention legislations is another major factor considered by the Indian judiciary in addressing the issue of personal liberty. The judiciary dealt with cases keeping in mind that the main object of preventive detention is to prevent crimes and protect the State. In cases that did not present an imminent threat to the State the liberty of individual was protected.[273] Similarly, under

[272] *A.K. Gopalan v. State of Madras* [1950] SCR 88
[273] *Srilal Shaw v. State of W.B*. [1973] SC 606

COFEPOSA, the court understood that the legislation was primarily for economic offences and thus ensured that the constitutional rights of detainees are safeguarded.

Whereas in the NSA case[274], which came into light when the Khalistani extremism in India was at its peak and there were also constant disturbances in Kashmir and North-Eastern states. The courts allowed the liberty to be curtailed. Courts allowed the State to have vast questionable powers at the cost of securing the national interest and for meeting the needs of preventive detention law.

3) Phase of National Emergency

The national emergency imposed on 25th June 1975, completely changed the judicial outlook on personal liberty of individuals. Before the declaration of national emergency, the judiciary had begun to understand the importance of personal liberty and started to give it its due importance.[275]

However, this all changed once the emergency was imposed. One of the worst instances is of the Habeas corpus case,[276] where the decision barred the court from challenging the legality of the detention thus depriving people of their personal liberty. Similarly in another case where the liberty was infringed during emergency, court barred the persons from challenge detention as fundamental rights are suspended by the president during emergency and thus there is no locus standi for detenues.[277]

This showed that during the emergency, even the judiciary also showed very minimal care towards the liberty of people, and gave the State unfettered powers which made the already dark national emergency an even harder phase for the ordinary people.

However, thankfully once the emergency was removed, judiciary regained its dignity and upheld the importance of personal liberty[278]. In the post emergency-era the right of personal liberty was even recognized in dealing with the stringent legislation such as TADA.[279]

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[274] *A.K. Roy v. Union of India*, [1982] SC 710
[275] *Kharak Singh v. State of UP* [1963] SC. 173., *Srilal Shaw v. State of W.B.* [1973] SC 606
[276] *A.D.M Jabalpur v. S. Shukla* [1976] SC 1206
[277] *Attorney general of India v. Amrit Lal Prajivandas* [1994] 5 SCC 54
[278] *Maneka Gandhi Maneka Gandhi v. Union of India* [1978] SCR (2) 621
[279] *Kartar Singh v. State of Punjab* [1994] 3 SCC 569

Thus, these three criteria help us understand in a broader sense as to what role has the judiciary played in dealing with personal liberty under preventive detention.

It's difficult to determine objectively whether the judiciary was successful in upholding liberty through these difficult phases. But one thing is for certain, the stance of judiciary has changed quite a lot depending on the prevailing circumstances and in all the cases it had tried to maintain a balanced position between the personal liberty of citizens and national interest according to the need of the times.

5.3 Suggestions and Way Forward

To ensure that in all future cases, the judiciary plays a more prominent role in safeguarding the personal liberty of people, the following suggestions are provided.

1) Use of preventive detention must be allowed in only extreme situations. As Justice Rohinton F. Nariman has observed, "*Preventive detention is a necessary evil only to prevent public disorder. The court must ensure that the facts brought before it directly and inevitably leads to a harm, danger or alarm or feeling of insecurity among the general public or any section thereof at large*."[280]

2) The concept of "Subjective Satisfaction" of the detaining authority in passing such kind of detention orders needs to be looked into. The 'subjective satisfaction' of the executive cannot be challenged before the Courts. It results in the detention being arbitrary. It strikes at the core principles of Art. 14, 19 and 21. On this basis, it must be removed completely. The executive authority must be made liable to present objective reasons that compelled them to detain the person. If no reasons are shown, then the person must be released immediately.

3) The period of preventive detention under Article 22(4) should be reduced and the process of representation should be much faster because it is unjust and arbitrary that a person should be 'preventively detained' for an unnecessarily long time without his case being referred to an Advisory Committee.

4) The dark days of emergency remind us how under MISA the courts were denied from looking into the legality of the detentions. In order to prevent the past from repeating itself, a provision is necessary stating that the power of judicial review of all preventive detention orders should not be excluded even during the times of imposition of national emergency. This provision needs to be inserted under Art. 22 as a constitutional amendment so that it makes it that much harder for the government to deny the Court from looking into the detention. However, since no government would be interested in limiting their own powers, the Judiciary must take it upon itself to look into all preventive detention orders

[280] *Akhtar Begum v. State of Telangana* [2021] W.P.No.32490

which are passed even in the times of emergency. It is both, a constitutional responsibility as a protector of rights and a chance to redeem itself for its judicial position in ADM Jabalpur.

5) The National Security Act, which is presently used to provide for 'preventive detention' needs to be amended on some major points. Firstly, Sec. 13 which allows detention up to 12 months should be reduced to one month only. Secondly, Sec 14A should be repealed and in no cases the detention should extend beyond three months without the opinion of Advisory Boards. Thirdly, Sec. 16 which gives immunity to the State from legal proceedings against arbitrary detention carried out in 'good faith' should be repealed and the State authorities should be held accountable for arbitrarily curtailing another person's liberty. Finally, the ground of 'Public Order' given under Sec 3 is misused quite frequently by the detaining authorities. Either there should be given a clear meaning to the term 'Public Order' which justifies such a harsh detention or this ground should be removed completely.

6) A change is required from within the Judiciary itself. It must be vigilant in dealing with cases of preventive detention. It must hold the right of life and personal liberty in the highest regard. Justice H.R. Khanna's remarkable dissenting opinion in favour of personal liberty used the naturalist approach of law which holds that the right of personal liberty is not the creation of law, such right exists inherently within human beings and cannot be taken away by an arbitrary law. This must be the key approach taken by the judiciary in dealing with such matters concerning the right of personal liberty.

7) Securing the Independence of Judiciary is the need of the hour. There needs to be a complete "*separation of Judiciary from the executive*" as directed under the Constitution[281] to ensure that that judiciary is independent and is free from the influences of the executive. This will allow the judiciary from acting under the control outside powers which may have malicious intent towards its political enemies. When it is free from any executive control, the judiciary can act towards securing personal liberty without restraints.

[281] Constitution of India 1950, Art. 50

8) Building on the last suggestion, the judges must be brave enough to stand up to a strong executive. In doing so, the judiciary must draw inspiration from the brave dissenting opinions various judges, most prominently, Justice Sinha of Allahabad H.C., referred as 'the strange man who could not be bribed or threatened' and Justice H.R. Khanna whose brave dissent in ADM Jabalpur, which as he later noted in his autobiography,[282] had cost him the chair of CJI. They must be the ideals for all the judges of today's times when the misuse of preventive detention laws is as high as ever. It secures the other forefront of Judicial independence, viz, impartiality of judges.

9) 44th Constitutional amendment needs to be enforced immediately. This constitutional amendment vastly favours the right of personal liberty under preventive detention laws. It reduces the period of three months to two months to keep a person in preventive detention without getting the report of the Advisory Board. However, this amendment has not been brought into existence for the simple reason to allow the executive to misuse its powers and curtail the liberty of persons. Despite the writ of mandamus issued by the minority judges in AK Roy's case, this amendment is still kept in cold storage. The Government has no justification in sitting over this amendment. It has to notify the coming into force of the amendment. It will relieve the pangs of the preventive detention.[283]

10) There is a need of judicial accountability mechanism in India. Any judges that are found to be associated with the executive authorities for purpose of furthering the governmental agenda need to be strictly punished. Sometimes, judges have acted according to the desires of the government or have mistakenly allowed the personal liberty to be curtailed. Judges need to be held accountable for their actions as they are given the paramount task as the 'Custodian of the Constitution'. The accountability mechanism must be operated from within the judiciary itself. If they are found to be indulging in activities that are detrimental to people's trust in the judiciary, they must be impeached and stripped of their

[282] HR Khanna, *Neither Roses nor Thorns*
[283] Devadas P, 'Judicial review of preventive detention orders' (2005)311.

judgeship. This will ensure that the fundamental rights of citizens are not infringed by those in power.

11) Preventive detention is considered a draconian law across the world and is only used during war times. However, India is the only democratic and civilized country that still uses preventive detention during times of peace. As such, it must especially adhere to the many international conventions and declarations such as UDHR, ICCPR and the ECHR which have recognized a basic aspect of personal liberty. Also, many of these international instruments and bodies like UNHRC and UN OHCHR have given several principles which provide various measures that must be implemented into the criminal law system of the country to ensure that human rights are not violated and detainees are at the very least given humane treatment. But, the ultimate goal of the Indian state should be towards the total abolition of preventive detention in peace times and allowing its limited use during the times of war.

These suggestions are made with the solemn hope that, a proper balance will be struck between individual liberty and public interest. A country based on Rule of Law and democratic principles, which had won its liberty from the foreign rule after being denied the 'right of life and personal liberty' cannot be a silent spectator to human sufferings. The recent trends show that the country and the courts has indeed started to understand the importance of personal liberty.

At first it was Justice HR Khanna as the lone crusader of democracy who upheld the dignity of the Court during the testing times and later on his view became widely accepted. In 2017, the Supreme Court overruled the decision of ADM Jabalpur and the majority, almost echoing J. Khanna, observed:

"No civilized state can contemplate an encroachment upon life and personal liberty without the authority of law. Neither life nor liberty are bounties conferred by the state nor does the Constitution create these rights. The right to life has existed even before the advent of the Constitution. In recognising the right, the Constitution does not become the sole repository of the right."[284]

[284] *K.S. Puttaswamy v. Union of India* [2017] SC 4161

By this decision, the judiciary has made an attempt to bury the darkest chapter of its own history, but only time will tell whether it has been truly and finally buried. However, it brings a ray of hope for the future of personal liberty and freedoms in India.

It's the Judiciary's duty to ensure check on the powers of the State. Because, after all, Liberty always demands a limitation on political authority; power as such when uncontrolled is always the natural enemy of freedom. The broader the discretion, the greater the chance of its abuse. Where discretion is absolute man has always suffered. Absolute discretion is more destructive of freedom than any of man's other inventions. And also, absolute discretion, like corruption marks the beginning of the end of liberty.[285]

The researcher would like to end with views of P.N. Bhagwati, J in which he clearly states what role the judiciary has played in dealing with cases of preventive detention and provides a general direction for the courts to follow in the coming future.

"*The Court has always regarded personal liberty as the most precious possession of mankind and refused to tolerate illegal detention, regardless of the social cost involved"*[286]

[285] J.S. Mill, *On Liberty* Chapter IV
[286] *Smt. Ichhu Devi v. Union of India* [1981] SCR (1) 640

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