Preventive Detention in India: Experiences and some Suggested Reforms

C.M. JARIWALA*

I

Preventive detention is the arch enemy of the right to personal liberty. It envisages detention without trial which is against the basic canons of criminal jurisprudence. At times when the liberty of the individuals crosses the limit and threatens the very existence of the State and at that point of time it fails to control the enjoyment of individual's liberty, then the State uses the preventive detention measure. This measure is not unknown in the dictatorial and the democratic regimes; the capitalist, the socialist and the communist governments. However, there was a difference in the exercise of the said power; some countries tried to handle this measure carefully and cautiously. They adopted it casually and only in grave situation affecting the very existence of the State. In other countries it became a part of the life of the country. They used the measure indiscriminately in time of war and peace. And thus in such countries the right to personal liberty remained in eclipse.

Now coming to the Indian experience, before Independence, the British regime in order to establish a strong foothold in India used the preventive detention measure for an indefinite period. When India got independence the provincial legislatures enacted laws relating to preventive detention. Though the freedom fighters were aiming towards securing better rights to the citizens of Free India, yet it was unfortunate that the preventive detention measure at the central level was put into force immediately after the commencement of the Constitution or India. Sardar Patel, who piloted the first Bill with respect to preventive detention, conceded that he had two sleepless nights before introducing such a Bill in Parliament. The Preventive Detention Act, 1950, was amended thrice to give some more protection to the person detained under the Act. In the beginning the Act was renewed every year; thereafter, every two years; and finally, every three years Parliament continued the operation of the Act. The Act of 1950 came to an end in the year 1969. But thereafter no vacuum was created in the area of preventive detention. The state legislatures immediately passed laws relating to preventive detention. This state of affairs continued until the Maintenance of Internal Security Act, 1971, came into force. This Act was

*LL.M. Ph.D. (London), Reader, Faculty of Law, Banaras Hindu University.

amended thrice so as to impose more restrictions on the persons detained under the Act and to allow the executive a free hand in matters of preventive detention. On June 27, 1975, the Presidential order gave blanket power to the executive authority to deal with persons preventively detained. It imposed a blanket ban on the detenu to claim any safeguard against the measure. This resulted in the 19 months' emergency. During the period between 26-27 June, 1975 a large number of persons were put behind the bars without trial and without affording to them any basic safeguards.

The brief survey of the twenty-eight years of preventive detention in India shows that the Indian experience falls in the second category mentioned above. This experience has raised cries that the existing measure relating to preventive detention should be repealed immediately and also that the constitutional provisions relating to preventive detention should be scrapped.

Following are some of the suggestions relating to the constitutional provisions with respect to preventive detention.

II

Entry 9 of List I of the Seventh Schedule to the Constitution confers on Parliament power to make a law with respect to preventive detention for reasons connected with defence, foreign affairs, or the security of India and persons subjected to such detention. The grounds of defence of India, foreign affairs and the security of India are the grounds on which the very existence of the Nation is based. And therefore, it is justified to give Parliament an exclusive power in this connection. The Government of India Act, 1935, also gave a similar exclusive power to the Federal Legislature. In other countries the Central Legislature is either given similar power or it has exercised the preventive detention power on similar grounds. For example, the Constitution of Malaysia gave the Central Legislature an exclusive power in this connection. It England, the United States of America, Ghana, Nigeria, Pakistan, *etc.*, the grounds on which the preventive detention measure was exercised were similar.

Entry 3 of List III confers concurrent power on Parliament and the state legislatures to make any law relating to preventive detention for reasons connected with the security of the State, the maintenance of public order or the maintenance of supplies and services essential to the community and persons subjected to such detention. It may be pointed out that in the countries referred to above the preventive detention measure is enacted at the Union level. The reason is that the provinces may not pass such a law to suit its own interests sacrificing the most valuable right to personal liberty. On the contrary, the Government of India Act, 1935, conferred on

the provincial legislatures also a power with respect to preventive detention for reasons connected with the maintenance of public order. Immediately before the commencement of the Constitution of India, there were diverse preventive detention laws passed by the provincial legislatures.[1]

The present Constitution is an improvement over the Act of 1935 as it did not give any exclusive power to state legislatures in this connection. But this does not mean that at no point of time there were jungle of state preventive detention laws. Soon after the Preventive Detention (Continuance) Act, 1966, came to an end, majority of the state legislatures passed preventive detention laws.[2] There was no uniformity amongst these legislations. Some were liberal whereas others were strict. In order to avoid the diversities in the preventive detention laws of the states, the Maintenance of Internal Security Act, 1971 was passed.[3] Recently when the States of Madhya Pradesh and the Jammu and Kashmir have passed Ordinances dealing with preventive detention, there was a lot of hue and cry against those measures. And therefore, it may be suggested that Parliament alone should be given power with respect to preventive detention.

Once we accepted the proposition that the concurrent power with respect to preventive detention may be abolished, a question arises: Whether Parliament should be given power to make a law relating to preventive detention on the grounds mentioned in entry 3 of List III?

As regards the ground of maintenance of public order is concerned, it was used in maximum cases of preventive detention because this ground was the most easily available one to the executive to control the law and order problems. There was a spurt of preventive detention cases especially since the year 1968 when persons were detained on grounds, for example, snatching away cash and valuables and teasing school girls[4], injuring one individual with a knife[5]; causing assault to one individual and inflicting grievous injury to his right leg[6]; causing undue harassment to respec-

---

1. See for example, the Assam Act of 1947 (V); Bengal Act of 1948 (III); the Orissa Act of 1948 (IV).

2. See for example, the Orissa Preventive Detention Act, 1966, the Rajasthan Preventive Detention Act, 1970, the Madhya Pradesh Public Safety Act, 1970; the Maharashtra Preventive Detention Act, 1970.

3. *L.S.D.* 1971, Vol. 3, pp. 192-193.

4. *Sushanta* v. *State of West Bengal*, A.I.R. 1969 S.C. 1004.

5. *Sudhir Kumar* v. *Police Commr., Calcutta*, A.I.R 1970 S.C. 814. See also assault cases: *Mintu Bhakta* v. *State of W.B.*, A.I.R. 1972 S.C. 2132; *Dipak Bose* v. *State of W.B.*, A.I.R. 1972 S.C. 2686.

6. *P. Mukherjee* v. *State of W.B.*, A.I.R. 1970 S.C. 852. See also *Manu Bhusan* v. *State of W.B.*, A.I.R. 1973 S.C. 295.

table young ladies;[7] shouting slogans like 'Naxalites Zindabad,' 'Long live Revolution' and 'Mao Tse Tung Zindabad'[8] demanding forcibly money from an individual,[9] etc. The above grounds have no direct relation with the maintenance of public order and still the executive wanted to control the said matters through extraordinary measures such as preventive detention.

Chief Justice Hidayatullah drew a fine distinction between the terms 'the security of state', 'public order' and 'law and order'. He was of the opinion that the security of state forms part of the inner circle, then comes the public order and finally in the outer circle comes the law and order.[10] In spite of this distinction, the demarcating line becomes blurred in certain cases. For example, a person commits assault or murder of another person. This is merely a problem of maintaining law and order. But if such a murder is committed in a public place or it has a communal colour, then such an act may lead to disturbance of the current of life of the community. Under such circumstances, the problem comes within the purview of the maintenance of public order.[11] This overlapping between the circles of 'law and order' and 'public order' has given the executive a free hand in controlling the law and order problem in the name of maintaining public order through this extra-ordinary measure. Once the law and order problems are allowed to be controlled in the name of maintaining public order then the executive will become habitual to take recourse to the extra-ordinary machinery and thus the ordinary criminal law will become blunt.[12] In these cirumstances, it may be suggested that the ground of maintaining public order should be scrapped from the legislative list relating to preventive detention. In England,[13] the United State of America,[14] Australia,[15] Ghana,[16] Pakistan,[17] etc. the preventive detention measures were not used for reasons connected with the maintenance of public order.

As regards other grounds in the concurrent power, the security of a state could be covered under the ground of security of India. The security of a state may be threatened either by war, external aggression or internal disturbance.[18] Thus if the security of a state is in danger, it would also

7. *Arun Ghosh* v. *State of W.B.*, A I.R. 1970 S.C. 1228. See also *In the matter of Adhir Kumar Sharma, The Unreported* cases (S.C.).
8. *Sundara Rao* v. *State of Orissa*, A.I.R. 1972 S.C. 739.
9. *R K. Paul.* v. *State of W.B.*, A.I.R. 1972 S.C. 863.
10. A.I.R. 1970 S.C. 1228, 1230.
11. *Arun Ghosh* v. *State of W.B., supra* note 7.
12. *G. Sadanandan* v. *State of Kerala*, A.I.R. 1966 S.C. 1925, 1928.
13. The Defence (General) Regulations, 1939. See regulation 188.
14. The Internal Security Act, 1950.
15. The War Precaution Act, 1914, this was repealed in 1920 but see section 4.
16. The Preventive Detention Act, 1958; see section 2 (1).
17. The Constitution of Pakistan—see Third Schedule, entry 43.
18. Article 352 also deals with the security of a part of the territory of India.

affect the security of the country. And therefore, security of the country will cover the ground of the security of a state separately enumerated in List III, entry 3. This view also gets support from the decided cases where persons were detained on the ground of security of a state.[19] So far as the ground of maintenance of supplies and services essential to the community is concerned this ground could be covered under the ground of defence of the country. In Australia, the High Court allowed the Commonwealth Parliament to legislate with respect to control of essential commodities under the defence power.[20] In India also the defence power of Parliament can be extended to control the maintenance of supplies and services essential to the life of the community.[21]

As regards the reasons for enacting a preventive detention measure, a question arises: how far is it justified to include all the grounds in one legislation only? The Preventive Detention Act, 1950, and the Maintenance of Internal Security Act, 1971, provided all the grounds in one single legislation. Such a type of legislation gives the executive a wide power to use the extraordinary measure. If the legislature is clear as to why they are using the measure, then they should confine the scope of such a law to only those reasons which are directly related instead of using all the reasons. In case of executive action effecting preventive detention on two grounds, the Supreme Court quashed the detention order on the ground that in the light of detention on two disjunctive grounds the authority making the petention order did not apply its mind which was required by the Act.[22] When the most valuable right of personal liberty is at stake, the legislature should carefully and scrupulously enact a law relating to preventive detention.

Apart from the grounds mentioned in the respective legislative lists, at times the legislature and the executive as well have expanded the scope of the preventive detention measure. In order to control smuggling activities and to conserve foreign exchange, Parliament passed the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. This Act was passed for reasons connected with the security of state. The activities mentioned in the Act cannot be said to have direct and immediate effect on the security of state. At the most it could be covered under the head of the maintenance of essential commodities. Further, the control of

---

19. *Jagan Nath Sathu* v. *Union of India*, A.I.R. 1960 S.C. 625. *Shyamal Mondal* v. *State of W.B.*, A.I.R. 1971 S.C. 2384.

20. *Farey* v. *Bucvelt* (1916) 21 C.L.R. 433; *Andrews* v. *Howell* (1941) 65 C.L.R. 255; *Miller* v. *Commonwealth* (1946) 73 C.L.R. 187.

21. The Defence of India Act, 1962, see section 3 (23).

22. *Kishori Mohan* v. *State of W.B.*, A.I.R. 1972 S.C. 1949; *Akshoy Konai* v. *State of W.B.*, A.I.R. 1973 S.C. 300.

food adulteration through preventive detention for reasons connected with the maintenance of supplies and services essential to the community cannot be justified.[23] The executive expanded the scope of the measure to control social boycott and excommunication,[24] price control etc.[25] There were suggestions in the press and Parliament that for prohibition of untouchability, evasion of taxes, etc., the preventive detention measures could be used. It may be submitted that this extra-ordinary measure was not contemplated to be used in solving socio-economic problems which the society may be facing. These problems should be tackled through the ordinary legal processes. The mere fact that the State failed in solving a problem, should not be a ground to have recourse to such an extraordinary measure. If this is allowed then a time will come when the State will take the help of preventive detention indiscriminately in all cases. And the right to personal liberty, with whatever little scope left by the Constituent Assembly in India, will be subject to permanent eclipse. In this connection it may be suggested that the legislature, the executive, the judiciary and the constituent power should not widen the frontiers of preventive detention.

The long experiences of preventive detention in India raises one more question: under what circumstances and for how long the preventive detention machinery be used? There is no constitutional limitation in this direction. In England, the United States of America, Austrlia, Nigeria, Ireland, Burma, etc., a resort to preventive detention was either available or exercised in time of war or national emergency. And the courts also did not allow the use of such a measure in time of peace.[26] In India right from the beginning of the British regime until todate the preventive detention has been on the statute book. The historical background shows that in the Indian community, the use of preventive detention provisions has become a part of life. And what Chief Justice Gajendragadkar warned in the year 1966 is becoming a reality.[27] He observed that such a continuous use of power would make the conscience of the authorities exercising those powers blunt to the basic right of the citizens and would ultimately pose a serious theat to the basic values on which the democratic way of life in India was founded. And therefor, in this connection it may be suggested that the provisions relating to preventive detention should be transferred from part III of the Constitution of

23. *Misrilal* v. *State*, A.I.R. 1971 Pat. 134.

24. *Shamrao* v. *District Magistrate*, A.I.R. 1952 S.C. 324.

25. *Mishrilal Jain* v. *Dist. Magis. Kamrup*, U.R. (S.C.) 1972, 100, 102.

26. *R (Zadig)* v. *Halliday*, (1917) A.C. 260, 271, *Liveridge* v. *Anderson*, [1942] A.C. 206, 261, *Australian Communist Party* v. *Commwealth* (1951) 83 C.L.R.I., 195; *R(O'Connell)* v. *Military Governor of Hare Park Camp.*, (1924) 2 IR 104, 112, 118; *Bo San Lin* v. *The Commr, of Police*, 1949 B.L.R. 372.

27. *G. Sadanandan* v. *State of Kerala*, *supra* note 12 at 1928.

India to part XVIII. The effect of such a change will be that preventive detention will become a part of the emergency power and the authorities will not use such a measure indiscriminately in times of war and peace. Moreover, the continuation of preventive detention machinery will be subject to the continuation of the proclamation of emergency. But such a conclusion in the light of continuous emergency in India will be meaningless and therefore a correponding constitutional change may be required so as to impose a check on the use of emergency power in extra-ordinary situations only. And, therefore, consequential amendments will be necessary in part XVIII of the Constitution.

III

The Constitution of India in part III makes provision for safeguards against preventive detention. Article 22 (4) to (7) deals with these safeguards. It provides for the safeguard of an advisory board to consider cases of detention for more than three months. Articie 22(4) (a) deals with the constitution of an advisory board. It says that an advisory board shall consist of persons who are, or have been, or are qualified to be appointed as, judges of a High Court. In this connection it may be suggested, that the words 'or are qualified to be appointed as' should be omitted. These persons have no experience of dispensing justice. And the appointing authority may choose any person who is qualified to be a judge from any walk of life. There are cases when the government appointed their own party men or members of Parliament as the members of advisory boards.[28] Though the above suggestion will enhance the workload of the judges of the High Courts, yet these persons can dispense justice better instead of other persons. But this does not mean that all judges are infallible. There were cases when persons were detained on vague[29] irrelevant[30] and non-existent grounds;[31] authorities were not satisfied;[31a] authorities did not

---

28. See *Kishorilal* v. *The State*, A.I.R. 1951 Ass. 169; L S.D. (1951) Part II, Vol. VIII, cols. 2921-22.

29. *Ram Krishna* v. *State of Delhi*, A.I.R. 1953 S.C. 318; *Shyamal* v. *Commr. of Police. Calcutta*, A.I.R. 1970 S.C. 269; *P. Mukherjee* v. *State of W.B.*, *supra* note 6; *Tapan Kumar* v. *State of W.B.*; A.I.R. 1972 S.C. 840.

30. *Sodhi Shamoher Singh* v. *State of Pepsu*, A.I.R. 1954 S.C. 276; *Hari Krisan* v. *State of Mah.*, A.I.R. 1962 S.C. 911; *Sudhir Kumar* v. *Police Commr., Calcutta*, A.I.R. 1970 S.C. 814.

31. *Dayanand Modi* v. *State of Bihar*, A.I.R. 1951 Pat. 47; See also *Mani* v. *Dist. Magis.*, A.I.R. 1950 Mad. 162 (F.B.); *Mott Lal* v. *State of Bihar*, A.I.R. 1968 S.C. 1509; *Rameshwar Lal* v. *State of Bihar*, A.I.R. 1968 S.C. 1303; *Dumka Das* v. *State of J & K.*, A.I.R. 1957 S.C. 164.

31*a*. *Dabu Mahto* v. *State of W.B.*, A.I.R. 1874 S.C. 816. See Jariwala, "Judicial Control of Subjective Satisfacttion: *Debu Mahato* v. *State of W.B.*," 1973 *S.C. Journal* 10.

apply their minds;[32] *malafide* considerations[33] etc. These cases were in fact considered by the advisory boards; and only when the court considered their cases that these infirmities were found and their detentions were quashed. In such cases can one not presume that the advisory board either did not consider these cases seriously or the board had acted on the pressure exerted from above. The working of the advisory board is kept in camera; and therefore, it is difficult to say anything in this connection. However, two suggestions may be made, firstly, a check on the working of the advisory board be provided; and secondly, in order to make the tribunal more impartial the control of the government should be made liberal. This can be possible to a certain extent, for example, by requiring the authority, which appoints the members of the board, to follow the advice given by the Chief Justice of the concerned High Court in such appointments. This will minimise to a certain extent the creeping of political element in the selection.

What procedure the board should follow is not mentioned in the Constitution. Article 22 (7) (c) says that Parliament may by law prescribe the procedure to be followed by an advisory board. Under this provision the power to prescribe the procedure is an exclusive power of Parliament. And, thus, it will maintain uniformity in this regard. The Preventive Detention Act, 1950, and its subsequent continuation Acts, and the Maintenance of Internal Security Act, 1971, adopted a procedure resembling judicial procedure. But the only black spot in the functioning of the board is that the board works in camera and except a part of the report of the board, the rest of the report is not open to the public. Such a secret working may rasie doubts on the working of the advisory board which should be avoided.

Article 22 (4) (a) is subject to the provision that after the consideration of the advisory board that there are sufficient reasons for detention, no such person shall be detained beyond the maximum period prescribed by any law made by Parliament under article 22 (7) (b). This article authorises Parliament by law to prescribe the maximum period for which any person may in any class or classes of cases be detained. This provision imposes a restriction on the state legislature that they cannot pass any law providing for preventive detention for more than three months. It gives exclusive power to Parliament only. Thus, it will maintain uniformity with respect to the maximum period of detention is concerned. But the short-coming in the article is that it does not prescribe any fixed time limit. This is left

32. *Mohd. Akbar* v. *Dist. Magis. Doda*, A.I.R. 1971 J & K. 12; *Keshab Roy* v. *State of W.B.*, A.I.R. 1972 S.C. 926; *Anant Mukhi* v. *State of W.B.*, A.I.R. 1972 S.C. 1256.

33. *In re Anandan*, A.I.R. 1952 Mad. 117; *Ishar Singh* v. *State*, A.I.R. 1953 Pep. 111; *G. Sadanandan* v. *State of Kerala*, *supra* note 12.

to the sweetwill of Parliament. In the light of this loophole the preventive detention measure could be imposed for an indefinite period.[34] In order to avoid it, it may be suggested that the Constitution should prescribe the maximum period of detention. But such prescription should always maintain a distinction between preventive detention and punitive detention Some of the countries referred to in this paper prescribed four, five or even ten years as the maximum period of detention.[35] But then in such cases it will be deemed that the State is taking punitive measure in the name of preventive detention. Once a timelimit is fixed the authority will have to release the detenu before that period, but if the authority considers that his activities are still prejudicial to any of the grounds mentioned in the law relating to preventive detention then on fresh grounds the authority could detain the same person. The requirement of fresh grounds will avoid the possibility of detention for an indefinite period.

The condition that the detention of any person shall not be for a period longer than three months is subject to the provision of article 22 (7) (a). It says that Parliament may by law prescribe the circumstances under which and the class or classes of cases in which a person may be detained for a period more than three monts without any reference to the advisory board. No such power is given to the state legislatures. If Parliament does not fulfil the requirement of article 22 (7) (a), the courts would declare the legislation unconstitutional on that ground.[36] It may be pointed out that preventive detention is an extraordinary measure but some minimum safeguards cannot be done away with. And, therefore, the drastic measure of article 22 (7) (a) may be repealed.

Article 22 (5) provides for important safeguards to a person detained under any law relating to preventive detention. Firstly, the person so detained shall, as soon as may be, given the grounds on which the order of detention has been made. At times, the executive detained persons on grounds with infirmities as noted above. And this was realised only when the judiciary took cognizance of the matter and ordered release of the detenus forthwith. In such cases it may be suggested that the government should adopt some mechanism to impose checks on the

---

34. *Fagu Shaw* v. *State of W.B.*, A.I.R. 1974 S.C. 613. See Jariwala, "Article 22 (7) (*b*): Prescription of 'Maximum Period' in case of Preventive Detention: *Fagu Shaw* v. *State of West Bengal*," 16 *J.I.L.I.* 1 308-11 (1974).

35. Ghana-Preventive Detention Act, 1951, five to ten years; Malaysia-Internal Security Act, 1960-2 years; Singapore-3 years, Burma-Public Order (Preservation) Act, 1947.— indefinite period.

36. *Sambhu Nath Sarkar* v. *State of W.B.*, A.I.R. 1973 S.C. 1425. See the author's article in *Law* (44) 1974. See cont. approach in *Gopalan* v. *State of Madras*, A.I.R. 1950 S.C. 27.

erring executive. For example, such persons may not be given power to use preventive detention measure anymore and some alternative arrangements be made. If this is accepted then the scene in West Bengal, where a number of persons were detained on infirm grounds,[37] may not be repeated. This check in turn will require the appropriate authority to apply its mind cautiously and carefully.

The above safeguard is greatly diluted by the provision of article 22 (6) which says that if the authority passing detention order considers it to be against the public interest to disclose facts relating to detention then the authority shall withhold the facts. If the facts are not given then no question will arise for making any representation. It may be pointed out that the term 'public interest' is of wide meaning[38] and therefore, the term 'national interest' may be substituted for the above phrase. This will allow the executive to take recourse to article 22(6) in exceptional situations only.

The second safeguard guaranteed against preventive detention measure is the right of representation. Article 22 (5) guarantees the earliest opportunity of making representation against the order. In case of undue delay in affording the detenu an opportunity to make representation against the order, the court set aside the detention order and ordered to release the detenu forthwith.[39]

The detenu can make representation if he is able to understand the contents of the grounds. If the order of detention is in a language which the detenu is not able to understand then he will not be in a position to make representation against the detention order. The preventive detention laws of some of the countries require that the order of detention shall be in the language which the detenu can understand. For example, section 26 (7) of the Preventive Detention Act, 1958 of Ghana requires that the order of detention should be either in English or translated in detenu's language. In India there were cases where the detenus were served with detention orders in language which they did not know and the court in such cases set-aside the detention order.[40] Though there were cases where the grounds were written in a language which the detenu did not know yet the court allowed the detention order on the ground that the concerned authority

37. The cases reported in A.I.R. 1972 S.C. show that in the majority of cases where grounds were declared to be defective, the case from the State of West Bengal topped the list.

38. *Kochunni* v. *State of Kerala*, A.I.R. 1960; *Joyti Prasad* v. *Union Territory of Delhi*, A.I.R. 1961 S.C. 1600; *State of Raj.* v. *G. Chawla*, A.I.R. 1959 S.C. 544.

39. *Abdus Sukkur* v. *State of W.B.*, 1972 S.C. 1915; *Kala Chand* v. *State of W.B.*, A.I.R. 1972 S.C. 2254.

40. *Harikrishna* v. *State of Mah.*, A.I.R. 1962 S.C. 911; *Bidya Deb* v. *Dist. Magis. Tripura*, A I.R. 1969 S.C. 323.

translated and interpreted the ground and, therefore, it fulfilled the requirement of article 22(5). It may be noted that merely saying that the grounds were given in the official language or the police authority translated and interpreted the grounds will not be sufficient unless the detenu is in a position to know the grounds. And, therefore, the authority making an order of detention may be required to take the precaution that the detenu is given grounds in the language which he understands. Further, the grounds may not be intelligible if they are vague. If the grounds are vague, the detenu may not be in a position to make an effective representation against the detention order and this will frustrate the object of the safeguards guaranteed in article 22 (5).

The Preventive Detention Act, 1950, in section 7 and the Maintenance of Internal Security Act, 1971, in section 8 make provision for the representation against the order of detention. Both sections provide an earliest opportunity of making representation to the appropriate government. When the government is given power to make an order of detention, and the same authority is given power to hear representation of the detenu in such cases, the safeguard of representation does not carry much weight. In this connection it may be suggested that an impartial tribunal may be constituted to hear representation of the detenu or the advisory board may be required to hear the representation which will also satisfy the requirement of article 22 (4) (*a*).

Though the Constitution of India in article 22 (4) and (5) provides important safeguards against this extraordinary measure yet the continuous emergency in India had resulted in the deprivation of the protection against preventive detention measure. This phenomenon was not experienced in England, the United States of America, Australia, etc. The continuation of emergency had become a part of the Indian life and the protections of article 22 (4) and (5) suffered a great set-back. During the long span of emergency, four times the President of India suspended the enforcement of article 22. The last and the most severe attack on the provisions of article 22 came on June 27, 1975, when the President of India imposed a blanket ban on its enforcement. This measure was validated by the majority of the Supreme Court in the *Habeas Corpus* case[41] where the Court gave up its microfine approach in protecting the safeguards available to a detenu. On the one hand, recourse to judicial protection was completely shut and on the other, the executive and the legislative authorities were given a clean slate to deal with preventive detention cases. And thus this state of affairs was mainly responsible for the nineteen months' sufferings to

41. *A.D.M. Jabalpur* v. *S. Shukla*, A.I.R. 1975 S.C. 1207.

the persons detained under the extraordinary measure who were denied not only basic rigths but also basic requirement.[42] And, therefore, unless the emergency provisions are amended in this connection, the safeguards in article 22 (4) and (5) will always remain ineffective. The suggestion that if the provisions with respect to preventive detention in the above article could be transferred to the chapter on Emergency Provision is accepted, then the provision of article 359 will not be applicable to these safeguards and thus the permanent eclipse could be avoided.

IV

Looking at the Indian experience and the experiences of other countries, no one can deny the necessity of preventive detention in exceptional cases. When the very existence of the country is in danger, the State cannot afford to sit idle and see that the basic canons of criminal jurisprudence are strictly followed. The State in such situation needs some extra-ordinary measures for its survival. And the preventive detention measure in the shape of a life saving devise cannot be ruled out from the constitutional frame-work.

The way in which the measure was implemented and especially the nineteen months' experience of preventive detention in India have proved that the time has come when the constitutional provisions relating to preventive detention require an amendment at the earliest. If we want that the Indian democracy should survive, the long eclipse on the right to personal liberty, a cherished right of the human being, should come to an end.

If India's pledge to the world community for the protection of the human rights has to be fulfilled, then the constitutional provisions relating to preventive detention must aim towards more controls on the legislative and the executive authorities and lesser restrictions on the detenus. Further this measure must be limited to *extra-ordinary situations* which shall include the defence and security of the country, and that it should form part of the emergency provisions. In a federation the central legislature alone shall have such a power and that too for a limited time. A responsible authority should be conferred with such extra-ordinary powers and the erring executive should be brought to book. The detenu should be given the right of effective representation against the order of detention. An impartial body be constituted to examine the working of the measure. And finally, the courts must not shirk from their responsibilites to jealously safeguard the interests of the detenu.

Now the time has come when we cannot ignore the warnings given by

---

42. *Union of India* v. *Bhanu Das*, A.I.R. 1977 S.C. 1027.

Chief Justice Gajendragadkar[43] and Justice Hegde[44] that the continuous exercise of such a power will make the concerned authorities, if not blunt, more insensible towards the right to personal liberty and this attitude of the executive will pose a threat to the basic values on which the democratic way of life is founded in India. It seems that these judges had in their minds the experience of Nazi government in Germany. In order to respond to the warning the legislature must do away with the existing provisions relating to preventive detention. The existing situtation in the country does not call for such an extra-ordinary measure. Last but not the least, the judiciary must not shirk from its resposibility to balance the individual's right to personal liberty and the national interests.

43. *G. Sadanandan* v. *State of Kerala*, *supra* note 12 at 1928.
44. *Moti Lal* v. *State of Bihar*, A.I.R. 1968 S.C. 1509, 1513.