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May, 19.

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v.

THE STATE OF MADRAS.

UNION OF INDIA : INTERVENER.

[SHRI HARILAL KANIA C.J., SAIYID FAZL ALI, PATANJALI SASTRI, MEHR CHAND MAHAJAN, MUKHERJEA and S. R. DAS JJ.]

Preventive Detention Act (IV of 1950), ss. 3, 7, 10-14.—Validity—Constitution of India, 1950, Arts. 13, 19 to 22, 32—Law relating to preventive detention—Whether infringes Fundamental Right as to freedom of movement—Whether subject to judicial review as to reasonableness under Art. 19 (5)—Scope of Art. 19—Right of free movement and Right to personal liberty, nature and incidents of—Art. 22, whether complete code as to preventive detention—Scope and applicability of Art. 21—"Law," "procedure established by law," meanings of—Whether include rules of natural justice—Construction of Art. 21—American decisions on "due process of law," value of—Omission to provide objective standard for satisfaction of authorities, to provide for oral hearing or leading of evidence, to fix maximum period of detention, and to specify "circumstances" and "classes of cases" where period of detention may be extended over 3 months, prohibiting detenu from disclosing grounds of detention—Validity of law—Construction of Constitution —Reference to debates and Report of Drafting Committee—Permissibility.

The Petitioner who was detained under the Preventive Detention Act (Act IV of 1950) applied under Art. 32 of the Constitution for a writ of *habeas corpus* and for his release from detention, on the ground that the said Act contravened the provisions of Arts. 13, 19, 21 and 22 of the Constitution and was consequently *ultra vires* and that his detention was therefore illegal :

Held, per KANIA C. J., PATANJALI SASTRI, MUKHERJEA and DAS JJ. (FAZL ALI and MAHAJAN JJ. *dissenting*)—that the Preventive Detention Act, 1950, with the exception of Sec. 14 thereof did not contravene any of the Articles of the Constitution and even though Sec. 14 was *ultra vires* inasmuch as it contravened the provisions of Art. 22(5) of the Constitution, as this section was severable from the remaining sections of the Act, the invalidity of Sec. 14 did not affect the validity of the Act as a whole, and the detention of the petitioner was not illegal.

FAZL ALI and MAHAJAN JJ.—Section 12 of the Act was also *ultra vires*, and since it contravened the very provision in the

Constitution under which the Parliament derived its competence to enact the law, the detention was illegal.

Held, *by the Full Court* (KANIA C. J., FAZL ALI, PATANJALI SASTRI, MAHAJAN, MUKHERJEA and DAS JJ.)—Section 14 of the Preventive Detention Act, 1950, contravenes the provisions of Art. 22 (5) of the Constitution in so far as it prohibits a person detained from disclosing to the Court the grounds on which a detention order has been made or the representation made by him against the order of detention, and is to that extent *ultra vires* and void.

Per KANIA C. J., PATANJALI SASTRI, MAHAJAN, MUKHERJEA and DAS JJ. (FAZL ALI J. *dissenting*).—Article 19 of the Constitution has no application to a law which relates directly to preventive detention even though as a result of an order of detention the rights referred to in sub-cls. (a) to (e) and (g) in general, and sub-cl. (d) in particular, of cl. (1) of Art. 19 may be restricted or abridged; and the constitutional validity of a law relating to such detention cannot therefore, be judged in the light of the test prescribed in cl. (5) of the said Article.

DAS J.—Article 19 (1) postulates a legal capacity to exercise the rights guaranteed by it and if a citizen loses the freedom of his person by reason of lawful detention as a result of a conviction for an offence or otherwise he cannot claim the rights under sub-cls. (a) to (e) and (g) of Art. 19 (1); likewise if a citizen's property is compulsorily acquired under Art. 31, he cannot claim the right under sub-cl. (f) of Art. 19 (1) with respect to that property. In short the rights under sub-cls. (a) to (e) and (g) end where lawful detention begins and therefore the validity of a preventive detention Act cannot be judged by Art. 19 (5).

MAHAJAN J.—Whatever be the precise scope of Art. 19 (1) (d) and Art. 19 (5) the provisions of Art. 19 (5) do not apply to a law relating to preventive detention, inasmuch as there is a special self-contained provision in Art. 22 regulating it.

FAZL ALI J.—Preventive detention is a direct infringement of the right guaranteed in Art. 19 (1) (d), even if a narrow construction is placed on the said sub-clause, and a law relating to preventive detention is therefore subject to such limited judicial review as is permitted by Art. 19 (5).

Per KANIA C. J., PATANJALI SASTRI, MUKHERJEA and DAS JJ. (FAZL ALI J. *dissenting*).—The concept of the right "to move freely throughout the territory of India" referred to in Art. 19 (1) (d), of the Constitution is entirely different from the concept of the right to "personal liberty" referred to in Art. 21, and Art. 19 should not, therefore, be read as controlled by the provisions of Art. 21. The view that Art. 19 guarantees substantive rights and Art. 21 prescribes the procedure is incorrect. DAS J.—Article 19 protects some of the important attributes of personal liberty as independent rights and the expression "Personal liberty" is used in Art. 21 as a compendious term

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including within its meaning all varieties of rights which go to make up the personal liberties of men.

FAZL ALI J.—Even if it be assumed that Art. 19 (1)(d) does not refer to "personal liberty" and that it bears the restricted meaning attributed to it, that is to say, it signifies merely the right to move from one locality to another, preventive detention must be held to affect this limited right of movement directly and substantially. One of the objects of preventive detention is to restrain a person detained from moving from place to place so that he may not spread disaffection or indulge in dangerous activities in the places he visits. The same consideration applies to the cases of persons who are interned or externed. Hence, externment, internment and certain other forms of restriction on movement have always been treated as kindred matters belonging to the same group or family, and the rule which applies to one must necessarily apply to the others.

Per KANIA C. J., PATANJALI SASTRI and DAS JJ. (MAHAJAN J. *dissenting*).—Article 22 does not form a complete code of constitutional safeguards relating to preventive detention. To the extent that provision is made in Art. 22 it cannot be controlled by Art. 21; but on points of procedure which expressly or by necessary implication are not dealt with by Art. 22, Art. 21 will apply. DAS J.—Art. 21 protects substantive rights by requiring a procedure and Art. 22 lays down the minimum rules of procedure that even the Parliament cannot abrogate or overlook. MAHAJAN J.—Art. 22 contains a self-contained code of constitutional safeguards relating to preventive detention and cannot be examined or controlled by the provisions of Art. 21. The principles underlying Art. 21 are however kept in view in Art. 22 and there is no conflict between these articles. MUKHERJEA J.—Even assuming that Art. 22 is not a self-contained code relating to preventive detention and that Art. 21 would apply, it is not permissible to supplement Art. 22 by the application of rules of natural justice. FAZL ALI J.—Art. 22 does not form an exhaustive code by itself relating to preventive detention. Parliament can make further provisions and if it has done so Art. 19 (5) may be applied to see if those provisions have transgressed the bounds of reasonableness.

Per KANIA C. J., MUKHERJEA and DAS JJ. (FAZL ALI J. *dissenting*).—In Art. 21 the word "law" has been used in the sense of State-made law and not as an equivalent of law in the abstract or general sense embodying the principles of natural justice; and "procedure established by law" means procedure established by law made by the State, that is to say, the Union Parliament or the Legislatures of the States. It is not proper to construe this expression in the light of the meaning given to the expression "due process of law" in the American Constitution, by the Supreme Court of America. PATANJALI SASTRI J.—"Law" in Art. 21 does not mean the *jus naturale* of civil law but means

positive or State-made law. "Procedure established by law" does not however mean any procedure which may be prescribed by a competent legislature, but the ordinary well-established criminal procedure, *i.e.*, those settled usages and normal modes of procedure sanctioned by the Criminal Procedure Code, which is the general law of criminal procedure in this country. The only alternative to this construction, if a constitutional transgression is to be avoided, is to interpret the reference to "law" as implying a constitutional amendment *pro tanto*, for it is only a law enacted by the procedure provided for such amendment that could modify or override a fundamental right without contravening Art. 13 (2).

FAZL ALI J.—There is nothing revolutionary in the view that "procedure established by law" must include the four principles of elementary justice which inhere in and are at the root of all civilized systems of law, and which have been stated by the American Courts and jurists as consisting in (1) notice, (2) opportunity to be heard, (3) impartial tribunal and (4) orderly course of procedure. These four principles are really different aspects of the same right, namely, the right to be heard before one is condemned. Hence the words "procedure established by law", whatever its exact meaning be, must necessarily include the principle that no person shall be condemned without hearing by an impartial tribunal.

Per KANIA C. J., FAZL ALI, PATANJALI SASTRI, MAHAJAN and DAS JJ.—Section 3 of the Preventive Detention Act, 1950, does not delegate any legislative power to an executive officer but merely confers on such officer a discretion to enforce the law made by the legislature, and is not therefore invalid on this ground. The fact that the section does not provide an objective standard for determining whether the requirements of law have been complied with, is not a ground for holding that it is invalid. FAZL ALI J.—Section 3 is however a reasonable provision only for the first step, *i.e.*, for arrest and initial detention and must be followed by some procedure for testing the so-called subjective satisfaction, which can be done only by providing a suitable machinery for examining the grounds on which the order of detention is made and considering the representations of the persons detained in relation to those grounds.

Per KANIA C. J., MAHAJAN and DAS JJ.—Section 7 of the said Act is not invalid merely because it does not provide for an oral hearing or an opportunity to lead evidence but only gives a right to make a representation. Right to an oral hearing and right to give evidence are not necessarily implied in the right to make a representation given by Art. 22.

Per KANIA C. J. and MAHAJAN J.—The provision contained in Sec. 11 that a person may be detained for such period as the

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State thinks fit does not contravene Art. 22 (7) and it is not therefore invalid.

Per KANIA C. J., PATANJALI SASTRI, MUKHERJEA and DAS JJ. (FAZL ALI and MAHAJAN JJ. *dissenting*).—Article 22 (7) means that Parliament may prescribe either the circumstances under which, *or* the class or classes of cases in which, a person may be detained for a period longer than three months without reference to an advisory board. It is not necessary that the Parliament should prescribe both. The matters referred to in clauses (a) and (b) of sub-sec. (1) of Sec. 12 constitute a sufficient description of such circumstances or classes of cases and Section 12 is not therefore open to the objection that it does not comply with Art. 22(7). Das J.—Parliament has in fact and substance prescribed both in clauses (a) and (b) of sub-sec. (1) of Sec. 12.

FAZL ALI and MAHAJAN JJ.—Article 22 (7) means that both the circumstances and the class or classes of cases (which are two different expressions with different meanings and connotations) should be prescribed, and the prescription of one without the other will not be enough. The enumeration of the subjects for reasons connected with which a law of preventive detention could be made contained in cls. (a) and (b) of sub-sec. (1) of Sec. 12 does not amount to prescribing the circumstances under which, or the class or classes of cases in which, a person can be detained for more than three months.

Per KANIA C. J.—While it is not proper to take into consideration the individual opinions of members of Parliament or Convention to construe the meaning of a particular clause, when a question is raised whether a certain phrase or expression was up for consideration at all or not, a reference to the debates may be permitted. PATANJALI SASTRI J.—In construing the provisions of an Act, speeches made in the course of the debates on the bill should not be taken into consideration. MUKHERJEA J.—In construing the Constitution it is better to leave out of account the debates in the Constituent Assembly, but a higher value may be placed on the report of the Drafting Committee.

ORIGINAL JURISDICTION: PETITION No. XIII OF 1950.

Application under Art. 32 (1) of the Constitution of India for a writ of *habeas corpus* against the detention of the appellant in the Madras jail in pursuance of an order of detention made under the Preventive Detention Act, 1950. The material facts of the case and arguments of counsel are set out in detail in the judgments. The relevant provisions of the Preventive Detention Act, 1950, are printed below.

1. Short title, extent and duration.—This Act may be called the Preventive Detention Act, 1950.

(2) It extends to the whole of India.....

(3) It shall cease to have effect on the 1st day of April, 1951, save as respects things done or omitted to be done before that date.

2. Definitions.—In this Act, unless the context otherwise requires.

(*a*) "State Government" means, in relation to a Part C State, the Chief Commissioner of the State; and

(*b*) "detention order" means an order made under Section 3.

3. Power to make orders detaining certain persons.—(*1*) The Central Government or the State Government may—

(*a*) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to—

(*i*) the defence of India, the relations of India with foreign powers, or the security of India, or

(*ii*) the security of the State or the maintenance of public order, or

(*iii*) the maintenance of supplies and services essential to the community, or

(*b*) if satisfied with respect to any person who is a foreigner within the meaning of the Foreigners Act, 1946 (XXXI of 1946), that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India

it is necessary so to do, make an order directing that such person be detained.

(2) Any District Magistrate or Sub-Divisional Magistrate, or in a Presidency-town, the Commissioner of Police, may, if satisfied as provided in sub-clauses (*ii*) and (*iii*) of clause (*a*) of sub-section (*1*), exercise the power conferred by the said sub-section.

(*3*) When any order is made under this section by a District Magistrate, Sub-Divisional Magistrate or Commissioner of Police, he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as in his opinion have a bearing on the necessity for the order.

7. Grounds of order of detention to be disclosed to persons affected by the order.—(*1*) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, communicate to him the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order, in a case where such order has been made by the Central Government, to that Government, and in a case where it has been made by a State Government or an officer subordinate thereto, to the State Government.

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11. Confirmation of detention order.—In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of the person concerned, the Central Government or the State Government, as the case may be, may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit.

12. Duration of detention in certain cases.—(1) Any person detained in any of the following classes of cases or under any of the following circumstances may be detained without obtaining the opinion of an Advisory Board for a period longer than three months, but not exceeding one year from the date of his detention, namely, where such person has been detained with a view to preventing him from acting in any manner prejudicial to—

(*a*) the defence of India, relations of India with foreign powers or the security of India; or

(*b*) the security of a State or the maintenance of public order.

* * * *

14. Disclosure of grounds of detention, etc.—(1) No court shall, except for the purpose of a prosecution for an offence punishable under sub-section (2), allow any statement to be made, or any evidence to be given, before it of the substance of any communication made under section 7 of the grounds on which a detention order has been made against any person or of any representation made by him against such order; and notwithstanding anything contained in any other law, no court shall be entitled to require any public officer to produce before it, or to disclose the substance of, any such communication or representation made, or the proceedings of an Advisory Board or that part of the report of an Advisory Board which is confidential.

(2) It shall be an offence punishable with imprisonment for a term which may extend to one year, or with fine, or with both, for any person to disclose or publish without the previous authorisation of the Central Government or the State Government, as the case may be, any contents or matter purporting to be contents of any such communication or representation as is referred to in sub-section (1):

Provided that nothing in this sub-section shall apply to a disclosure made to his legal adviser by a person who is the subject of a detention order.

M. K. Nambiar (*S. K. Aiyar* and *V. G. Rao*, with him) for the petitioner.

K. Rajah Aiyar, Advocate-General of Madras (*C. R. Pattabhi Raman* and *R. Ganapathi*, with him) for the State of Madras.

M. C. Setalvad, Attorney-General for India (*Jindralal*, with him) for the Union of India.

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1950. May 19. The following Judgments were delivered.

KANIA C. J.—This is a petition by the applicant under article 32 (1) of the Constitution of India for a writ of *habeas corpus* against his detention in the Madras Jail. In the petition he has given various dates showing how he has been under detention since December, 1947. Under the ordinary Criminal Law he was sentenced to terms of imprisonment but those convictions were set aside. While he was thus under detention under one of the orders of the Madras State Government, on the 1st of March, 1950, he was served with an order made under section 3 (1) of the Preventive Detention Act, IV of 1950. He challenges the legality of the order as it is contended that Act IV of 1950 contravenes the provisions of articles 13, 19 and 21 and the provisions of that Act are not in accordance with article 22 of the Constitution. He has also challenged the validity of the order on the ground that it is issued *mala fide*. The burden of proving that allegation is on the applicant. Because of the penal provisions of section 14 of the impugned Act the applicant has not disclosed the grounds, supplied to him, for his detention and the question of *mala fides* of the order therefore cannot be gone into under this petition.

The question of the validity of Act IV of 1950 was argued before us at great length. This is the first case in which the different articles of the Constitution of India contained in the Chapter on Fundamental Rights has come for discussion before us. The Court is indebted to the learned counsel for the applicant and the Attorney-General for their assistance in interpreting the true meaning of the relevant clauses of the Constitution.

In order to appreciate the rival contentions it is useful first to bear in mind the general scheme of the Constitution. Under article 53 of the Constitution the executive power of the Union is vested in the President and is to be exercised by him in accordance with the

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Constitution either directly or through officers subordinate to him. The legislative powers of the Union are divided between the Parliament and Legislatures of the States. The ambit and limitations on their respective powers are found in article 246 read with article 245, Schedule VII, Lists 1, 2 and 3 of the Constitution. For the Union of India the Supreme Court is established and its powers and jurisdiction are set out in articles 124 to 147. This follows the pattern of the Government of India Act, 1935, which was the previous Constitution of the Government of India. Unlike the American Constitution, there is no article vesting the judicial power of the Union of India in the Supreme Court. The material points substantially altering the edifice are first in the Preamble which declares India a Sovereign Democratic Republic to secure to all its citizens justice, liberty and equality and to promote among them all, fraternity. Part III of the Constitution is an important innovation. It is headed "Fundamental Rights". In that Part the word "State" includes both the Government of the Union and the Government of the States. By articles 13 it is expressly provided that all laws in force in the territory of India, immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of this Part, to the extent of such inconsistency, are void. Therefore, all laws in operation in India on the day the Constitution came into force, unless otherwise saved, to the extent they are inconsistent with this Chapter on Fundamental Rights, become automatically void. Under article 13 (2) provision is made for legislation after the Constitution comes into operation. It is there provided that the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall to the extent of the contravention, be void. Therefore, as regards future legislation also the Fundamental Rights in Part III have to be respected and, unless otherwise saved by the provisions of the Constitution, they will be void to the extent they contravene the provisions of Part III. Under article 245 (1) the legislative powers conferred under

article 246 are also made "subject to the provisions of this Constitution," which of course includes Part III dealing with the Fundamental Rights. The term law in article 13, is expressed to be wide enough to include Acts, Ordinances, Orders, Bye-laws, Rules, Regulations and even custom or usage having, in the territory of India, the force of law. The rest of this Part is divided in seven divisions. "Right to Equality" is found in articles 14-18, "Right to Freedom" in articles 19-22, "Right against Exploitation" in articles 23 and 24, "Right to Freedom of Religion" in articles 25-28, "Cultural and Educational Rights" in articles 29 and 30, "Right to Property" in article 31 and "Right to Constitutional Remedies" in artciles 32-35. In this case we are directly concerned only with the articles under the caption "Right to Freedom" (19-22) and article 32 which gives a remedy to enforce the rights conferred by this Part. The rest of the articles may have to be referred to only to assist in the interpretation of the above-mentioned articles.

It is obvious that by the insertion of this Part the powers of the Legislature and the Executive, both of the Union and the States, are further curtailed and the right to enforce the Fundamental Rights found in Part III by a direct application to the Supreme Court is removed from the legislative control. The wording of article 32 shows that the Supreme Court can be moved to grant a suitable relief, mentioned in article 32 (2), only in respect of the Fundamental Rights mentioned in Part III of the Constitution.

The petitioner is detained under a preventive detention order, made under Act IV of 1950, which has been passed by the Parliament of India. In the Seventh Schedule of the Constitution, List I contains entries specifying items in respect of which the Parliament has exclusive legislative powers. Entry 9 is in these terms: "Preventive detention for reasons connected with Defence, Foreign Affairs or the Security of India; persons subjected to such detention." List III of that Schedule enumerates topics on which both the Union and the States have concurrent legislative

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powers. Entry 3 of that List is in these terms: "Preventive detention for reasons connected with the security of a State, the maintenance of public order or the maintenance of supplies and services essential to the community; persons subjected to such detention." It is not disputed that Act IV of 1950 is covered by these two Entries in List I and List III of the Seventh Schedule. The contention of the petitioner is that the impugned legislation abridges or infringes the rights given by articles 19-21 and is also not in accordance with the permissive legislation on preventive detention allowed under articles 22 (4) and (7) and in particular is an infringement of the provisions of article 22 (5). It is therefore necessary to consider in detail each of these articles and the arguments advanced in respect thereof.

Article 19 is for the protection of certain rights of freedom to citizens. It runs as follows :—

"19. (1)—All citizens shall have the right—
(a) to freedom of speech and expression ;
(b) to assemble peaceably and without arms ;
(c) to form associations or unions ;
(d) to move freely throughout the territory of India ;
(e) to reside and settle in any part of the territory of India ;
(f) to acquire, hold and dispose of property ; and
(g) to practise any profession, or to carry on any occupation, trade or business.

"(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order

reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business."

Clause (2) specifies the limits up to which the abridgement of the right contained in 19 (1) (a) may be permitted. It is an exception. Similarly clause (3) sets out the limit of abridgement of the right in 19 (1) (b) and clause (4) specifies such limits in respect of the right in 19 (1) (c). Clause (5) is in respect of the rights mentioned in 19 (1) (d), (e) and (f) and clause (6) is in respect of the rights contained in 19 (1) (g). It cannot be disputed that the articles collected under, the caption "Right to Freedom" have to be considered together to appreciate the extent of the Fundamental Rights. In the first place it is necessary to notice that

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there is a distinction between rights given to citizens and persons. This is clear on a perusal of the provisions of article 19 on the one hand and articles 20, 21 and 22 on the other. In order to determine whether a right is abridged or infringed it is first necessary to determine the extent of the right given by the articles and the limitations prescribed in the articles themselves permitting its curtailment. The inclusion of article 13 (1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment, to the extent it transgresses the limits, invalid. The existence of article 13(1) and (2) in the Constitution therefore is not material for the decision of the question what fundamental right is given and to what extent it is permitted to be abridged by the Constitution itself.

As the preventive detention order results in the detention of the applicant in a cell it was contended on his behalf that the rights specified in article 19 (1) (a), (b), (c), (d), (e) and (g) have been infringed. It was argued that because of his detention he cannot have a free right to speech as and where he desired and the same argument was urged in respect of the rest of the rights mentioned in sub-clauses (b), (c), (d), (e) and (g). Although this argument is advanced in a case which deals with preventive detention, if correct, it should be applicable in the case of punitive detention also to any one sentenced to a term of imprisonment under the relevant section of the Indian Penal Code. So considered, the argument must clearly be rejected. In spite of the saving clauses (2) to (6), permitting abridgement of the rights connected with each of them, punitive detention under several sections of the Penal Code, *e.g.*, for theft, cheating, forgery and even ordinary assault, will be illegal. Unless such conclusion necessarily follows from the article, it is obvious that such construction should be avoided. In my opinion, such result is clearly not the outcome of the Constitution. The article has to be read without any pre-conceived notions. So read, it clearly means

that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenue's life. On that short ground, in my opinion, this argument about the infringement of the rights mentioned in article 19 (1) generally must fail. Any other construction put on the article, it seems to me, will be unreasonable.

It was next urged that while this interpretation may meet the contention in respect of rights under article 19 (1) (a), (b), (c), (e) and (g), the right given by article 19 (1), (d) is left untouched. That sub-clause expressly gives the right "to move freely throughout the territory of India". It was argued that by the confinement of the petitioner under the preventive detention order his right to move freely throughout the territory of India is directly abridged and therefore the State must show that the impugned legislation imposes only reasonable restrictions on the exercise of that right in the interests of the general public or for the protection of the interests of any Scheduled Tribe, under article 19 (5). The Court is thus enjoined to inquire whether the restrictions imposed on the detained person are reasonable in the interests of the general public. Article 14 of the Constitution gives the right to equality in these terms :

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

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It was argued that the words "within the territory of India" are unnecessary in that article because the Parliament is supreme to make laws operative only within the territory of India. Without those words also the article will bear the same meaning. Similarly, it was urged that the words "territory of India" in article 19 (1) (d) may be treated as superfluous, and preventive detention would thus be an abridgement of the right to move freely. In my opinion, this rule of construction itself is faulty. Because certain words may be considered superfluous (assuming them to be so in article 14 for the present discussion) it is quite improper to assume that they are superfluous wherever found in the rest of the Constitution. On the contrary, in my opinion, reading sub-clause (d) as a whole the words "territory of India" are very important. What is sought to be protected by that sub-clause is the right to freedom of movement, *i.e.*, without restriction, throughout the territory of India. Read with their natural grammatical meaning the sub-clause only means that if restrictions are sought to be put upon movement of a citizen from State to State or even within a State such restrictions will have to be tested by the permissive limits prescribed in clause (5) of that Article. Sub-clause (d) has nothing to do with detention, preventive or punitive. The Constitution mentions a right to freedom of movement throughout the territory of India. Every word of that clause must be given its true and legitimate meaning and in the construction of a Statute, particularly a Constitution, it is improper to omit any word which has a reasonable and proper place in it or to refrain from giving effect to its meaning. This position is made quite clear when clause (5) is read along with this sub-clause. It permits the imposition of reasonable restrictions on the exercise of such right either in the interest of general public or the protection of the interest of any Scheduled Tribe. It is difficult to conceive of a reasonable restriction necessary in the interests of the *general* public for confining a person in a cell. Such restriction may be appropriate to prevent a person from going from one Province to another or

one area to another, having regard to local conditions prevailing in particular areas. The point however is made abundantly clear by the alternative, *viz.*, for the protection of the interests of any Scheduled Tribe. What protection of the interests of a Scheduled Tribe requires the confinement of a man in a cell? On the other hand, preventing the movement of a person from one part of the territory of India to another and the question of reasonable restriction imposed to protect the interests of a Scheduled Tribe is clearly intelligible and often noticed in the course of the administration of the country. Scheduled Tribes have certain rights, privileges and also disabilities. They have their own civilization, customs and mode of life and prevention of contact with persons or groups with a particular Scheduled Tribe may be considered undesirable during a certain time or in certain conditions. The legislative history of India shows that Scheduled Tribes have been given a separate place on these grounds. Reading article 19 as a whole, therefore, it seems to me that it has no application to a legislation dealing with preventive or punitive detention as its direct object. I may point out that the acceptance of the petitioner's argument on the interpretation of this clause will result in the Court being called upon to decide upon the reasonableness of several provisions of the Indian Penal Code and several other penal legislations as abridging this right. Even under clause (5), the Court is permitted to apply the test of reasonableness of the restrictions or limits not generally, but only to the extent they are either in the interests of the general public, *e.g.*, in case of an epidemic, riot, etc., or for the protection of the interests of any Scheduled Tribe. In my opinion, this is not the intention of the Constitution. Therefore the contention urged in respect of article 19 fails.

It was argued that article 19 and article 21 should be read together as implementing each other. Article 19 gave substantive rights to citizens while article 21 prescribed that no person can be deprived of his life and personal liberty except by procedure

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established by law. Even so, on a true construction of article 19, it seems to me that both preventive and punitive detention are outside the scope of article 19.

In order to appreciate the true scope of article 19 it is useful to read it by itself and then to consider how far the other articles in Part III affect or control its meaning. It is the first article under the caption "Right to Freedom". It gives the rights mentioned in 19 (1) (a) to (g) to all citizens of India. These rights read by themselves and apart from the controls found in clauses (2) to (6) of the same article, specify the different general rights which a free citizen in a democratic country ordinarily has. Having specified those rights, each of them is considered separately from the point of view of a similar right in the other citizens, and also after taking into consideration the principle that individual liberty must give way, to the extent it is necessary, when the good or safety of the peope genlerally is concerned. Thus the right to freedom of speech and expression is given by 19 (1) (a). But clause (2) provides that such right shall not prevent the operation of a law which relates to libel", slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State. Clause (2) thus only emphasizes that while the individual citizen has a free right of speech or expression, he cannot be permitted to use the same to the detriment of a similar right in another citizen or to the detriment of the State. Thus, all laws of libel, slander, contempt of Court or laws in respect of matters which offend against decency or morality are reaffirmed to be operative in spite of this individual right of the citizen to freedom of speech and expression. Similarly, that right is also subject to laws which prevent undermining the security of the State or against activities which tend to overthrow the State. A similar analysis of clauses (3) and (4) shows similar restrictions imposed on similar grounds. In the same way clause (5) also permits reasonable restrictions in the exercise of the right to freedom of movement throughout the territory of India, the right to reside and settle in any part of the

territory of India or the right to acquire, hold and dispose of property, being imposed by law provided such reasonable restrictions on the exercise of such right are in the interest of the general public. The Constitution further provides by the same clause that similar reasonable restrictions could be put on the exercise of those rights for the protection of the interest of a Scheduled Tribe. This is obviously to prevent an argument being advanced that while such restriction could be put in the interest of general public, the Constitution did not provide for the imposition of such restriction to protect the interests of a smaller group of people only. Reading article 19 in that way as a whole the only concept appears to be that the specified rights of a free citizen are thus controlled by what the tramers of the Constitution thought were necessary restrictions in the interest of the rest of the citizens.

Reading article 19 in that way it appears to me that the concept of the right to move freely throughout the territory of India is an entirely different concept from the right to "personal liberty" contemplated by article 21. "Personal liberty" covers many more rights in one sense and has a restricted meaning in another sense. For instance, while the right to move or reside may be covered by the expression "personal liberty" the right to freedom of speech [mentioned in article 19 (1) (a)] or the right to acquire, hold or dispose of property (mentioned in 19 (1) (f) cannot be considered a part of the *personal* liberty of a citizen. They form part of the liberty of a citizen but the limitation imposed by the word "personal" leads me to believe that those rights are not covered by the expression personal liberty. So read there is no conflict between articles 19 and 21. The contents and subject matters of articles 19 and 21 are thus not the same and they proceed to deal with the rights covered by their respective words from totally different angles. As already mentioned in respect of each of the rights specified in sub-clauses of article 19 (1) specific limitations in respect of each is provided, while the expression "personal

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liberty" in article 21 is generally controlled by the general expression "procedure established by law." The Constitution, in article 19, and also in other articles in Part III, thus attempts to strike a balance between individual liberty and the general interest of the society. The restraints provided by the Constitution on the legislative powers or the executive authority of the State thus operate as guarantees of life and personal liberty of the individuals.

Deprivation (total loss) of personal liberty, which *inter alia* includes the right to eat or sleep when one likes or to work or not to work as and when one pleases and several such rights sought to be protected by the expression "personal liberty" in article 21, is quite different from restriction (which is only a partial control) of the right to move freely (which is relatively a minor right of a citizen) as safeguarded by article 19 (1) (d). Deprivation of personal liberty has not the same meaning as restriction of free movement in the territory of India. This is made clear when the provisions of the Criminal Procedure Code in Chapter VIII relating to security of peace or maintenance of public order are read. Therefore article 19 (5) cannot apply to a substantive law depriving a citizen of personal liberty. I am unable to accept the contention that the word "deprivation" includes within its scope "restriction" when interpreting article 21. Article 22 envisages the law of preventive detention. So does article 246 read with Schedule Seven, List I, Entry 9 and List III, Entry 3. Therefore, when the subject of preventive detention is specifically dealt with in the Chapter on Fundamental Rights I do not think it is proper to consider a legislation permitting preventive detention as in conflict with the rights mentioned in article 19 (1). Article 19 (1) does not purport to cover all aspects of liberty or of personal liberty. In that article only certain phases of liberty are dealt with. "Personal liberty" would primarily mean liberty of the physical body. The rights given under article 19 (1) do not directly come under that description. They are rights which accompany the freedom or liberty of the person. By their very

nature they are freedoms of a person assumed to be in full possession of his personal liberty. If article 19 is considered to be the only article safeguarding personal liberty several well-recognised rights, as for instance, the right to eat or drink, the right to work, play, swim and numerous other rights and activities and even the right to life will not be deemed protected under the Constitution. I do not think that is the intention. It seems to me improper to read article 19 as dealing with the same subject as article 21. Article 19 gives the rights specified therein only to the citizens of India while article 21 is applicable to all persons. The word citizen is expressly defined in the Constitution to indicate only a certain section of the inhabitants of India. Moreover, the protection given by article 21 is very general. It is of "law"—whatever that expression is interpreted to mean. The legislative restrictions on the law-making powers of the legislature are not here prescribed in detail as in the case of the rights specified in article 19. In my opinion therefore article 19 should be read as a separate complete article.

Article 21 which is also in Part III under the caption "Right to Freedom" runs as follows :—

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

This article has been strongly relied upon by the petitioner in support of his contention that the impugned Act is *ultra vires* the Parliament as it abridges the right given by this article to every person. It was argued that under the Constitution of the United States of America the corresponding provision is found in the 5th and 14th Amendments where the provision, *inter alia,* is "that no person shall be deprived of his life or liberty or property except *by due process of law.*" It was contended for the petitioner that the Indian Constitution gives the same protection to every person in India, except that in the United States "due process of law" has been construed by its Supreme Court to cover both

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substantive and procedural law, while in India only the protection of procedural law is guaranteed. It was contended that the omission of the word "due" made no difference to the interpretation of the words in article 21. The word "established" was not equivalent to "prescribed". It had a wider meaning. The word "law" did not mean enacted law because that will be no legislative protection at all. If so construed, any Act passed by the Parliament or the State Legislature, which was otherwise within its legislative power, can destroy or abridge this right. On the same line of reasoning, it was argued that if that was the intention there was no necessity to put this as a fundamental right in Part III at all. As to the meaning of the word "law" it was argued that it meant principles of natural justice. It meant "jus", *i.e.*, law in the abstract sense of the principles of natural justice, as mentioned in standard works of Jurisprudence, and not "lex", *i.e.*, enacted law. Against the contention that such construction will leave the meaning vague, it was argued that four principles of natural justice recognised in all civilized countries were covered, in any event, by the word "law". They are: (1) An objective test, *i.e.*, a certain, definite and ascertainable rule of human conduct for the violation of which one can be detained; (2) Notice of the grounds of such detention; (3) An impartial tribunal, administrative, judicial or advisory, to decide whether the detention is justified; and (4) Orderly course of procedure, including an opportunity to be heard orally (not merely by making a written representation) with a right to lead evidence and call witnesses.

In my opinion, this line of approach is not proper and indeed is misleading. As regards the American Constitution its general structure is noticed in these words in "The Government of the United States" by Munro (5th Edition) at page 53: "The architects of 1787 built only the basement. Their descendants have kept adding walls and windows, wings and gables, pillars and porches to make a rambling structure which is not yet finished. Or, to change the metaphor, it has a fabric which, to use the words of

James Russell Lowell, is still being 'woven on the roaring loom of time'. That is what the framers of the original Constitution intended it to be. Never was it in their mind to work out a final scheme for the government of the country and stereotype it for all time. They sought merely to provide a starting point." The same aspect is emphasized in Professor Willis's book on Constitutional Law and Cooley's Constitutional Limitations. In contrast to the American Constitution, the Indian Constitution is a very detailed one. The Constitution itself provides in minute details the legislative powers of the Parliament and the State Legislatures. The same feature is noticeable in the case of the judiciary, finance, trade, commerce and services. It is thus quite detailed and the whole of it has to be read with the same sanctity, without giving undue weight to Part III or article 246, except to the extent one is legitimately and clearly limited by the other.

Four marked points of distinction between the clause in the American Constitution and article 21 of the Constitution of India may be noticed at this stage. The first is that in U.S.A. Constitution the word "liberty" is used *simpliciter* while in India it is restricted to personal liberty. (2) In U.S.A. Constitution the same protection is given to property, while in India the fundamental right in respect of property is contained in article 31. (3) The word "due" is omitted altogether and the expression "due process of law" is not used deliberately. (4) The word "established" is used and is limited to "Procedure" in our article 21.

The whole argument of the petitioner is founded on the meaning of the word "law" given to it by the Supreme Court of America. It seems unnecessary to embark on a discussion of the powers and jurisdiction of the Supreme Court of the U.S.A. and how they came to enlarge or abridge the meaning of law in the expression "due process of law" Without going into details, I think there is no justification to adopt the meaning of the word "law" as interpreted by the Supreme Court of U.S.A. in the expression "due

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process of law" merely because the word "law" is used in article 21. The discussion of the meaning of "due process of law" found in Willis on Constitutional Law and in Cooley's Constitutional Limitations shows the diverse meanings given to that expression at different times and under different circumstances by the Supreme Court of U.S.A., so much so that the conclusion reached by these authors is that the expression means reasonable law according to the view of the majority of the judges of the Supreme Court at a particular time holding office. It also shows how the meaning of the expression was widened or abridged in certain decades. Moreover, to control the meaning so given to that expression from time to time the doctrine of police powers was brought into play. That doctrine, shortly put, is that legislation meant for the good of the people generally, and in which the individual has to surrender his freedom to a certain extent because it is for the benefit of the people at large, has not to be tested by the touchstone of the "due process of law" formula.

Our attention was drawn to the debates and report of the drafting committee of the Constituent Assembly in respect of the wording of this clause. The report may be read not to control the meaning of the article, but may be seen in case of ambiguity. In *The Municipal Council of Sydney* v. *The Commonwealth* ( ), it was thought that individual opinion of members of the Convention expressed in the debate cannot be referred to for the purpose of construing the Constitution. The same opinion was expressed in *United States* v. *Wong Kim Ark* ([2]). The result appears to be that while it is not proper to take into consideration the individual opinions of Members of Parliament or Convention to construe the meaning of the particular clause, when a question is raised whether a certain phrase or expression was up for consideration at all or not, a reference to the debates may be permitted. In the present case the debates were referred to to show that the expression "due process of law" was known to exist in the American Constitution

(1) (1904) 1 Com, L.R. 208. (2) (169) U.S. 649 at 699.

and after a discussion was not adopted by the Constituent Assembly in our Constitution. In *Administrator-General of Bengal* v. *Premlal Mullick* (1), a reference to the proceedings of the Legislature which resulted in the passing of the Act was not considered legitimate aid in the construction of a particular section. The same reasons were held as cogent for excluding a reference to such debates in construing an Indian Statute. Resort may be had to these sources with great caution and only when latent ambiguities are to be resolved. See Craies' Statute Law. (4th Edition) page 122, Maxwell on Interpretation of Statutes (9th Edition) pp. 28-29 and Crawford on Statutory Construction (1940 Edition) p. 379, article 214. A perusal of the report of the drafting committee to which our attention was drawn shows clearly that the Constituent Assembly had before it the American article and the expression "due process of law" but they deliberately dropped the use of that expression from our Constitution.

No extrinsic aid is needed to interpret the words of article 21, which in my opinion, are not ambiguous. Normally read, and without thinking of other Constitutions, the expression "procedure established by law" must mean procedure prescribed by the law of the State. If the Indian Constitution wanted to preserve to every person the protection given by the due process clause of the American Constitution there was nothing to prevent the Assembly from adopting the phrase, or if they wanted to limit the same to procedure only, to adopt that expression with only the word "procedural" prefixed to "law". However, the correct question is what is the right given by article 21 ? The only right is that no person shall be deprived of his life or liberty except according to procedure established by law. One may like that right to cover a larger area, but to give such a right is not the function of the Court ; it is the function of the Constitution. To read the word "law" as meaning rules of natural justice will land one in

(1) (1895) L.R. 22 I.A. 107.

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difficulties because the rules of natural justice, as regards procedure, are nowhere defined and in my opinion the Constitution cannot be read as laying down a vague standard. This is particularly so when in omitting to adopt "due process of law" it was considered that the expression "procedure established by law" made the standard specific. It cannot be specific except by reading the expression as meaning procedure prescribed by the legislature. The word, "law" as used in this Part has different shades of meaning but in no other article it appears to bear the indefinite meaning of natural justice. If so, there appears no reason why in this article it should receive this peculiar meaning. Article 31 which is also in Part III and relates to the fundamental rights in respect of property runs as follows :--

"No person shall be deprived of his property save by authority of law."

It is obvious that in that clause "law" must mean enacted law. The object of dealing with property under a different article appears more to provide the exceptions found in article 31 (2) to (6), rather than to give the word "law" a different meaning than the one given in article 21. The word "established" according to the Oxford Dictionary means "to fix, settle, institute or ordain by enactment or agreement." The word "established" itself suggests an agency which fixes the limits. According to the dictionary this agency can be either the legislature or an agreement between the parties. There is therefore no justification to give the meaning of "jus" to "law" in article 21.

The phrase "procedure established by law" seems to be borrowed from article 31 of the Japanese Constitution. But other articles of that Constitution which expressly preserve other personal liberties in different clauses have to be read together to determine the meaning of "law" in the expression "procedure established by law." These articles of the Japanese Constitution have not been incorporated in the Constitution of India in the same language. It is not shown that the word "law" means "jus" in the Japanese Constitution. In the Japanese Constitution these

rights claimed under the rules of natural justice are not given by the interpretation of the words "procedure established by law" in their article 31. The word "due" in the expression "due process of law" in the American Constitution is interpreted to mean "just," according to the opinion of the Supreme Court of U.S.A. That word imparts jurisdiction to the Courts to pronounce what is "due" from otherwise, according to law. The deliberate omission of the word "due" from article 21 lends strength to the contention that the justiciable aspect of "law", *i.e.*, to consider whether it is reasonable or not by the Court, does not form part of the Indian Constitution. The omission of the word "due", the limitation imposed by the word "procedure" and the insertion of the word "established" thus brings out more clearly the idea of legislative prescription in the expression used in article 21. By adopting the phrase "procedure established by law" the Constitution gave the legislature the final word to determine the law.

Our attention was drawn to *The King* v. *The Military Governor of the Hair Park Camp* (1), where articles 6 and 70 of the Irish Constitution are discussed. Under article 6 it is provided that the liberty of the person is inviolable and no person shall be deprived of such except "in accordance with law"..... In article 70 it is provided that no one shall be tried "save in due course of law" and extraordinary Courts were not permitted to be established except the Military Courts to try military offences. The expression "in accordance with law" was interpreted to mean not rules of natural justice but as the law in force at the time. The Irish Court gave the expression "due course of law" the meaning given to it according to the English law and not the American law. It was observed by Lord Atkin in *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria* (2), that in accordance with British Jurisprudence no member of the executive can interfere with the liberty or property of a British subject except when he can support the legality of his act before a Court of justice.

(1) [1924] 2 Irish Reports K.B. 104. (2) [1931] A. C. 662 at 670.

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In *The King* v. *The Secretary of State for Home Affairs* ( ), Scrutton L. J. observed : "A man undoubtedly guilty of murder must yet be released if due forms of law have not been followed in his conviction." It seems very arguable that in the whole set-up of Part III of our Constitution these principles only remain guaranteed by article 21.

A detailed discussion of the true limits of article 21 will not be necessary if article 22 is considered a code to the extent there are provisions therein for preventive detention. In this connection it may be noticed that the articles in Part III deal with different and separate rights. Under the caption "Right to Freedom" articles 19—22 are grouped but each with a separate marginal note. It is obvious that article 22 (1) and (2) prescribe limitations on the right given by article 21. If the procedure mentioned in those articles is followed the arrest and detention contemplated by article 22 (1) and (2), although they infringe the personal liberty of the individual, will be legal, because that becomes the established legal procedure in respect of arrest and detention. Article 22 is for protection against arrest and detention in certain cases, and runs as follows :—

"22. (1) 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.

(2) 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.

(3) Nothing in clauses (1) and (2) shall apply—

(a) to any person who for the time being is an enemy alien ; or

(1) [1923] to K.B. 361 at 382.

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorize 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 :

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (1) ; or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) 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.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4) ;

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention ; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

The learned Attorney-General contended that the subject of preventive detention does not fall under

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article 21 at all and is covered wholly by article 22. According to him, article 22 is a complete code. I am unable to accept that contention. It is obvious that in respect of arrest and detention article 22 (1) and (2) provide safeguards. These safeguards are excluded in the case of preventive detention by article 22 (3), but safeguards in connection with such detention are provided by clauses (4) to (7) of the same article. It is therefore clear that article 21 has to be read as supplemented by article 22. Reading in that way the proper mode of construction will be that to the extent the procedure is prescribed by article 22 the same is to be observed; otherwise article 21 will apply. But if certain procedural safeguards are expressly stated as not required, or specific rules on certain points of procedure are prescribed, it seems improper to interpret these points as not covered by article 22 and left open for consideration under article 21. To the extent the points are dealt with, and included or excluded, article 22 is a complete code. On the points of procedure which expressly or by necessary implication are not dealt with by article 22, the operation of article 21 will remain unaffected. It is thus necessary first to look at article 22 (4) to (7) and next at the provisions of the impugned Act to determine if the Act or any of its provisions are *ultra vires*. It may be noticed that neither the American nor the Japanese Constitution contain provisions permitting preventive detention, much less laying down limitations on such right of detention, in normal times, *i.e.*, without a declaration of emergency. Preventive detention in normal times, *i.e.*, without the existence of an emergency like war, is recognised as a normal topic of legislation in List I, Entry 9, and List III, Entry 3, of the Seventh Schedule. Even in the Chapter on Fundamental Rights article 22 envisages legislation in respect of preventive detention in normal times. The provisions of article 22 (4) to (7) by their very wording leave unaffected the large powers of legislation on this point and emphasize particularly by article 22 (7) the power of the Parliament to deprive a person of a right to have his case considered by an advisory board. Part III and

article 22 in particular are the only restrictions on that power and but for those provisions the power to legislate on this subject would have been quite unrestricted. Parliament could have made a law without any safeguard or any procedure for preventive detention. Such an autocratic supremacy of the legislature is certainly cut down by article 21. Therefore, if the legislature prescribes a procedure by a validly enacted law and such procedure in the case of preventive detention does not come in conflict with the express provisions of Part III or article 22 (4) to (7), the Preventive Dentention Act must be held valid notwithstanding that the Court may not fully approve of the procedure prescribed under such Act.

Article 22 (4) opens with a double negative. Put in a positive form it will mean that a law which provides for preventive detention for a period longer than three months shall contain a provision establishing an advisory board, (consisting of persons with the qualifications mentioned in sub-clause (a), and which has to report before the expiration of three months if in its opinion there was sufficient cause for such detention. This clause, if it stood by itself and without the remaining provisions of article 22, will apply both to the Parliament and the State Legislatures. The proviso to this clause further enjoins that even though the advisory board may be of the opinion that there was sufficient cause for such detention, *i.e.*, detention beyond the period of three months, still the detention is not to be permitted beyond the maximum period, if any, prescribed by Parliament under article 22 (7) (b). Again the whole of this sub-clause is made inoperative by article 22 (4) (b) in respect of an Act of preventive detention passed by Parliament under clauses (7) (a) and (b). Inasmuch as the impugned Act is an Act of the Parliament purported to be so made, clause 22 (4) has no operation and may for the present discussion be kept aside. Article 22 (5) prescribes that when any person under a preventive detention law is detained, 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

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earliest opportunity of making a representation against the order. This clause is of general operation in respect of every detention order made under any law permitting detention. Article 22 (6) permits the authority making the order to withhold disclosure of facts which such authority considers against the public interest to disclose. It may be noticed that this clause only permits the non-disclosure of facts, and reading clauses (5) and (6) together a distinction is drawn between facts and grounds of detention. Article 22 (4) and (7) deal not with the period of detention only but with other requirements in the case of preventive detention also. They provide for the establishment of an advisory board, and the necessity of furnishing grounds to the detenue and also to give him a right to make a representation. Reading article 22 clauses (4) and (7) together it appears to be implied that preventive detention for less than three months, without an advisory board, is permitted under the Chapter on Fundamental Rights, provided such legislation is within the legislative competence of the Parliament or the State Legislature, as the case may be.

Article 22 (5) permits the detained person to make a representation. The Constitution is silent as to the person to whom it has to be made, or how it has to be dealt with. But that is the procedure laid down by the Constitution. It does not therefore mean that if a law made by the Parliament in respect of preventive detention does not make provision on those two points it is invalid. Silence on these points does not make the impugned Act in contravention of the Constitution because the first question is what are the rights given by the Constitution in the case of preventive detention. The contention that the representation should be to an outside body has no support in law. Even in the *Liversidge* case the representation had to be made to the Secretary of State and not to another body. After such representation was made, another advisory board had to consider it, but it was not necessary to make the representation itself to a third party. Article 22 (4) and (7) permit the non-establishment of an advisory board expressly in a parliamentary legislation

providing for preventive detention beyond three months. If so, how can it be urged that the non-establishment of an advisory board is a fundamental right violated by the procedure prescribed in the Act passed by the Parliament ?

The important clause to be considered is article 22 (7). Sub-clause (a) is important for this case. In the case of an Act of preventive detention passed by the Parliament this clause contained in the Chapter on Fundamental Rights, thus permits detention beyond a period of three months and excludes the necessity of consulting an advisory board, if the opening words of the sub-clause are complied with. Sub-clause (b) is permissive. It is not obligatory on the Parliament to prescribe any maximum period. It was argued that this gives the Parliament a right to allow a person to be detained indefinitely. If that construction is correct, it springs out of the words of sub-clause (7) itself and the Court cannot help in the matter. Sub-clause (c) permits the Parliament to lay down the procedure to be followed by the advisory board in an inquiry under sub-clause (a) of clause (4). I am unable to accept the contention that article 22 (4) (a) is the rule and article 22 (7) the exception. I read them as two alternatives, provided by the Constitution for making laws on preventive detention.

Bearing in mind the provisions of article 22 read with article 246 and Schedule VII, List I, Entry 9, and List III, Entry 3, it is thus clear that the Parliament is empowered to enact a law of preventive detention (a) for reasons connected with defence, (b) for reasons connected with foreign affairs, (c) for reasons connected with the security of India ; and (under List III), (d) for reasons connected with the security of a State, (e) for reasons connected with the maintenance of public order, or (f) for reasons connected with the maintenance of supplies and services essential to the community. Counsel for the petitioner has challenged the validity of several provisions of the Act. In respect of the construction of a Constitution Lord Wright in *James* v. *The Commonwealth of Australia* (1),

(1) (1936) A.C. 578 at 614.

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observed that "a Constitution must not be construed in any narrow and pedantic sense." Mr. Justice Higgins in *Attorney-General of New South Wales* v. *Brewery Employees' Union* (1), observed: "Although we are to interpret words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting—to remember that it is a Constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be." In *In re The Central Provinces and Berar Act XIV of* 1938 (2), Sir Maurice Gwyer C. J. after adopting these observations said: "especially is this true of a Federal Constitution with its nice balance of jurisdictions. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or prevert the language of the enactment in the interest of any legal or constitutional theory or even for the purpose of supplying omissions or of correcting supposed errors." There is considerable authority for the statement that the Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority. It is also stated, if the words be positive and without ambiguity, there is no authority for a Court to vacate or repeal a Statute on that ground alone. But it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and

(1) (1908) 6 Com. L.R. 469 at 611-12. (2) (1939) F.C.R. 18 at 37.

paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of Courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights.

It was first argued that by section 3 the Parliament had delegated its legislative power to the executive officer in detaining a person on his being satisfied of its necessity. It was urged that the satisfaction must be of the legislative body. This contention of delegation of the legislative power in such cases has been considered and rejected in numerous cases by our Federal Court and by the English Courts. It is unnecessary to refer to all those cases. A reading of the various speeches in *Liversidge* v. *Anderson* (1) clearly negatives this contention. Section 3 of the impugned Act is no delegation of legislative power to make laws. It only confers discretion on the officer to enforce the law made by the legislature. Section 3 is also impugned on the ground that it does not provide an objective standard which the Court can utilize for determining whether the requirements of law have been complied with. It is clear that no such objective standard of conduct can be prescribed, except as laying down conduct tending to achieve or to avoid a particular object. For preventive detention action must be taken on good suspicion. It is a subjective test based on the cumulative effect of different actions, perhaps spread over a considerable period. As observed by Lord Finlay in *The King* v. *Halliday* (2), a Court is the least appropriate tribunal to investigate the question whether circumstances of suspicion exist warranting the restraint on a person. The contention is urged in respect of preventive detention and not punitive detention. Before a person can be held liable for an offence it is obvious that he should be in a position to know what he may do or not do, and an omission to do or not to do will result in the State

(1) (1942) A.C. 206. (2) (1917) A.C.260 at 269.

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considering him guilty according to the penal enactment. When it comes however to preventive detention, the very purpose is to prevent the individual not merely from acting in a particular way but, as the sub-heads summarized above show, from achieving a particular object. It will not be humanly possible to tabulate exhaustively all actions which may lead to a particular object. It has therefore been considered that a punitive detention Act which sufficiently prescribes the objects which the legislature considers have not to be worked up to is a sufficient standard to prevent the legislation being vague. In my opinion, therefore, the argument of the petitioner against section 3 of the impugned Act fails. It was also contended that section 3 prescribes no limit of time for detention and therefore the legislation is *ultra vires*. The answer is found in article 22 (7) (b). A perusal of the provisions of the impugned Act moreover shows that in section 12 provision is made for detention for a period longer than three months but not exceeding one year in respect of clauses (a) and (b) of that section. It appears therefore that in respect of the rest of the clauses mentioned in section 3 (1) (a) the detention is not contemplated to be for a period longer than three months, and in such cases a reference to the advisory board under section 9 is contemplated.

Section 7 of the Act which is next challenged, runs on the same lines as article 22 (5) and (6) and in my opinion infringes no provision of the Constitution. It was argued that this gave only the right of making a representation without being heard orally or without affording an opportunity to lead evidence and therefore was not an orderly course of procedure, as required by the rules of natural justice. The Parliament by the Act has expressly given a right to the person detained under a preventive detention order to receive the grounds for detention and also has given him a right to make a representation. The Act has thus complied with the requirements of article 22 (5). That clause, which prescribes what procedure has to be followed as a matter of fundamental right, is silent, about the person detained having a right to be heard

orally or by a lawyer. The Constituent Assembly had before them the provisions of clause (1) of the same article. The Assembly having dealt with the requirements of receiving grounds and giving an opportunity to make a representation has deliberately refrained from providing a right to be heard orally. If so, I do not read the clause as guaranteeing such right under article 22 (5). An "orderly course of procedure" is not limited to procedure which has been sanctioned by settled usage. New forms of procedure are as much, held even by the Supreme Court of America, due process of law as old forms, provided they give a person a fair opportunity to present his case. It was contended that the right to make a representation in article 22 (5) must carry with it a right to be heard by an independent tribunal; otherwise the making of a representation has no substance because it is not an effective remedy. I am unable to read clause (5) of article 22 as giving a fundamental right to be heard by an independent tribunal. The Constitution deliberately stops at giving the right of representation. This is natural because under article 22 (7), in terms, the Constitution permits the making of a law by Parliament in which a reference to an advisory board may be omitted. To consider the right to make a representation as necessarily including a right to be heard by an independent judicial, administrative or advisory tribunal will thus be directly in conflict with the express words of article 22 (7).

Even according to the Supreme Court of U.S.A. a right to a judicial trial is not absolute. In the *United States* v. *Ju Toy* (1), a question arose about the exclusion from entry into the States, of a Chinese who claimed to be a citizen of the United States. At page 263 the majority judgment contains the following passage :—"If for the purpose of argument, we assume that the Fifth Amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial: That is the result of the cases which we have cited, and the almost necessary result of the

(1) (198)U.S. 253 at 263.

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power of the Congress to pass exclusion laws. That the decision may be entrusted to an executive officer, and that his decision is due process of law, was affirmed and explained in several cases. It is unnecessary to repeat the often-quoted remarks of Mr. Justice Curits, speaking for the whole Court, in *Den Exden Murray* v. *Hoboken Land and Improvement Company* (1), to show that the requirement of a judicial trial does not prevail in every case."

Again, I am not prepared to accept the contention that a right to be heard orally is an essential right of procedure even according to the rules of natural justice. The right to make a defence may be admitted, but there is nothing to support the contention that an oral interview is compulsory. In the *Local Government Board* v. *Arlidge* (2), the respondent applied to the Board constituted under the Housing Act to state a special case for the opinion of the High Court, contending that the order was invalid because (1) the report of the Inspector had been treated as a confidential document and had not been disclosed to the respondent, and (2) because the Board had declined to give the respondent an opportunity of being heard orally by the person or persons by whom the appeal was finally decided. The Board rejected the application. Both the points were urged before the House of Lords on appeal. Viscount Haldane L. C. in his speech rejected the contention about the necessity of an oral hearing by observing "But it does not follow that the procedure of every tribunal must be the same. In the case of a Court of law tradition in this country has prescribed certain principles to which, in the main, the procedure must conform. But what that procedure is to be in detail must depend on the nature of a tribunal." In rejecting the contention about the disclosure of the report of the Inspector, the Lord Chancellor stated: "It might or might not have been useful to disclose this report, but I do not think that the Board was bound to do so any more than it would have been bound to disclose all the minutes made on the papers in the office before

(1) 18 H.O.W. 272 at 280. (2) (1915) A.C. 120.

a decision was come to .... What appears to me to have been the fallacy of the judgment of the majority in the Court of appeal is that it begs the question at the beginning by setting up the test of the procedure of a Court of justice instead of the other standard which was laid down for such cases in *Board of Education* v. *Rice* (1). I do not think the Board was bound to hear the respondent orally provided it gave him the opportunities he actually had." In spite of the fact that in England the Parliament is supreme I am unable to accept the view that the Parliament in making laws, legislates against the well-recognised principles of natural justice accepted as such in all civilized countries. The same view is accepted in the United States in *Federal Communications Commission* v. *WJR The Goodwill Station* (2).

A right to lead evidence against facts suspected to exist is also not essential in the case of preventive detention. Article 22 (6) permits the non-disclosure of facts. That is one of the clauses of the Constitution dealing with fundamental rights. If even the non-disclosure of facts is permitted, I fail to see how there can exist a right to contest facts by evidence and the non-inclusion of such procedural right could make this Act invalid.

Section 10 (3) was challenged on the ground that it excludes the right to appear in person or by any lawyer before the advisory board and it was argued that this was an infringement of a fundamental right. It must be noticed that article 22 (1) which gives a detained person a right to consult or be defended by his own legal practitioner is specifically excluded by article 22 (3) in the case of legislation dealing with preventive detention. Moreover, the Parliament is expressly given power under article 22 (7) (c) to lay down the procedure in an inquiry by an advisory board. This is also a part of article 22 itself. If so, how can the omission to give a right to audience be considered against the constitutional rights ? It was pointed out that section 10 (3) prevents even the disclosure of a

(1) (1911) A.C. 179. (2) 337 U.S. 265 at 276.

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portion of the report and opinion of the advisory board. It was argued that if so how can the detained person put forth his case before a Court and challenge the conclusions? This argument was similarly advanced in *Local Government Board* v. *Arlidge* (1) and rejected, as mentioned above. In my opinion, the answer is in the provision found in article 22 (7) (c) of the Constitution of India.

It was argued that section 11 of the impugned Act was invalid as it permitted the continuance of the detention for such period as the Central Government or the State Government thought fit. This may mean an indefinite period. In my opinion this argument has no substance because the Act has to be read as a whole. The whole life of the Act is for a year and therefore the argument that the detention may be for an indefinite period is unsound. Again, by virtue of article 22 (7) (b), the Parliament is not obliged to fix the maximum term of such detention. It has not so fixed it, except under section 12, and therefore it cannot be stated that section 11 is in contravention of article 22 (7).

Section 12 of the impugned Act is challenged on the ground that it does not conform to the provisions of article 22 (7). It is argued that article 22 (7) permits preventive detention beyond three months, when the Parliament prescribes "the circumstances in which, and the class or classes of cases in which," a person may be detained. It was argued that both these conditions must be fulfilled. In my opinion, this argument is unsound, because the words used in article 22 (7) themselves are against such interpretation. The use of the word "which" twice in the first part of the sub-clause, read with the comma put after each, shows that the legislature wanted these to be read as disjunctive and not conjunctive. Such argument might have been possible (though not necessarily accepted) if the article in the Constitution was "the circumstances and the class or classes of cases in which...." I have no doubt that by the clause, as worded, the legislature

(1) (1915) A.C. 120.

intended that the power of preventive detention beyond three months may be exercised either if the circumstances in which, *or* the class or classes of cases in which, a person is suspected or apprehended to be doing the objectionable things mentioned in the section. This contention therefore fails.

It was next contended that by section 12 the Parliament had provided that a person might be detained for a period longer than three months but not exceeding one year from the date of his detention, without obtaining the opinion of an advisory board, with a view to prevent him from acting in any manner prejudicial to (a) the defence of India, relations of India with foreign powers or the security of India; or (b) the security of a State or the maintenance of public order. It must be noticed that the contingency provided in section 3 (1) (a) (iii), *viz.*, the maintenance of supplies and services essential to the community is omitted in section 12. Relying on the wording of these two sub-sections in section 12, it was argued that in the impugned Act the wording of Schedule VII List I, Entry 9, and List III, Entry 3, except the last part are only copied. This did not comply with the requirement to specify either the circumstances or the class or classes of cases as is necessary to be done under article 22 (7) of the Constitution. Circumstances ordinarily mean events or situation extraneous to the actions of the individual concerned, while a class of cases mean determinable groups based on the actions of the individuals with a common aim or idea. Determinable may be according to the nature of the object also. It is obvious that the classification can be by grouping the activities of people or by specifying the objectives to be attained or avoided. The argument advanced on behalf of the petitioner on this point does not appeal to me because it assumes that the words of Schedule VII List I, Entry 9, and List III, Entry 3 are never capable of being considered as circumstances or classes of cases. In my opinion, that assumption is not justified, particularly when we have to take into consideration cases of preventive

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detention and not of conviction and punitive detention. Each of the expressions used in those entries is capable of complying with the requirement of mentioning circumstances or classes of cases. The classification of cases, having regard to an object, may itself amount to a description of the circumstances. It is not disputed that each of the entries in the Legislative Lists in the Seventh Schedule has a specific connotation well understood and ascertainable in law. If so, there appears no reason why the same expression when used in section 12 (1) (a) and (b) of the impugned Act should not be held to have such specific meaning and thus comply with the requirement of prescribing circumstances or classes of cases. This argument therefore must be rejected.

Section 13 (2) was attacked on the ground that even if a detention order was revoked, another detention order under section 3 might be made against the same person on the same grounds. This clause appears to be inserted to prevent a man being released if a detention order was held invalid on some technical ground. There is nothing in the Chapter on Fundamental Rights and in article 21 or 22 to prevent the inclusion of such a clause in a parliamentary legislation, permitting preventive detention. Article 20 (2) may be read as a contrast on this point.

Dealing with the four fundamental principles of natural justice in procedure claimed by the petitioner, it is thus clear that in respect of preventive detention no question of an objective standard of human conduct can be laid down. It is conceded that no notice before detention can be claimed by the very nature of such detention. The argument that after detention intimation of the grounds should be given has been recognised in article 22 (5) and incorporated in the impugned Act. As regards an impartial tribunal, article 22 (4) and (7) read together give the Parliament ample discretion. When in specified circumstances and classes of cases the preventive detention exceeds three months, the absence of an advisory board is expressly permitted

by article 22 (7). Under article 22 (4) it appears implied that a provision for such tribunal is not necessary if the detention is for less than three months. As regards an opportunity to be heard, there is no absolute natural right recognised in respect of oral representation. It has been held to depend on the nature of the tribunal. The right to make a representation is affirmed by the Constitution in article 22 (5) and finds a place in the impugned Act. The right to an orderly course of procedure to the extent it is guaranteed by article 22 (4) read with article 22 (7) (c), and by article 22 (7) (a) and (b), has also been thus provided in the Act. It seems to me therefore that the petitioner's contentions even on these points fail.

Section 14 was strongly attacked on the ground that it violated all principles of natural justice and even infringed the right given by article 22 (5) of the Constitution. It runs as follows :

"14. (1) No Court shall, except for the purposes of a prosecution for an offence punishable under sub-section (2), allow any statement to be made, or any evidence to be given, before it of the substance of any communication made under section 7 of the grounds on which a detention order has been made against any person or of any representation made by him against such order ; and, notwithstanding anything contained in any other law, no Court shall be entitled to require any public officer to produce before it, or to disclose the substance of, any such communication or representation made, or the proceedings of an Advisory Board or that part of the report of an Advisory Board which is confidential.

(2) It shall be an offence punishable with imprisonment for a term which may extend to one year, or with fine, or with both, for any person to disclose or publish without the previous authorisation of the Central Government or the State Government, as the case may be, any contents or matter purporting to be contents of any such communication or representation as is referred to in sub-section (1) :

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Provided that nothing in this sub-section shall apply to a disclosure made to his legal adviser by a person who is the subject of a detention order."

By that section the Court is prevented (except for the purpose of punishment for such disclosure) from being informed, either by a statement or by leading evidence, of the substance of the grounds conveyed to the detained person under section 7 on which the order was made, or of any representation made by him against such order. It also prevents the Court from calling upon any public officer to disclose the substance of those grounds or from the production of the proceedings or report of the advisory board which may be declared confidential. It is clear that if this provision is permitted to stand the Court can have no material before it to determine whether the detention is proper or not. I do not mean whether the grounds are sufficient or not. It even prevents the Court from ascertaining whether the alleged grounds of detention have anything to do with the circumstances or class or classes of cases mentioned in section 12 (1) (a) or (b). In *Machindar Shivaji Mahar* v. *The King* (1), the Federal Court held that the Court can examine the grounds given by the Government to see if they are relevant to the object which the legislation has in view. The provisions of article 22 (5) do not exclude that right of the Court. Section 14 of the impugned Act appears to be a drastic provision which requires considerable support to sustain it in a preventive detention Act. The learned Attorney-General urged that the whole object of the section was to prevent ventilation in public of the grounds and the representations, and that it was a rule of evidence only which the Parliament could prescribe. I do not agree. This argument is clearly not sustainable on the words of article 22 clauses (5) and (6). The Government has the right under article 22 (6) not to disclose facts which it considers undersirable to disclose in the public interest. It does not permit the Government to refrain from disclosing grounds which fall under clause (5).

(1) [1949-50] F.C.R. 827.

Therefore, it cannot successfully be contended that the disclosure of grounds may be withheld from the Court in public interest, as a rule of evidence. Moreover, the position is made clear by the words of article 22 (5). It provides that the detaining authority shall communicate to such detained person the grounds *on which the order has been made.* It is therefore essential that the grounds must be connected with the order of preventive detention. If they are not so connected the requirements of article 22 (5) are not complied with and the detention order will be invalid. Therefore, it is open to a detained person to contend before a Court that the grounds on which the order has been made have no connection at all with the order, or have no connection with the circumstances or class or classes of cases under which a preventive detention order could be supported under section 12. To urge this argument the aggrieved party must have a right to intimate to the Court the grounds given for the alleged detention and the representation made by him. For instance, a person is served with a paper on which there are written three stanzas of a poem or three alphabets written in three different ways. For the validity of the detention order it is necessary that the grounds should be those on which the order has been made. If the detained person is not in a position to put before the Court this paper, the Court will be prevented from considering whether the requirements of article 22 (5) are complied with and that is a right which is guaranteed to every person. It seems to me therefore that the provisions of section 14 abridge the right given under article 22 (5) and are therefore *ultra vires.*

It next remains to be considered how far the invalidity of this section affects the rest of the impugned Act. The impugned Act minus this section can remain unaffected. The omission of this section will not change the nature or the structure or the object of the legislation. Therefore the decision that section 14 is *ultra vires* does not affect the validity of the rest of the Act. In my opinion therefore Act IV of 1950, except section 14, is not *ultra vires.* It does not infringe any

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provisions of Part III of the Constitution and the contention of the applicant against the validity of that Act, except to the extent of section 14, fails. The petition therefore fails and is dismissed.

FAZL ALI J.—The question to be decided in this case is whether the Preventive Detention Act, 1950 (Act IV of 1950), is wholly or in part invalid and whether the petitioner who has been detained under that Act is entitled to a writ in the nature of *habeas corpus* on the ground that his detention is illegal. The question being a pure question of law can be decided without referring to a long chain of facts which are narrated in the petitioner's application to this Court and which have a more direct bearing on the alleged *mala fides* of the authorities who have detained him than on the validity of the Act.

The Act which is impugned was enacted by the Parliament on the 26th February, 1950, and will cease to have effect on the 1st April, 1951, save as respects things done or omitted to be done before that date. The main provisions of the Act are set out in sections 3, 7, 8, 9, 10, 11, 12 and 14. Section 3 (1) provides that "the Central Government or the State Government may—

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to—

(i) the defence of India, the relations of India with foreign powers, or the security of India, or

(ii) the security of the State or the maintenance of public order, or

(iii) the maintenance of supplies and services essential to the community, or

(b) if satisfied with respect to any person who is a foreigner within the meaning of the Foreigners Act, 1946 (XXXI of 1946), that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India,

it is necessary so to do, make an order directing that such person be detained."

Sub-sections (2) and (3) of this section empower a District Magistrate, Sub-Divisional Magistarte or the Commissioner of Police in a Presidency Town to exercise the power conferred by and make the order contemplated in sub-section (1), but with the qualification that any order made thereunder must be reported forthiwth to the Government of the State to which the officer in question is subordinate with the grounds on which the order has been made and such other particulars as in his opinion have a bearing on the necessity for the order. Section 7 of the Act provides that the authority making an order of detention shall as soon as may be communicate to the person detained the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order, in a case where such order has been made by the Central Government, to that Government, and in a case where it has been made by a State Government or an officer subordinate thereto, to the State Government. Section 8 provides that the Central Government and each State Government shall, whenever necessary, constitute one or more advisory boards for the purposes of the Act. and state the qualifications of persons of which the board should consist. Section 9 provides that when a detention order has been made with a view to preventing a person from acting in any manner prejudicial to the maintenance of supplies and services essential to the community or if it is made in regard to a person who is a foreigner within the meaning of the Foreigners Act with a view to regulating his continued presence in India or making arrangements for his expulsion from India, the grounds on which the order has been made and the representation, if any, of the person detained shall, within six weeks from the date of detention, be placed before an advisory board. It will be noticed that this section does not provide that the cases of persons who are detained under section 3 (1) (a) (i) and (ii) will also be placed before the advisory board. Section 10 lays down the

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procedure to be followed by the advisory board and section 11 provides that in any case where the advisory board has reported that there is sufficient cause for the detention of the person concerned, the detention order may be confirmed and the detention of the person concerned may be continued for such period as the Central Government or the State Government, as the case may be, thinks fit. Section 12 which is a very important section, as we shall presently see, runs as follows :—

"12 (1) Any person detained in any of the following classes of cases or under any of the following circumstances may be detained without obtaining the opinion of an Advisory Board for a period longer than three months, but not exceeding one year from the date of his detention, namely, where such person has been detained with a view to preventing him from acting in any manner prejudicial to—

(a) the defence of India, relations of India with foreign powers or the security of India; or

(b) the security of a State or the maintenance of public order.

(2) The case of every person detained under a detention order to which the provisions of sub-section (1) apply shall, within a period of six months from the date of his detention, be reviewed where the order was made by the Central Government or a State Government, by such Government, and where the order was made by any officer specified in sub-section (2) of section 3, by the State Government to which such officer is subordinate, in consultation with a person who is or has been or is qualified to be appointed as Judge of a High Court nominated in that behalf by the Central Government or the State Government, as the case may be."

Section 14, which is also a material section for the purpose of this case, is to the following effect :—

"(1) No Court shall, except for the purposes of a prosecution for an offence punishable under sub-section (2), allow any statement to be made, or any

evidence to be given, before it of the substance of any communication made under section 7 of the grounds on which a detention order has been made against any person or of any representation made by him against such order; and, notwithstanding anything contained in any other law, no Court shall be entitled to require any public officer to produce before it, or to disclose the substance of, any such communication or representation made, or the proceedings of an Advisory Board or that part of the report of an Advisory Board which is confidential.

(2) It shall be an offence punishable with imprisonment for a term which may extend to one year, or with fine, or with both, for any person to disclose or publish without the previous authorisation of the Central Government or the State Government, as the case may be, any contents or matter purporting to be the contents of any such communication or representation as is referred to in sub-section (1):

Provided that nothing in this sub-section shall apply to a disclosure made to his legal adviser by a person who is the subject of a detention order."

The point which has been pressed before us is that the Act is invalid, as it takes away or abridges certain fundamental rights conferred by Part III of the Constitution of India, and in support of this general proposition, reliance is placed on article 13 (2) which runs as follows:—

"The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

The rights guaranteed under Part III of the Constitution are classified under seven broad heads, as follows:—

(1) Right to equality;
(2) Right to freedom;
(3) Right against exploitation;
(4) Right to freedom of religion;
(5) Cultural and educational rights;
(6) Right to property; and
(7) Right to constitutional remedies.

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Most of the articles which are said to have been disregarded occur under the heading "Right to freedom," these articles being articles 19 (1) (d), 21 and 22. Another article which is also said to have been violated is article 32, under which the present application for a writ of *habeas corpus* purports to have been made.

Article 19 (1) is divided into seven sub-clauses and runs as follows :—

"All citizens shall have the right—

(a) to freedom of speech and expression ;

(b) to assemble peaceably and without arms ;

(c) to form associations or unions ;

(d) to move freely throughout the territory of India ;

(e) to reside and settle in any part of the territory of India ;

(f) to acquire, hold and dispose of property ; and

(g) to practise any profession, or to carry on any occupation, trade or business."

Clauses (2), (3), (4), (5) and (6) of this article provide that nothing in clause (1) shall affect the operation of any existing law in regard to the rights under that clause, under certain conditions which are mentioned therein. Clause (5), with which we are directly concerned and which will serve as a specimen to show the nature of these provisions, is to the following effect :—

"Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

The contentions advanced on behalf of the petitioner with reference to this article are :—(1) that the Act under which he has been detained deprives him who is a citizen of the Republic of India of the right to move freely throughout the territory of India, which is guaranteed under article 19 (1) (d), and (2)

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that under clause (5) of article 19, it is open to this Court to judge whether the restrictions imposed by the Act on the exercise of the right conferred by article 19 (1) (d) are reasonable or otherwise. Before dealing with this argument, it is necessary to understand the meaning of the words used in article 19 (1) (d), and to have a clear comprehension as to the true nature of the right conferred thereunder. The contention put forward on behalf of the petitioner is that freedom of movement is the essence of personal liberty and any restraint on freedom of movement must be held to amount to abridgment or deprivation of personal liberty, as the case may be, according to the nature of the restraint. After very careful consideration, I have come to the conclusion that this contention is well-founded in law. Blackstone in his "Commentaries on the Laws of England" (4th Edition, volume 1, page 134) states that "personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due course of law". The authority of this statement has never been questioned, and it has been bodily incorporated by H. J. Stephen in his "Commentaries on the Laws of England" and has been reproduced by Cooley in his well-known treatise on "Constitutional Limitations" (8th Edition, volume 1, page 710), which was extensively quoted by both parties in the course of their arguments. The view that freedom of movement is the essence of personal liberty will also be confirmed by reference to any book on the criminal law of England dealing with the offence of false imprisonment or any commentary on the Indian Penal Code dealing with the offences of wrongful restraint or confinement. Russell in his book on "Crimes and Misdemeanours" (8th Edition, volume 1, page 861), dealing with the offence of false imprisonment states as follows :—

"False imprisonment is unlawful and total restraint of the personal liberty of another, whether by constraining him or compelling him to go to a particular place or by confining him in a prison or

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police station or private place, or by detaining him against his will in a public place.....the essential element in the offence is the unlawful detention of the person or the unlawful restraint on his liberty. Such interference with the liberty of another's movements is unlawful, unless it may be justified....."

Again, Dr. Gour in dealing with the offence of wrongful restraint in his book on "The Penal Law of British India" (5th Edition, page 1144) observes as follows :—

"Following the principle that every man's person is sacred and that it is free, law visits with its penalties those who abridge his personal liberty, though he may have no design upon his person. But the fact that he controls its movements for ever so short a time is an offence against the King's peace, for no one has the right to molest another in his free movements."

Dealing with the offence of wrongful confinement, the same learned author observes as follows at page 1148 of his book :—

"'Wrongful confinement' is a species of 'wrongful restraint' as defined in the last section. In wrongful restraint, there is only a partial suspension of one's liberty of locomotion, while in wrongful confinement there is a total suspension of liberty 'beyond certain circumscribing limits'."

Both these authors speak of restraint on personal liberty and interference with the liberty of one's movements or suspension of liberty or locomotion as interchangeable terms. In *Bird* v. *Jones* ([1]), Coleridge J. said that "it is one part of the definition of freedom to be able to go whithersoever one pleases". A similar opinion has been expressed by several authors including Sir Alfred Denning in his book entitled. "Freedom under the Law." There can therefore be no doubt that freedom of movement is in the last analysis the essence of personal liberty, and just as a man's wealth is generally measured in this country in terms of rupees, annas and pies, one's personal liberty depends upon the extent of his freedom of movement. But it is contended on behalf of the State that freedom of move-

(1) 7 Q.B. 742.

ment to which reference has been made in article 19 (1) (d) is not the freedom of movement to which Blackstone and other authors have referred, but is a different species of freedom which is qualified by the words "throughout the territory of India." How the use of the expression "throughout the territory of India" can qualify the meaning of the rest of the words used in the article is a matter beyond my comprehension. In my opinion, the words "throughout the territory of India" were used to stretch the ambit of the freedom of movement to the utmost extent to which it could be guaranteed by our Constitution. The Constitution could not guarantee freedom of movement outside the territorial limits of India, and so has used those words to show that a citizen was entitled to move from one corner of the country to another freely and without any obstruction. "Throughout" is an amplifying and not a limiting expression, and I am surprised to find that the expression "throughout the territory of India," which was used to give the widest possible scope to the freedom of movement, is sought to be construed as an expression limiting the scope and nature of the freedom. In my opinion, the words "throughout the territory of India," having regard to the context in which they have been used here, have the same force and meaning as the expression "to whatsoever place one's own inclination may direct" used by Blackstone, or the expression "freedom to be able to go whithersoever one pleases" used by Coleridge J. in *Bird* v. *Jones* (1). I am certain that neither of these authorities contemplated that the freedom of movement which is vouchsafed to a British citizen, is guaranteed beyond the territorial limits of British territories.

The question as to whether preventive detention is an encroachment on the right guaranteed by article 19 (1) (d) has been considered by the Nagpur, Patna and Calcutta High Courts. The view which has been ultimately adopted by these High Courts is that preventive detention is not a violation of the right guaranteed by article 19 (1) (d), but, in the Calcutta

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High Court, where the matter has been elaborately discussed, at least five Judges have held that it does, and in the ultimate analysis the number of Judges who have held the contrary view appears to be the same. Having regard to the fact that the view expressed by so many learned Judges is opposed to the view I am inclined to take, I consider it necessary to deal briefly with the main objections which have been raised in support of the narrow meaning sought to be attached to the words in article 19 (1) (d). I have already dealt with one of them which is based on the expression "throughout the territory of India." And I shall now proceed to deal with the other *seriatim*.

I. It will be recalled that clause (5) of article 19, which I have already quoted in full provides among other things that nothing in clause (1) (d) shall affect the operation of any law, present or future, imposing reasonable restrictions on the exercise of the right of freedom of movement either in the interests of the general public or for the protection of the interests of any Scheduled Tribe. It has been argued that the use of the words "interests of any Scheduled Tribe" in this clause shows that the right guaranteed by article 19 (1) (d) is a limited right of movement, such as the right to visit different localities and to go from one place to another and is different from the expression "freedom of movement" which has been stated by Blackstone to be another name for personal liberty. It is pointed out that the restrictions in contemplation here are mainly restrictions preventing undesirable outsiders from visiting Scheduled Areas and exploiting Scheduled Tribes, and if the words "freedom of movement" had been used in the larger sense, such a small matter would not have found a place in clause (5) of article 19.

I must frankly confess that I am unable to appreciate this argument and to hold that a mere reference to Scheduled Tribes affects the plain meaning of the words used in clause (1) (d) of article 19. The words used in article 19 (1) (d) are very wide and mean that a person can go at his will in any direction to any locality and to any distance. Restraint on a freedom

so wide in scope and extent may assume a variety of forms and may include internment or externment of a person, his confinement to a particular locality or within the walls of a prison, his being prevented from visiting or staying in any particular area, etc. The framers of the Constitution wanted to save all restrictive legislation affecting freedom of movement made in the interests of the general public (which expression means the same thing as "public interests") and I think that the law in regard to preventive detention is fully covered by the expression "restrictions imposed in the public interests." But they also remembered that there were restrictive laws made in the interests of an important community and that similar laws may have to be made in future and hence they added the words "for the protection of the interests of any Scheduled Tribe." A reference to the Fifth Schedule of the Constitution and the corresponding provisions of the Government of India Act, 1935, as well as to certain laws made for Chota Nagpur, Santhal Parganas and other localities will show that great importance has been attached in this country to the protection and preservation of the members of the scheduled tribes and maintenance of order in tribal areas, and this, in my opinion, is sufficient to account for the special mention of the scheduled tribes in clause (5). It may, at first sight, appear to be a relatively small matter, but in their anxiety to cover the whole field of restrictive laws made whether in the public interest or in the interests of a particular community and not to leave the smallest loophole, the framers of the Constitution apparently decided to draft the clause in the present form. As far as I am aware, there are no restrictive laws made in the interests of any community other than the scheduled tribes, and I think clause (5) is sufficiently comprehensive to include the smallest as well as the most complete restrictions on freedom of movement. I am also satisfied that the mere mention of scheduled tribes in clause (5) cannot change the plain meaning of the words of the main provision which we find in article 19(1) (d) and confine it to some kind of peculiar and truncated freedom of

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movement which is unconnected with personal liberty and which is unknown to any Constitution with which we are familiar.

It will perhaps be not out of place to refer in this connection to Ordinance XIV of 1943, which is one of the ordinances by which the Defence of India Act, 1939, was partly amended. This ordinance provides for—

"the apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain as the case may be suspects, on grounds appearing to such authority to be reasonable, of being of hostile origin, or of having acted, acting, being about to act, or being likely to act in a manner prejudicial to the public safety or interest, the defence of British India, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war, or with respect to whom such authority is satisfied that his apprehension and detention are necessary for the purpose of preventing him from acting in any such prejudicial manner, 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."

The points to be noted in connection with the ordinance are :—

(1) that it is an ordinance specifically providing for apprehension and detention ;

(2) that notwithstanding the fact that there is a general reference in it to acts prejudicial to public safety or interests and maintenance of public order there is also a specific reference to maintenance of peaceful conditions in tribal areas ;

(3) that tribal areas and scheduled tribes are kindred subjects as would appear from the Fifth Schedule appended to the Constitution ; and

(4) that maintenance of peaceful conditions in tribal areas may be as much in the public interest as in the interests of persons living in those areas.

This ordinance shows at least this much that sometimes the law of preventive detention can also be made in the interests of scheduled tribes or scheduled areas and consequently the mere mention of scheduled tribes in clause (5) does not necessarily exclude laws relating to preventive detention from the scope of article 19 (5). The same remarks apply to the ordinance called "The Restriction and Detention Ordinance, 1944" (Ordinance No. III of 1944) which empowered the Central Government or the Provincial Government to detain and make orders restricting the movements of certain persons in the interest of public safety, maintenance of public order as well as maintenance of peaceful conditions in tribal areas, etc.

II. It is also argued that since preventive detention amounts to a total deprivation of freedom of movement, it is not a violation of the right granted under article 19 (1) (d) in regard to which the word "restriction" and not "deprivation" has been used in clause (5). This argument also does not appeal to me. There are really two questions which fall to be decided in this case, *viz.*, (a) Does preventive detention take away the right guaranteed by article 19 (1) (d) ? ; and (b) if so, what are the consequences, if any ?

It seems obvious to me that preventive detention amounts to a complete deprivation of the right guaranteed by article (19) (d). The meaning of the word "restriction" is to be considered with reference to the second question and I think that it will be highly technical to argue that deprivation of a right cannot be said to involve restriction on the exercise of the right. In my opinion, having regard to the context in which the word "restriction" has been used, there is no antithesis between that word and the word "deprivation." As I have already stated, restraint on the right to move can assume a variety of forms and restriction would be the most appropriate expression to be used in clause (5) so as to cover all those forms ranging from total to various kinds of partial deprivation of freedom of movement. I will however have to advert to this subject later and will try to show that the

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construction I have suggested is supported by good authority.

III. It appears that some of the Judges who had to deal with the question which we have before us were greatly influenced by the argument that if the deprivation of personal liberty amounts to deprivation of the right granted under article 19 (1) (d), any conviction for an offence under the Indian Penal Code involving a sentence of imprisonment will be subject to judicial review on the ground of reasonableness of the provisions of the Code under which the conviction is recorded. Meredith C. J. of the Patna High Court has given expression to his concern for the situation which will thereby arise, in these words :—

"It will be seen that the claim made is very sweeping indeed. It would mean that every law under which a person may be imprisoned, including all the provisions of the Penal Code, is open to examination by the Courts on the ground of reasonableness. It makes the Courts supreme arbiters in regard to any such legislation, and they can reject it or accept it in accordance with their ideas of whether it appeals to their reason. But ideas of reasonableness or otherwise are apt to vary widely. Take for example, laws relating to prohibition or take such a matter as adultery which the Indian law regards as a crime punishable with imprisonment but the English law does not. It is difficult to believe the framers of the Constitution ever intended to place so enormous a power in the hands of the Courts....." [*Rattan Roy* v. *The State of Bihar*].

The obvious and strictly legal reply to this argument is that the consideration, which has so greatly weighed with the learned Chief Justice, is not enough to cut down the plain meaning of the general words used in article 19 (5) of the Constitution. As has been pointed out in a number of cases, "in construing enacted words, we are not concerned with the policy involved or with the results injurious or otherwise which may follow by giving effect to the language

used" [*King Emperor* v. *Benoari Lal Sharma and others.* (1)].

Apart from this aspect of the matter, I agree with one of the learned Judges of the Calcutta High Court in his remark that "no calamitous or untoward result will follow even if the provisions of the Penal Code become justiciable." I am certain that no Court would interfere with a Code which has been the law of the land for nearly a century and the provisions of which are not in conflict with the basic principles of any system of law. It seems to me that this Court should not be deterred from giving effect to a fundamental right granted under the Constitution, merely because of a vague and unfounded fear that something catastrophic may happen.

I have so far proceeded on the assumption that the basis of the objection raised by Meredith C. J. is correct in law, but, in my opinion, it is not. Crime has been defined to consist in those acts or omissions involving breach of a duty to which a sanction is attached by law by way of punishment or pecuniary penalty in the public interests. (See Russell's "Crimes and Misdemeanours".) Section 2 of the Indian Penal Code, 1860, provides that "every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within British India." The Indian Penal Code does not primarily or necessarily impose restrictions on the freedom of movement, and it is not correct to say that it is a law imposing restrictions on the right to move freely. Its primary object is to punish crime and not to restrict movement. The punishment may consist in imprisonment or a pecuniary penalty. If it consists in a pecuniary penalty, it obviously involves no restriction on movement; but if it consists in imprisonment, there is a restriction on movement. This restraint is imposed not under a law imposing restrictions on movement but under a law defining crime and making it punishable. The punishment is correlated directly with the violation of some other person's right and not with the right of

(1) (1945) F.C.R. 161 at p. 177.

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movement possessed by the offender himself. In my opinion, therefore, the Indian Penal Code does not come within the ambit of the words "law imposing restriction on the right to move freely".

In the course of the arguments, the expression "punitive detention" was frequently used and the tendency was to put it on the same footing as preventive detention for the purpose of certain arguments. Punitive detention is however essentially different from preventive detention. A person is punitively detained only after a trial for committing a crime and after his guilt has been established in a competent Court of justice. A person so convicted can take his case to the State High Court and sometimes bring it to this Court also; and he can in the course of the proceedings connected with his trial take all pleas available to him including the plea of want of jurisdiction of the Court of trial and the invalidity of the law under which he has been prosecuted. The final judgment in the criminal trial will thus constitute a serious obstacle in his way if he chooses to assert even after his conviction that his right under article 19 (1) (d) has been violated. But a person who is preventively detained has not to face such an obstacle whatever other obstacle may be in his way.

IV. It was pointed out that article 19 being confined to citizens, the anomalous situation will follow that in cases of preventive detention, a citizen will be placed in a better position than a non-citizen, because if a citizen is detained his detention will be open to some kind of judicial review under article 19 (5), but if a non-citizen has been detained his case will not be open to such review. In this view, it is said that the whole Act relating to preventive detention may be declared to be void if it is unreasonable, though it concerns citizens as well as persons other than citizens. I must frankly state that I am not at all perturbed by this argument. It is a patent fact that the Constitution has confined all the rights mentioned in article 19 (1) to citizens. It is equally clear that restrictions on those rights are to a limited extent at least open to judicial review. The very same question which is

raised in regard to article 19 (1) (d) will arise with regard to most of the other sub-clauses. A citizen has the right to assemble peaceably and without arms, to form associations or unions and so on. If there is any law imposing unreasonable restrictions on any of these rights, that law will not be good law so far as citizens are concerned, but it may be good law so far as non-citizens are concerned. I do not see why a similar situation arising with regard to the right granted under sub-clause (d) should be stated to be anomalous. So far as the right of free movement is concerned, a non-citizen has been granted certain protections in articles 21 and 22. If a citizen has been granted certain other additional protections under article 19 (1) (d), there is no anomaly involved in the discrimination. I think that it is conceivable that a certain law may be declared to be void as against a citizen but not against a non-citizen. Such a result however should not affect our mind if it is found to have been clearly within the contemplation of the framers of the Constitution.

V. It was contended that the rights declared by article 19 are the rights of a free citizen and if he has already been deprived of his liberty in the circumstances referred to in articles 20, 21 and 22, then it would be idle to say that he still enjoys the right referred to in article 19. After giving my fullest consideration to this argument, I have not been able to appreciate how it arises in this case. There is nothing in article 19 to suggest that it applies only to those cases which do not fall under articles 20, 21 and 22. Confining ourselves to preventive detention, it is enough to point out that a person who is preventively detained must have been, before he lost his liberty, a free man. Why can't he say to those who detained him: "As a citizen I have the right to move freely and you cannot curtail or take away my right beyond the limits imposed by clause (5) of article 19." This is the only question which arises in the case and it should not be obscured by any abstruse or metaphysical considerations. It is true that if you put a man under detention, he cannot move and therefore he is not in a position to

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exercise the right guaranteed under article 19 (1) (d), but this is only the physical aspect of the matter and a person who is bed-ridden on account of disease suffers from a similar disability. In law, however, physical duress does not deprive a person of the right to freedom of movement. If he has been detained under some provision of law imposing restrictions on the freedom of movement, then the question will arise whether the restrictions are reasonable. If he has been detained under no provision of law or under some law which is invalid, he must be set at liberty.

To my mind, the scheme of the Chapter dealing with the fundamental rights does not contemplate what is attributed to it, namely, that each article is a code by itself and is independent of the others. In my opinion, it cannot be said that articles 19, 20, 21 and 22 do not to some extent overlap each other. The case of a person who is convicted of an offence will come under articles 20 and 21 and also under article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with in article 22, also amounts to deprivation of personal liberty which is referred to in article 21, and is a violation of the right of freedom of movement dealt with in article 19 (1) (d). That there are other instances of overlapping of articles in the Constitution may be illustrated by reference to article 19 (1) (f) and article 31 both of which deal with the right to property and to some extent overlap each other. It appears that some learned High Court Judges, who had to deal with the very question before us, were greatly impressed by the statement in the report of the Drafting Committee of the Constituent Assembly on article 15 (corresponding to the present article 21), that the word "liberty" should be qualified by the insertion of the word "personal" before it for otherwise it may be construed very widely so as to include the freedoms dealt with in article 13 (corresponding to the present article 19). I am not however preparded to hold that this statement is decisive on the question of the construction of the words used in article 19 (1) (d) which are quite plain and can be construed without any

extraneous help. Whether the report of the Drafting Committee and the debates on the floor of the House should be used at all in construing the words of a statute, which are words of ordinary and common use and are not used in any technical or peculiar sense, is a debatable question; and whether they can be used in aid of a construction which is a strain upon the language used in the clause to be interpreted is a still more doubtful matter. But, apart from these legal considerations, it is, I think, open to us to analyse the statement and see whether it goes beyond adding a somewhat plausible reason—a superficially plausible reason—for a slight verbal change in article 21. It seems clear that the addition of the word "personal" before "liberty" in article 21 cannot change the meaning of the words used in article 19, nor can it put a matter which is inseparably bound up with personal liberty beyond its place. Personal liberty and personal freedom, in spite of the use of the word "personal," are, as we find in several books, sometimes used in a wide sense and embrace freedom of speech, freedom of association, etc. These rights are some of the most valuable phases or elements of liberty and they do not cease to be so by the addition of the word "personal." A general statement by the Drafting Committee referring to freedom in plural cannot take the place of an authoritative exposition of the meaning of the words used in article 19 (1) (d), which has not been specifically referred to and cannot be such an overriding consideration as to compel us to put a meaning opposed to reason and authority. The words used in article 19 (1) (d) must be construed as they stand, and we have to decide upon the words themselves whether in the case of preventive detention the right under article 19 (1) (d) is or is not infringed. But, as I shall point out later, however, literally we may construe the words used in article 19 (1) (d) and however restricted may be the meaning we may attribute to those words, there can be no escape from the conclusion that preventive detention is a direct infringement of the right guaranteed in article 19 (1) (d).

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Having dealt with the principal objections, I wish to revert once again to the main topic. The expressions "personal liberty" and "personal freedom" have, as we find in several books, a wider meaning and also a narrower meaning. In the wider sense, they include not only immunity from arrest and detention but also freedom of speech, freedom of association, etc. In the narrower sense, they mean immunity from arrest and detention. I have shown that the juristic conception of "personal liberty," when these words are used in the sense of immunity from arrest, is that it consists in freedom of movement and locomotion. I have also pointed out that this conception is at the root of the criminal law of England and of this country, so far as the offences of false imprisonment and wrongful confinement are concerned. The gravamen of these offences is restraint on freedom of movement. With these facts in view, I have tried to find out whether there is any freedom of movement known in England apart from personal liberty used in the sense of immunity from arrest and detention, but I find no trace of any such freedom. In Halsbury's Laws of England (2nd Edition, volume 6, page 391), the freedoms mentioned are the right to personal freedom (or immunity from detention or confinement), the right to property, the right to freedom of speech, the right of public meeting, the right of association, etc. Similar classifications will be found in Dicey's "Introduction to the Study of the Law of the Constitution" and Keith's "Constitutional Law" and other books on constitutional subjects, but there is no reference anywhere to any freedom or right of movement in the sense in which we are asked to construe the words used in article 19 (1) (d). In the Constitutions of America, Ireland and many other countries where freedom is prized, there is no reference to freedom or right of movement as something distinct from personal liberty used in the sense of immunity from arrest and confinement. The obvious explanation is that in legal conception no freedom or right of movement exists apart from what personal liberty connotes and therefore a separate treatment of this freedom was not necessary. It is only in the Constitution of the Free

City of Danzig, which covers an area of 791 square miles, that we find these words in article 75:—"All nationals shall enjoy freedom of movement within the City." There is however no authoritative opinion available to support the view that this freedom is anything different from what is otherwise called personal liberty. The problem of construction in regard to this particular right in the Constitution of Danzig is the same as in our Constitution. Such being the general position, I am confirmed in my view that the juristic conception that personal liberty and freedom of movement connote the same thing is the correct and true conception, and the words used in article 19 (1) (d) must be construed according to this universally accepted legal conception.

This conclusion is further supported by reference to the war legislation in England and in India, upon which the law of preventive detention, which has been in force in this country since the war, is based. In the first world war, the British Parliament passed the Defence of the Realm Consolidation Act, in 1914, and a number of regulations were made under it including regulation 14-B, which permitted the Secretary of State to subject any person "to such obligations and *restrictions* as hereinafter mentioned in view of his hostile origin or associations." Lord Atkin in referring to this regulation said in *Liversidge* v. *Sir John Anderson* (1), "that the regulation undisputedly gave to a Secretary of State unrestricted power to detain a suspected person." Apparently, Lord Atkin meant that the restriction referred to in the Act included preventive detention. Under this regulation, one Arthur Zadig was interned, and he applied to the King's Bench for a writ of *habeas corpus* which was refused. The matter ultimately came up before the House of Lords in *Rex* v. *Halliday* (2), and the noble Lords in dealing with the case proceeded on the assumption that there was no difference between internment and incarceration or imprisonment. Lord Shaw in narrating the facts of th case stated:—

(1) [1942] A. C. 238.

(2) [1917] A. C. 260.

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"His person was seized, he has been interned.... The appellant lost his liberty and was interned....."

He then proceeded to state that there was no difference between internment and imprisonment and quoted the following passage from Blackstone:—

"The confinement of the person, in any wise, is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment."

Proceeding on this footing (which I find to be the common basis in all other speeches delivered in the case, though Lord Shaw had given a dissenting judgment), Lord Finlay while dealing with the provisions of the regulations observed :—

"One of the most obvious means of taking precautions against dangers such as are enumerated is to impose some restriction on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy" (1).

Again, Lord Atkinson while dealing with the merits of the case made the following observation :—

"If the legislature chooses to enact that he can be deprived of his liberty and incarcerated or interned for certain things for which he could not have been heretofore incarcerated or interned, that enactment and the orders made under it if *intra vires* do not infringe upon the Habeas Corpus Acts or take away any right conferred by Magna Charta....."(2)

This passage read with the previous passage quoted by me will show that both internment and incarceration were regarded as "restrictions on the freedom of movement" and that deprivation of liberty and restriction on freedom of movement were used as alternative expressions bearing the same meaning.

The same conclusion is to be drawn by reference to the regulations made in the last world war under the Emergency Powers (Defence) Act, 1939. The regulation which directly dealt with detention orders was 18-B. This regulation and a number of other regulations have been placed in Part I under the heading "Restrictions

(1) [1917] A. C. 269. (2) [1917] A. C. 272.

on movements and activities of persons." The classification is important, because it meets two principal arguments advanced in this case. It shows firstly that detention is a form of restriction and secondly that it is a restriction on movement. I have noticed that "movement" is used in plural, and the heading also refers to restrictions on activities, but, having regard to the subjects classified under this head, movement undoubtedly refers to physical movement and includes such movements as entering a particular locality, going from one place to another, etc., *i.e.*, the very things to which article 19 (1) (d) is said to have reference. In *Liversidge's* case, in construing the provisions of the Act of 1939, Viscount Maugham observed as follows:—

"The language of the Act of 1939 (above cited) shows beyond doubt that Defence Regulations may be made which must deprive the subject "whose detention appears to the Secretary of State to be expedient in the interests of public safety" of all his liberty of movement while the regulations remain in force" (1).

Thus Viscount Maugham also considered detention to be synonymous with deprivation of liberty of movement.

The classification that we find in the Defence of the Realm Regulations was with a little verbal modification adopted in the Defence of India Rules, and we find that here also rule 26, which dealt with preventive detention, has been placed under the heading "Restriction of movements and activities of persons." A somewhat similar classification has also been adopted in a series of Provincial Acts and Ordinances relating to maintenance of order [see section 2 of the Bihar Maintenance of Public Order Act, 1949, section 16 of the West Bengal Security Act, 1948, section 4 of the East Punjab Public Safety Act, 1949, section 2 of the Madras Maintenance of Public Order Act, 1947, section 3 of the U.P. Maintenance of Public Order Temporary Act, 1947, and section 2 of the Bombay Public Security Measures Act, 1947]. In these Acts and Ordinances, preventive detention and certain

(1) [1942] A. C. 219.

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other forms of restriction on movement such as internment, externment, etc., have been classed together and dealt with more or less on the same footing, and sometimes they have been dealt with in different clauses of the same section. In one of the Acts, the same advisory board is to deal with the case of a detenue as well as that of an externed person, and there are also similar provisions giving them the right to represent their case to the Government.

I will now assume for the sake of argument that the freedom of movement to which reference is made in article 19 (1) (d) has nothing to do with personal liberty and that the words which occur in the article bear the restricted meaning attributed to them by the learned Attorney-General and some of my colleagues. It seems to me that even on this assumption, it is difficult to arrive at any conclusion other than what I have already arrived at. There can be no doubt that preventive detention does take away even this limited freedom of movement directly and substantially, and, if so, I do not see how it can be argued that the right under article 19 (1) (d) is not infringed if the alternative interpretation is accepted. We have only to ask ourselves: Does a person who is detained retain even a fraction of his freedom of movement in howsoever restricted sense the term may be used and does he not lose his right to move *freely* from one place to another or visit any locality he likes as a necessary result of his detention? I think I should refer here once more to the fact that in the Defence of the Realm Regulations and Defence of India Rules, preventive detention is classed under the heading "Restriction of movements and activities." "Movement" is here used in plural and refers to that very type of movement which is said to be protected by article 19 (1) (d), moving from one State or place to another, visiting different localities, etc. One of the objects of preventive detention is to restrain the person detained from moving from place to place so that he may not spread disaffection or indulge in dangerous activities in the places he visits. The same consideration applies to the cases of persons who are interned or externed. Hence, externment,

internment and certain other forms of restriction on movement have always been treated as kindred matters belonging to the same group or family and the rule which applies to one must necessarily apply to the other. It is difficult to hold that the case of externment can possibly be dealt with on a different footing from the case of preventive detention. I am however interested to find that the Patna and Bombay High Courts have held that a person who is externed can successfully assert that the right granted to him under article 19 (1) (d) has been violated. This view has not been seriously challenged before us, and, if it is correct, I really do not see how it can be held that preventive detention is also not a direct invasion of the right guaranteed in article 19 (1) (d). Perhaps, one may pause here to ask what kind of laws were in contemplation of the framers of the Constitution when they referred to laws imposing restrictions in the public interest in article 19 (5). I think the war laws and the Provincial Acts and Ordinances to which I have already referred must have been among them, these being laws which expressly purport to impose restrictions on movements. If so, we should not overlook the fact that preventive detention was an inseparable part of these laws and was treated as a form of restriction on movement and classified as such. It seems to me that when the matter is seriously considered, it would be found that the interpretation of the learned Attorney-General attracts the operation of article 13 (2) no less strongly and directly than the interpretation I have suggested, and I prefer the latter only because I consider that it is legally unsound to treat what is inseparably bound up with and is the essential element in the legal concept of personal liberty as a wholly separate and unconnected entity. But as I have already indicated, it will be enough for the purpose of this case if we forget all about personal liberty and remember only that detention is, as is self-evident and as has been pointed out by Viscount Maugham and other eminent judges, another name for depriving a person of all his "liberty of movement."

It was pointed out in the course of the arguments

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that preventive detention not only takes away the right in article 19 (1) (d) but also takes away all the other rights guaranteed by article 19 (1), except the right to hold, acquire and dispose of property. Where exactly this argument is intended to lead us to, I cannot fully understand, but it seems to me that it involves an obvious fallacy, because it overlooks the difference in the modes in which preventive detention operates on the right referred to in sub-clause (d) and other sub-clauses of article 19 (1). The difference is that while preventive detention operates on freedom of movement directly and inevitably, its operation on the other rights is indirect and consequential and is often only notional. One who is preventively detained is straightaway deprived of his right of movement as a direct result of his detention, but he loses the other rights only in consequence of his losing freedom of movement. Besides, while freedom of movement is lost by him in all reality and substance, some of the other rights may not be lost until he wishes to exercise them or is interested in exercising them. A person who is detained may not be interested in freedom of association or may not pursue any profession, occupation, trade or business. In such a case, the rights referred to are lost only in theory and not as a matter of substance. I wish only to add that when I said that I was not able to understand the full force of the argument which I have tried to deal with, what I had in mind was that if preventive detention sweeps away or affects almost all the rights guaranteed in article (19) (1), the matter deserves very serious consideration and we cannot lightly lay down that article 13 (2) does not come into operation.

Being fully alive to the fact that it is a serious matter to be asked to declare a law enacted by Parliament to be unconstitutional, I have again and again asked myself the question: What are we to put in the scales against the construction which I am inclined to adopt and in favour of the view that preventive detention does not take away the freedom of movement guaranteed in article 19 (1) (d)? The inevitable answer has always been that while in one of the scales

we have plain and unambiguous language, the opinion of eminent jurists, judicial dicta of high authority, constitutional practice in the sense that no Constitution refers to any freedom of movement apart from personal liberty, and the manner in which preventive detention has been treated in the very laws on which our law on this subject is based, all that we can put in the opposite scale is a vague and ill-founded apprehension that some fearful object such as the revision of the Penal Code is looming obscurely in the distant horizon, the peculiar objection that the mere mention of the scheduled tribes will alter the meaning of certain plain words, the highly technical and unreal distinction between restriction and deprivation and the assumption not warranted by any express provision that a person who is preventively detained cannot claim the right of freedom of movement because he is not a free man and certain other things which, whether taken singly or collectively, are too unsubstantial to carry any weight. In these circumstances, I am strongly of the view that article 19 (1) (d) guarantees the right of freedom of movement in its widest sense, that freedom of movement being the essence of personal liberty, the right guaranteed under the article is really a right to personal liberty and that preventive detention is a deprivation of that right. I am also of the view that even on the interpretation suggested by the learned Attorney-General, preventive detention cannot but be held to be a violation of the right conferred by article 19 (1) (d). In either view, therefore, the law of preventive detention is subject to such limited judicial review as is permitted under article 19 (5). The scope of the review is simply to see whether any particular law imposes any unreasonable restrictions. Considering that the restrictions are imposed on a most valuable right, there is nothing revolutionary in the legislature trusting the Supreme Court to examine whether an Act which infringes upon that right is within the limits of reason.

I will now pass on to the consideration of article 21, which runs as follows :—

"No person shall be deprived of his life or personal

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liberty except according to procedure established by law."

Here again, our first step must be to arrive at a clear meaning of the provision. The only words which cause some difficulty in the proper construction of the article are "procedure established by law."

The learned Attorney-General contended before us that the word "law" which is used in article 21 means State-made law or law enacted by the State. On the other hand, the learned counsel for the petitioner strongly contended that the expression "procedure established by law" is used in a much wider sense and approximates in meaning to the expression "due process of law" as interpreted by the Supreme Court of America in the earliest times and, if that is so, it means exactly what some of the American writers mean to convey by the expression "procedural due process."

In the course of the arguments, the learned Attorney-General referred us to the proceedings in the Constituent Assembly for the purpose of showing that the article as originally drafted contained the words "without due process of law" but these words were subsequently replaced by the words "except according to procedure established by law." In my opinion, though the proceedings or discussions in the Assembly are not relevant for the purpose of construing the meaning of the expressions used in article 21, especially when they are plain and unambiguous, they are relevant to show that the Assembly intended to avoid the use of the expression "without due process of law." That expression had its roots in the expression "*per legem terrae*" (law of the land) used in Magna Charta in 1215. In the reign of Edward III, however, the words "due process of law" were used in a statute guaranteeing that no person will be deprived of his property or imprisoned or indicted or put to death without being brought in to answer by due process of law (28, Edward III, Ch. III). The expression was afterwards adopted in the American Constitution and also in the Constitutions of some of the constituent States, though some of the States preferred to use the

words "in due course of law" or "according to the law of the land." [See Cooley on "Constitutional Limitations," 8th Edn. Vol. II, pages 734-5]. In the earliest times, the American Supreme Court construed "due process of law" to cover matters of procedure only, but gradually the meaning of the expression was widened so as to cover substantive law also, by laying emphasis on the word "due." The expression was used in such a wide sense that the judges found it difficult to define it and in one of the cases it was observed as follows:—

"It would be difficult and perhaps impossible to give to those words a definition, at once accurate, and broad enough to cover every case. This difficulty and perhaps impossibility was referred to by Mr. Justice Miller in *Davidson* v. *New Orleans*, where the opinion was expressed that it is wiser to ascertain their intent and application by the 'gradual process of judicial inclusion and exclusion,' as the cases presented for decision shall require, with the reasoning on which such decisions may be founded:" *Missouri Pacific Railway Co.* v. *Humes* (1).

It seems plain that the Constituent Assembly did not adopt this expression on account of the very elastic meaning given to it, but preferred to use the words "according to procedure established by law" which occur in the Japanese Constitution framed in 1946.

It will not be out of place to state here in a few words how the Japanese Constitution came into existence. It appears that on the 11th October, 1945, General McArthur directed the Japanese Cabinet to initiate measures for the preparation of the Japanese Constitution, but, as no progress was made, it was decided in February, 1946, that the problem of constitutional reform should be taken over by the Government Section of the Supreme Commander's Headquarters. Subsequently the Chief of this Section and the staff drafted the Constitution with the help of American constitutional lawyers who were called to assist the Government Section in the task. This Constitution, as a learned writer has remarked, bore

(1) 115 U.S. 512 at page 518.

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on almost every page evidences of its essentially Western origin, and this characteristic was especially evident in the preamble "particularly reminiscent of the American Declaration of Independence, a preamble which, it has been observed, no Japanese could possibly have conceived or written and which few could even understand." [See Ogg and Zink's "Modern Foreign Governments"]. One of the characteristics of the Constitution which undoubtedly bespeaks of direct American influence is to be found in a lengthy chapter, consisting of 31 articles, entitled "Rights and Duties of the People," which provided for the first time an effective "Bill of Rights" for the Japanese people. The usual safeguards have been provided there against apprehension without a warrant and against arrest or detention without being informed of the charges or without adequate cause (articles 33 and 34).

Now there are two matters which deserve to be noticed:—(1) that the Japanese Constitution was framed wholly under American influence; and (2) that at the time it was framed the trend of judicial opinion in America was in favour of confining the meaning of the expression "due process of law" to what is expressed by certain American writers by the somewhat quaint but useful expression "procedural due process." That there was such a trend would be clear from the following passage which I quote from Carl Brent Swisher's "The Growth of Constitutional Power in the United States" (page 107):—

"The American history of its interpretation falls into three periods. During the first period, covering roughly the first century of government under the Constitution, due process was interpreted principally as a restriction upon procedure—and largely the judicial procedure—by which the government exercised its powers. During the second period, which, again roughly speaking, extended through 1936, due process was expanded to serve as a restriction not merely upon procedure but upon the substance of the activities in which the government might engage. During the third period, extending from 1936 to date, the use of due

process as a substantive restriction has been largely suspended or abandoned, leaving it principally in its original status as a restriction upon procedure."

In the circumstances mentioned, it seems permissible to surmise that the expression "procedure established by law" as used in the Japanese Constitution represented the current trend of American judicial opinion with regard to "due process of law," and, if that is so, the expression as used in our Constitution means all that the American writers have read into the words "procedural due process." But I do not wish to base any conclusions upon mere surmise and will try to examine the whole question on its merits.

The word "law" may be used in an abstract or concrete sense. Sometimes it is preceded by an article such as "a" or "the" or by such words as "any" "all," etc., and sometimes it is used without any such prefix. But, generally, the word "law" has a wider meaning when used in the abstract sense without being preceded by an article. The question to be decided is whether the word "law" means nothing more than statute law.

Now whatever may be the meaning of the expression "due process of law," the word "law" is common to that expression as well as "procedure established by law" and though we are not bound to adopt the construction put on "law" or "due process of law" in America, yet since a number of eminent American Judges have devoted much thought to the subject, I am not prepared to hold that we can derive no help from their opinions and we should completely ignore them. I will therefore in the first instance set out certain quotations from a few of the decisions of the American Supreme Court construing the word "law as used in the expression "due process of law," in so far as it bears on the question of legal procedure.

(1) "Although the legislature may at its pleasure provide new remedies or change old ones, the power is nevertheless subject to the condition that it cannot remove certain ancient land-marks, or take away certain fundamental rights which have been always

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recognized and observed in judicial procedures:" *Bardwell* v. *Collin* (1).

(2) "By the law of the land is most clearly intended the general law: a law which hears before it condemns, which proceeds upon inquiry and renders judgments only after trial. The meaning is that every citizen shall hold his life, liberty and property, and immunities under the protection of the general rules which govern society:" *Dartmouth College Case* (2)

(3) "Can it be doubted that due process of law signifies a right to be heard in one's defence? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution? If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and enforce justice, Courts possess the right to inflict the very wrongs which they were created to prevent:" *Hovey* v. *Elliott* (3).

(4) "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his say in Court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered: *"Gatpin* v. *Page* (4).

Thus, in America, the word "law" does not mean merely State-made law or law enacted by the State and does not exclude certain fundamental principles of

(1) 44 Minn. 97; 9 L.R.A. 152.
(2) 17 U.S. 4.
(3) 167 U. S. 409 at page 417.
(4) 85 U.S. 18.

justice which inhere in every civilized system of law and which are at the root of it. The result of the numerous decisions in America has been summed up by Professor Willis in his book on "Constitutional Law" at page 662, in the statement that the essentials of due process are: (1) notice, (2) opportunity to be heard, (3) an impartial tribunal, and (4) orderly course of procedure. It is pointed out by the learned author that these essentials may assume different forms in different circumstances, and so long as they are conceded in principle, the requirement of law will be fulfilled. For example, a person cannot require any particular form or method of hearing, but all that he can require is a reasonable opportunity to be heard. Similarly, an impartial tribunal does not necessarily mean a judicial tribunal in every case. So far as orderly course of procedure is concerned, he explains that it does not require a Court to strictly weigh the evidence but it does require it to examine the entire record to ascertain the issues, to discover whether there are facts not reported and to see whether or not the law has been correctly applied to facts. The view expressed by other writers is practically the same as that expressed by Professor Willis, though some of them do not expressly refer to the fourth element, *viz.*, orderly course of procedure. The real point however is that these four elements are really different aspects of the same right, *viz.*. the right to be heard before one is condemned.

So far as this right is concerned, judicial opinion in England appears to be the same as that in America. In England, it would shock one to be told that a man can be deprived of his personal liberty without a fair trial or hearing. Such a case can happen only if the Parliament expressly takes away the right in question in an emergency as the British Parliament did during the last two world wars in a limited number of cases. I will refer here to a few cases which show that the fundamental principle that a person whose right is affected must be heard has been observed not only in cases involving personal liberty but also in proceedings affecting other rights, even though they may have

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come before administrative or quasi-judicial tribunals. *Cooper* v. *The Wadsworth Board of Works* (1) was a case under an Act which empowered the District Board to alter or demolish a house where the builder had neglected to give notice of his intention seven days before proceeding to lay or dig the foundation. Acting upon this power, the Board directed the demolition of a building without notice to the builder, but this was held to be illegal. Byles J. in dealing with the matter observed as follows :—

"I conceive they acted judicially because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions, beginning with Dr. Bentley's case, and ending with some very recent cases, establish that although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature. The judgment of Mr. Justice Fortescue, in Dr. Bentley's case, is somewhat quaint, but it is very applicable, and has been the law from that time to the present. He says, "The objection for want of notice can never be got over The laws of God and man both give the party an opportunity to make his defence, if he has any."

In the same case Erle C. J. observed :—

"It has been said that the principle that no man shall be deprived of his property without an opportunity of being heard, is limited to a judicial proceeding .....I do not quite agree with that ; .....the law, I think, has been applied to many exercises of power which in common understanding would not be at all more a judicial proceeding than would be the act of the District Board in ordering a house to be pulled down."

The observations made by Erle C. J. were quoted and applied by Sir Robert Collier in *Smith* v. *The Queen* (2), and the observations of Lord Campbell in *Regina* v. *The Archbishop of Canterbury* (3) were to the same effect.

(1) 14 C.B. (N.S.) 180.

(2) 3 A.C. 614.

(3) 1 E. & E. 559.

A similar opinion was expressed by Sir George Jessel in *Fisher* v. *Keane* (1), *Labouchere* v. *Earl of Wharncliffe,* (2) and *Russel* v. *Russel* (3) . In the last mentioned case, he observed as follows:—

"It [*Wood* v. *Woad* (4)] contains a very valuable statement by the Lord Chief Baron as to his view of the mode of administering justice by persons other than Judges who have judicial functions to perform which I should have been very glad to have had before me on both those club cases that I recently heard, namely, the case of *Fisher* v. *Keane* and the case of *Labouchere* v. *Earl of Wharncliffe.* The passage I mean is this, referring to a committee: "They are bound in the exercise of their functions by the rule expressed in the maxim *"audi alteram partem"*, that no man should be condemned to consequences without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals'."

This opinion was quoted with approval by Lord Macnaghten in *Lapointe* v. *L'Association etc. de Montreal* (5). In that case, on an application for pension by the appellant, who had been obliged to resign, the Board of Directors, without any judicial inquiry into the circumstances, resolved to refuse the claim on the ground that he was obliged to tender his resignation. This procedure was condemned by Lord Macnaghten as being "contrary to rules of society and above all contrary to the elementary principles of justice." These observations of Lord Macnaghten were referred to and relied on in *The King* v. *Tribunal of Appeal under the Housing Act,* 1919 (6). In that case, a company proposed to build a picture house and the local authority having prohibited the building, the company appealed under the Housing

(1) 11 Ch. D. 353.
(2) 13 Ch. D. 346.
(3) 14 Ch. D. 471.
(4) [1874] L. R. 9 Ex. 190.
(5) [1906] A. C. 535.
(6) [1920] 1. B. 334.

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(Additional Powers) Act, 1919, which contained a provision that an appeal could in certain cases be properly determined without a hearing and that the appellate Court could dispense with the hearing and determine the appeal summarily. It was held that the meaning of rule 7 was that the tribunal on appeal might dispense with an oral hearing, not that they might dispense with a hearing of any kind, and that they were bound to give the appellants a hearing in the sense of an opportunity to make out a case. The Earl of Reading in delivering the judgment observed :

"The principle of law applicable to such a case is well stated by Kelly C.B. in *Wood* v. *Woad* in a passage which is cited with approval by Lord Macnaghten in *Lapointe* v. *L' Association etc. de Montreal*....."

In *Local Government Board* v. *Arlidge*(1), the Local Government dismissed an appeal by a person against whom a closing order had been made under Housing, Town Planning, &c. Act, without an oral hearing and without being allowed to see the report made by the Board's Inspector upon public local inquiry. The House of Lords did not interfere with the order on the ground that the appeal had been dealt with by an administrative authority whose duty was to enforce obligations on the individual in the interests of the community and whose character was that of an organization with executive functions. The principle however was conceded and lucidly set forth that when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially, and they must deal with the question referred to them without bias and must give to each of the parties an opportunity of presenting its case, and that the decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. Commenting upon this case, which is generally regarded as an extreme case, Mr. Gavin Simonds, who afterwards became a member of the House of Lords observes :—

(1) [1915] A. C. 120.

"I think you would agree that if the subject-matter of such proceedings as are here indicated was the liberty of the subject, or indeed his life, you would regard such a judicial procedure as outrageous." (*See* C. K. Allen's "Law and Orders," page 167).

I have particularly referred to cases which were before administrative tribunals, because I have to deal in this case with preventive detention which is said to be an executive act and because I wish to point out that even before executive authorities and administrative tribunals an order cannot generally be passed affecting one's rights without giving one such hearing as may be appropriate to the circumstances of the case. I have only to add that Halsbury after enumerating the most important liberties which are recognized in England, such as right of personal freedom, right to freedom of speech, right of public meeting, etc., adds :—

"It seems to me that there should be added to this list the following rights which appear to have become well-established—the right of the subject to have any case affecting him tried in accordance with the principles of natural justice, particularly the principles that a man may not be a judge in his own cause, and that no party ought to be condemned unheard, or to have a decision given against him unless he has been given a reasonable opportunity of putting forward his case....." (Halsbury's Laws of England, 2nd Edition, volume 6, page 392).

The question is whether the principle that no person can be condemned without a hearing by an impartial tribunal which is well-recognized in all modern civilized systems of law and which Halsbury puts on a par with well-recognized fundamental rights cannot be regarded as part of the law of this country. I must confess that I find it difficult to give a negative answer to this question. The principle being part of the British system of law and procedure which we have inherited, has been observed in this country for a very long time and is also deeply rooted in our ancient history, being the basis of the

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panchayat system from the earliest times. The whole of the Criminal Procedure Code, whether it deals with trial of offences or with preventive or quasi-administrative measures such as are contemplated in sections 107, 108, 109, 110 and 145, is based upon the foundation of this principle, and it is difficult to see that it has not become part of the "law of the land" and does not inhere in our system of law. If that is so, then "procedure established by law" must include this principle, whatever else it may or may not include. That the word "law" used in article 21 does not mean only State-made law is clear from the fact that though there is no statute laying down the complete procedure to be adopted in contempt of Court cases, when the contempt is not within the view of the Court, yet such procedure as now prevails in these cases is part of our law. The statute-law which regulates the procedure of trials and enquiries in criminal cases does not specifically provide for arguments in certain cases, but it has always been held that no decision should be pronounced without hearing arguments. In a number of cases, it has been held that though there may be no specific provision for notice in the statute, the provision must be read into the law. I am aware that some Judges have expressed a strong dislike for the expression "natural justice" on the ground that it is too vague and elastic, but where there are well-known principles with no vagueness about them, which all systems of law have respected and recognized, they cannot be discarded merely because they are in the ultimate analysis found to be based on natural justice. That the expression "natural justice" is not unknown to our law is apparent from the fact that the Privy Council has in many criminal appeals from this country laid down that it shall exercise its power of interference with the course of criminal justice in this country when there has been a breach of principles of natural justice or departure from the requirements of justice. [See *In re Abraham Mallory Dillet* (1), *Taba Singh* v. *King Emperor* (2), *George Gfeller* v. *The*

(1) 12 A. C. 459. (2) I. L. R. 48 Bom. 515.

King (1), and *Bugga and others* v. *Emperor* (2)]. In the present case, there is no vagueness about the right claimed which is the right to have one's guilt or innocence considered by an impartial body and that right must be read into the words of article 21. Article 21 purports to protect life and personal liberty, and it would be a precarious protection and a protection not worth having, if the elementary principle of law under discussion which, according to Halsbury is on a par with fundamental rights, is to be ignored and excluded. In the course of his arguments, the learned counsel for the petitioner repeatedly asked whether the Constitution would permit a law being enacted, abolishing the mode of trial permitted by the existing law and establishing the procedure of trial by battle or trial by ordeal which was in vogue in olden times in England. The question envisages something which is not likely to happen, but it does raise a legal problem which can perhaps be met only in this way that if the expression "procedure established by law" simply means any procedure established or enacted by statute it will be difficult to give a negative answer to the question, but if the word "law" includes what I have endeavoured to show it does, such an answer may be justified. It seems to me that there is nothing revolutionary in the doctrine that the words "procedure established by law" must include the four principles set out in Professor Willis' book, which, as I have already stated, are different aspects of the same principle and which have no vagueness or uncertainty about them. These principles, as the learned author points out and as the authorities show, are not absolutely rigid principles but are adaptable to the circumstances of each case within certain limits. I have only to add that it has not been seriously controverted that "law" in this article means valid law and "procedure" means certain definite rules of proceeding and not something which is a mere pretence for procedure.

I will now proceed to examine article 22 of the Constitution which specifically deals with the subject

(1) A. I. R. 1943, P. C. 211. (2) A. I. R. 1919 P. C. 108.

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of preventive detention. The first point to be noted in regard to this article is that it does not exclude the operation of articles 19 and 21, and it must be read subject to those two articles, in the same way as articles 19 and 21 must be read subject to article 22. The correct position is that article 22 must prevail in so far as there are specific provisions therein regarding preventive detention, but, where there are no such provisions in that article, the operation of articles 19 and 21 cannot be excluded. The mere fact that different aspects of the same right have been dealt with in three different articles will not make them mutually exclusive except to the extent I have indicated.

I will now proceed to analyse the article and deal with its main provisions. In my opinion, the main provisions of this article are:—(1) that no person can be detained beyond three months without the report of an advisory board [clause 4 (a)]; (2) that the Parliament may prescribe the circumstances and the class or classes of cases in which a person may be detained for more than three months without obtaining the opinion of an advisory board [clause 7 (a)]; (3) that when a person is preventively detained, the authority making the order of detention shall communicate to such person the grounds on which the order is made and shall afford him the earliest opportunity of making a representation against the order [clause (5)]; and (4) that the Parliament may prescribe the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention [clause 7 (b)]. The last point does not require any consideration in this case, but the first three points do require consideration.

In connection with the first point, the question arises as to the exact meaning of the words "such detention" occurring in the end of clause 4 (a). Two alternative interpretations were put forward: (1) "such detention" means preventive detention; (2) "such detention" means detention for a period longer than three months. If the first interpretation is correct, then the function of the advisory board would be to go into the merits of the case of each person and simply

report whether there was sufficient cause for his detention. According to the other interpretation, the function of the advisory board will be to report to the government whether there is sufficient cause for the person being detained for more than three months. On the whole, I am inclined to agree with the second interpretation. *Prima facie,* it is a serious matter to detain a person for a long period (more than three months) without any enquiry or trial. But article 22 (4) (a) provides that such detention may be ordered on the report of the advisory board. Since the report must be directly connected with the object for which it is required, the safeguard provided by the article, *viz.,* calling for a report from the advisory board, loses its value, if the advisory board is not to apply its mind to the vital question before the government, namely, whether prolonged detention (detention for more than three months) is justified or not. Under article 22 (4) (a), the advisory board has to submit its report before the expiry of three months and may therefore do so on the eighty-ninth day. It would be somewhat farcical to provide, that after a man has been detained for eighty-nine days, an advisory board is to say whether his initial detention was justified. On the other hand, the determination of the question whether prolonged detention (detention for more than three motnhs) is justified must necessarily involve the determination of the question whether the detention was justified at all, and such an interpretation only can give real meaning and effectiveness to the provision. The provision being in the nature of a protection or safeguard, I must naturally lean towards the interpretation which is favourable to the subject and which is also in accord with the object in view.

The next question which we have to discuss relates to the meaning and scope of article 22 (7) (a) which runs as follows :—

"Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining

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the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4)."

The question is what is meant by "circumstances" and "class or classes of cases" used in this provision. This question has arisen because of the way in which these expressions appear to have been interpreted and applied in the Act of Parliament with which we are concerned. As the matter is important and somewhat complicated, I shall try to express my meaning as clearly as possible even at the risk of some repetition, and, in doing so, I must necessarily refer to the impugned Act as well as Lists I and III of the Seventh Schedule of the Constitution, under which Parliament had jurisdiction to enact it. Item 9 of List I—Union List—shows that the Parliament has power to legislate on preventive detention for reasons connected with (1) defence, (2) foreign affairs, and (3) security of India. Under List III—Concurrent List—the appropriate item is item 3 which shows that law as to preventive detention can be made for reasons connected with (1) the security of the State, (2) the maintenance of public order, and (3) the maintenance of supplies and services essential to the community. The impugned Act refers to all the subjects mentioned in Lists I and III in regard to which law of preventive detention can be made. Section 3 (1) of the Act, the substance of which has already been mentioned, is important, and I shall reproduce it verbatim.

"The Central Government or the State Government may—

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to—

(i) the defence of India, the relations of India with foreign powers, or the security of India, or

(ii) the security of the State or the maintenance of public order, or

(iii) the maintenance of supplies and services essential to the community, or

(b) if satisfied with respect to any person who is a foreigner within the meaning of the Foreigners Act, 1946 (XXXI of 1946), that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India,

it is necessary so to do, make an order directing that such person be detained."

It will be noticed that all the subjects of legislation concerning preventive detention occurring in item 9 of List I are grouped in sub-clause (1) of clause (a). The subjects in this group are three in number and, for convenience of reference, I shall hereafter refer to them as A, B and C. In sub-clause (ii), we find grouped two of the matters referred to in item 3 of List III, these being security of the State and the maintenance of public order. These two subjects, I shall refer to as D and E. In sub-clause (iii), reference has been made to the third matter in item 3 of List III, and I shall refer to this subject as F. With this classification, let us now turn to the Constitution itself.

On reading articles 22 (4) and 22 (7) together, it would be clear that so long as article 22 (4) (a) holds the field and Parliament does not act under clause (7) (a) of article 22, there must be an advisory board in every case, *i.e.*, if the legislation relates to groups A to F, as it does here, there must be an advisory board for all these groups.

Article 22 (7) however practically engrafts an exception. It states in substance that the Parliament may by an Act provide for preventive detention for more than three months without reference to an advisory board, but in such cases it shall be incumbent on the Parliament to prescribe (1) the circumstances and (2) the class or classes of cases in which such course is found to be necessary. If the case contemplated in clause (4) (a) is the rule and that contemplated in clause (7) (a) is the exception, then the circumstances and the class or classes of cases must be of a special or extraordianry nature, so as to take the case out of the rule and bring it within the exception. It is always

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possible to draw the line between the normal or ordinary and the abnormal or extraordinary cases, and this is what, in my opinion, the Parliament was expected to do under clause (7) (a). I do not think that it was ever intended that Parliament could at its will treat the normal as the abnormal or the rule as the exception. But this is precisely what has been done in this case. All the items on which preventive legislation is possible excepting one, *i.e.*, A to E, have been put within the exception, and only one, F, which relates to maintenance of supplies and services essential to the community, has been allowed to remain under the rule. In other words, it is provided that there shall be an advisory board only for the last category, F, but no provision having been made for the other categories, A to E, it may be assumed that the advisory board has been dispensed with in those cases. The learned Attorney-General maintained that it would have been open to the Parliament to dispense with the advisory board even for the category F, and if such a course had been adopted it would not have affected the validity of the Act. This is undoubtedly a logical position in the sense that it was necessary for him to go as far as this to justify his stand; but, in my opinion, the course adopted by the Parliament in enacting section 12 of the impugned Act is not what is contemplated under article 22 (7) (a) or is permitted by it. The circumstances to be prescribed must be special and extraordinary circumstances and the class or classes of cases must be of the same nature. In my opinion, the Constitution never contemplated that the Parliament should mechanically reproduce all or most of the categories A to F almost verbatim and not apply its mind to decide in what circumstances and in what class or classes of cases the safeguard of an advisory board is to be dispensed with.

I may state here that two views are put forward before us as to how clauses (4) (a) and 7 (a) of article 22 are to be read:—(1) that clause (4) (a) lays down the rule that in all cases where detention for more than three months is ordered, it should be done in consultation with and on the report of the advisory

board, and clause (7) (a) lays down an exception to this rule by providing that Parliament may pass an Act permitting detention for more than three months without reference to an advisory board; (2) that clauses (4) (a) and (7) (a) are independent clauses making two separate and alternative provisions regarding detention for more than three months, in one case on the report of an advisory board and in other case without reference to an advisory board. Looking at the substance and not merely at the words, I am inclined to hold that clause (7) (a) practically engrafts an exception on the rule that preventive detention for more than three months can be ordered only on the report of an advisory board, and so far I have proceeded on that footing. But it seems to me that it will make no difference to the ultimate conclusion, whichever of the two views we may adopt. Even on the latter view, it must be recognized that the law which the Constitution enables the Parliament to make under article 22 (7) (a) would be an exceptionally drastic law, and, on the principle that an exceptionally drastic law must be intended for an exceptional situation, every word of what I have said so far must stand. Clause (7) (a) is only an enabling provision, and it takes care to provide that the Parliament cannot go to the extreme limit to which it is permitted to go without prescribing the class or classes of cases and the circumstances to which the extreme law would be applicable. It follows that the class or classes of cases and the circumstances must be of a special nature to require such legislation.

It was urged that the word "and" which occurs between "circumstances" and "class or classes of cases" is used in a disjunctive sense and should be read as "or", and by way of illustration it was mentioned that when it is said that a person may do this and that, it means that he is at liberty to do either this or that. I do not think that this argument is sound. I think that clause (7) (a) can be accurately paraphrased somewhat as follows:—"Parliament may dispense with an advisory board, but in that case it shall prescribe the circumstances and the class or

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classes of cases...." If this is the meaning, then "and" must be read as "and" and not as "or"; and "may" must be read as "shall" Supposing it was said that Parliament may prescribe the time and place for the doing of a thing, then can it be suggested that both time and place should not be prescribed? It seems obvious to me that the class or classes of cases must have some reference to the persons to be detained or to their activities and movements or to both. "Circumstances" on the other hand refer to something extraneous, such as surroundings, background, prevailing conditions, etc., which might prove a fertile field for the dangerous activities of dangerous persons. Therefore the provision clearly means that both the circumstances and the class or classes of cases (which are two different expressions with different meanings and connotations and cannot be regarded as synonymous) should be prescribed, and prescription of one without prescribing the other will not be enough. As I have already stated, such law as can be enacted under article 22 (7) (a) must involve, by reason of the extreme limit to which it can go, serious consequences to the persons detained. It will mean (1) prolonged detention, *i.e.*, detention for a period longer than three months, and (2) deprivation of the safeguard of an advisory board. Hence article 22 (7) (a) which purports to be a protective provision will cease to serve its object unless it is given a reasonable interpretation. To my mind, what it contemplates is that the law in question must not be too general but its scope should be limited by prescribing both the class or classes of cases and the circumstances.

It was contended that the expression "class or classes of cases" is wide enough to enable the Parliament to treat any of the categories mentioned in Lists I and III, items 9 and 3 respectively, (*i.e.*, any of the categories A to F) as constituting a class. At first sight, it seemed to me to be a plausible argument, but the more I think about it the more unsound it appears to me. The chief thing to be remembered is what I have already emphasized more than once, *viz.*, that a special or extreme type of law must be limited to special classes of cases and circumstances. Under the

Constitution, the Parliament has to prescribe "the class or classes", acting within the limits of the power granted to it under Lists I and III. The class or classes must be its own prescription and must be so conceived as to justify by their contents the removal of an important safeguard provided by the Constitution. Prescribing is more than a mere mechanical process. It involves a mental effort to select and adapt the thing prescribed to the object for which it has to be prescribed. We find here that what is to be prescribed is "class or classes" (and also "circumstances"). We also find that what the law intends to provide is prolonged detention (by which words I shall hereafter mean detention for more than three months) and elimination of the advisory board. The class or classes to be prescribed must therefore have a direct bearing on these matters and must be so selected and stated that any one by looking at them may say:—"That is the reason why the law has prescribed prolonged detention without reference to an advisory board." In other words, there must be something to make the class or classes prescribed fit in with an extreme type of legislation—some element of exceptional gravity or menace which cannot be easily and immediately overcome and therefore necessitates prolonged detention; and there must be something to show that reference to an advisory board would be an undesirable and cumbersome process and wholly unsuitable for the exceptional situation to which the law applies. Perhaps a simple illustration may make the position still clearer. Under the Lists, one of the subjects on which Parliament may make a law of preventive detention is "matter connected with the maintenance of public order." The Act simply repeats this phraseology and states in section 3: "with a view to preventing him (the person to be detained) from acting in a manner prejudicial to the maintenance of public order." This may be all right for section 3, but section 12 must go further. An act prejudicial to the maintenance of public order may be an ordinary act or it may be an act of special gravity. I think that article 22 (7) (a) contemplates that the graver and

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more heinous types of acts falling within the category of acts prejudicial to the maintenance of public order (or other heads) should be prescribed so as to define and circumscribe the area of an exceptional piece of legislation.

That some kind of sub-classification (if I may be permitted to use this word) of the categories A to F was possible can be illustrated by reference to regulation 18-B of the British Defence of the Realm Regulations. This regulation was made under an Act of 1939 which authorized "the making of regulations for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of public safety or the defence of the realm." The two matters "public safety" and "defence of the realm" are analogous to some of the heads stated in Lists I and III. It will be instructive to note that under these two heads, regulation 18-B has set forth several sub-heads or class or classes of cases in which preventive detention could be ordered. These classes are much more specific than what we find in section 3 of the impugned Act and therefore there is less chance of misuse by the executive of the power to order preventive detention. The classes set out are these:—(1) If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations, (2) if the Secretary of State has reasonable cause to believe any person to have been *recently concerned* in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts, (3) if the Secretary of State has reasonable cause to believe any person to have been or to be a member of or to have been or to be active in the furtherance of the objects of, any such organization as is hereinafter mentioned....(a) the organization is subject to foreign influence or control (b) the persons in control of the organization have or have had associations with persons concerned in the government of, or sympathies with the system of government of, any Power with which His Majesty is at war, and in either case there is danger of the utilization of the organization for purposes prejudicial to the public safety, etc., (4) if the Secretary

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of State has reasonable cause to believe that the recent conduct of any person for the time being in an area or any words recently written or spoken by such a person expressing sympathy with the enemy, indicates or indicate that that person is likely to assist the enemy. I have only to point out that the scope within which preventive detention can be legislated upon in this country is much larger than the scope indicated in the British Act under which Regulation 18-B was framed, and therefore there is more scope for specification of the circumstances as well as the class or classes of cases under the impugned Act. But all that has been done is that words which occur in the legislative Lists have been taken and transferred into the Act.

What I have stated with regard to class or classes of cases also applies to the circumstances which are also to be prescribed under article 22 (7) (a). These circumstances are intended to supply the background or setting in which the dangerous activities of dangerous persons might prove specially harmful. They must be special circumstances which demand a specially drastic measure and under which reference to an advisory board might defeat the very object of preventive action. The evident meaning of article 22 (7) (a) seems to be that the picture will not be complete without mentioning both the classes and the circumstances. There was some discussion at the Bar as to what kind of circumstances might have been specified. It is not for me to answer this question, but I apprehend that an impending rebellion or war, serious disorder in a particular area such as has induced the Punjab Government to declare certain areas as "disturbed areas," tense communal situation, prevalence of sabotage or widespread political dacoities and a variety of other matters might answer the purpose the Constitution had in view.

I will now try to sum up the result of a somewhat protracted discussion into which I had to enter merely to clarify the meaning of a very important provision of the Constitution which has, in my opinion, been completely misunderstood by the framers of the

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impugned Act. It appears to me that article 22 deals with three classes of preventive detention :—

(1) preventive detention for three months ;

(2) preventive detention for more than three months on the report of the advisory board ; and

(3) preventive detention for more than three months without reference to the advisory board.

If one has to find some kind of a label for these classes for a clear understanding of the subject, one may label them as "dangerous," "more dangerous" and "most dangerous." Now so far as the first two classes are concerned, there is nothing to be prescribed under the Constitution. Apparently, the authors of the Constitution were not much concerned about class No. (1), and they thought that in so far as class No. (2) was concerned the provision that a reference to the advisory board was necessary coupled with the provision that detention was not to exceed the maximum period which may be fixed by the Parliament was enough. But they did take care to make a special provision for class No. (3), and it is extermly important for the liberty of the subject as well as for the smooth working of the Constitution that this provision should not be lightly treated but should receive a well-considered and reasonable construction. It is elementary that the rigour of a law should correspond to or fit the gravity of the evil or danger it aims at combating, and it is also evident that the law which the Parliament has been permitted to enact under article 22 (7) (a) can, so far as rigour is concerned, go to the farthest limit. It follows that the law must have been intended for exceptionally grave situations and exigencies. Hence the authors of the Constitution have made it necessary that the Parliament should put certain specifications into the Act which it is empowered to pass under article 22 (7) (a), so that by means of these specifications the necessity for enacting so drastic a law should be apparent on the face of it, and its application should be confined to the classes and circumstances specified. The Act must prescribe (1) "class or classes of cases" which are to have reference to the persons

against whom the law is to operate and their activities and movements and (2) "circumstances" which would bring into prominence the conditions and the backgrounds against which dangerous activities should call for special measures. By means of such two-fold prescription, the sphere for the application of the law will be confined only to a special type of cases—it will be less vague, less open to abuse and enable those who have to administer it to determine objectively when a condition has arisen to justify the use of the power vested in them by the law. This, in my opinion, is the true meaning and significance of article 22 (7) (a) and any attempt to whittle it down will lead to deplorable results.

Having stated my views as to the construction of article 22 (7) (a), I propose to consider at once whether section 12 of the impugned Act conforms to the requirements of that provision. In my opinion, it does not, because it fails to prescribe either the circumstances or the class or classes of cases in the manner required by the Constitution. It does not prescribe circumstances at all, and, though it purports to prescribe the class or classes, it does so in a manner showing that the true meaning of the provision from which the Parliament derived its power has not been grasped. I have sufficiently dwelt on this part of the case and shall not repeat what I have already said. But I must point out that even if it be assumed that the view advanced by the learned Attorney-General is correct and it was within the competence of Parliament to treat any of the categories mentioned in items 9 and 3 of Lists I and III as constituting a class and to include it without any qualification or change, the impugned section cannot be saved on account of a two-fold error :— (1) the word "and" which links "class or classes" with "circumstances" in article 22 (7) (a) has been wrongly construed to mean "or;" and (2) the distinction between "circumstances" and "class or classes" has been completely ignored and they are used as interchangeable terms. The first error appears to me to be quite a serious one, because though the Constitution lays down two requirements and insists

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on the prescription of circumstances as well as class or classes, it has been assumed in enacting section 12 that prescription of one of them only will be enough. The other error is still more serious and goes to the root of the matter. There can be no doubt that circumstances and class or classes are two different expressions and have different meanings, but the Act proceeds on the assumption that circumstances are identical with class or classes, as will appear from the words "any person detained in any of the following classes of cases or under any of the following circumstances" used in the section. I have already shown how important the specification of circumstances is in legislation of such an extreme and drastic character. Therefore, to confuse "classes" with "circumstances" and to omit to mention "circumstances" at all are in my opinion grave errors. There can, in my opinion, be no escape from the conclusion that section 12 of the Act by which a most important protection or safeguard conferred on the subject by the Constitution has been taken away, is not a valid provision, since it contravenes the very provision in the Constitution under which the Parliament derived its competence to enact it.

I will now briefly deal with article 22 (5) which makes it incumbent on the authority ordering preventive detention to communicate to the person detained the grounds on which the order has been made and to give him the earliest opportunity of making a representation against the order. It must be remembered that this provision is intended to afford protection to and be a safeguard in favour of a detained person, and it cannot be read as limiting any rights which he has under the law or any other provisions of the Constitution. If article 21 guarantees that before a person is deprived of his liberty he must be allowed an opportunity of establishing his innocence before an impartial tribunal, that right still remains. In point of fact, there is no express exclusion of that right in the Constitution and no prohibition against constituting an impartial tribunal. On the other hand, the right to make a representation which has

been granted under the Constitution, must carry with it the right to the representation being properly considered by an impartial person or persons. There must therefore be some machinery for properly examining the cases of the detenus and coming to the conclusion that they have not been detained without reason. If this right had been expressly taken away by the Constitution, there would have been an end of the matter, but it has not been expressly taken away, and I am not prepared to read any implicit deprivation of such a valuable right. The mere reference to an advisory board in article 22 (4) (a) does not, if my interpretation of the provision is correct, exclude the constitution of a proper machinery for the purpose of examining the cases of detenus on merits. The constitution of an advisory board for the purpose of reporting whether a person should be detained for more than three months or not is a very different thing from constituting a board for the purpose of reporting whether a man should be detained for a single day. In the view I take, all that Parliament could do under clause (7) (a) of article 22 was to dispense with an advisory board for the purpose contemplated in clause (4) (a) of that article and not to dispense with the proper machinery, by whichever name it may be called, for the purpose of examining the merits of the case of a detained person.

It was argued that article 22 is a code by itself and the whole law of preventive detention is to be found within its four corners: I cannot however easily subscribe to this sweeping statement. The article does provide for some matters of procedure, but it does not exhaustively provide for them. It is said that it provides for notice, an opportunity to the detenu to represent his case, an advisory board which may deal with his case, and for the maximum period beyond which a person cannot be detained. These points have undoubtedly been touched, but it cannot be said that they have been exhaustively treated. The right to represent is given, but it is left to the legislature to provide the machinery for dealing with the representation. The advisory board has been mentioned, but

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it is only to safeguard detention for a period longer than three months. There is ample latitude still left to the Parliament, and if the Parliament makes use of that latitude unreasonably, article 19 (5) may enable the Court to see whether it has transgressed the limits of reasonableness.

I will now proceed to deal with the Act in the light of the conclusions I have arrived at. So far as section 3 of the Act is concerned, it was contended that it is most unreasonable, because it throws a citizen at the mercy of certain authorities, who may at their own will order his detention and into whose minds we cannot probe to see whether there is any foundation for the subjective satisfaction upon which their action is to rest. I am however unable to accept this argument. The administrative authorities who have to discharge their responsibilities have to come to quick decisions and must necessarily be left to act on their own judgment. This principle is by no means unreasonable and it underlies all the preventive or quasi-administrative measures which are to be found in the Criminal Procedure Code. Under section 107 of that code, it is left to the discretion of the magistrate concerned to determine whether in his opinion there is sufficient ground for proceeding against any person who is likely to occasion a breach of the peace. Under section 145 also, his initial action depends upon his personal satisfaction. Therefore I do not find anything wrong or unconstitutional in section 3 of the Act. But I must point out that it is a reasonable provision only for the first step, *i.e.*, for arrest and initial detention, and must be followed by some procedure for testing the so-called subjective satisfaction, which can be done only by providing a suitable machinery for examining the grounds on which the order of detention is made and considering the representations of the persons detained in relation to those grounds.

I do not also find anything radically wrong in section 7 of the Act, which makes it incumbent on the authority concerned to communicate to a detenu the grounds on which the order has been made and to

afford him the earliest opportunity of making a representation against the order. Section 10 which provides that the advisory board shall make its report within ten weeks from the date of the detention order is in conformity with article 22(4) (a) of the Constitution, and the only comment which one can make is that Parliament was not obliged to fix such a long period for the submission of a report and could have made it shorter in ordinary cases. The real sections which appear to me to offend the Constitution are sections 12 and 14. I have already dealt with the principle objection to section 12, while discussing the provisions of article 22 (7) (a) and I am of the opinion that section 12 does not conform to the provisions of the Constitution and is therefore *ultra vires*. I also think that even if it be held that it technically complies with the requirements of article 22 (7) (a), Parliament has acted unreasonably in exercising its discretionary power without applying its mind to essential matters and thus depriving the detenus of the safeguard of an advisory board which the Constitution has provided in normal cases. So far as section 14 is concerned, all my colleagues have held it to be *ultra vires*, and, as I agree with the views expressed by them, I do not wish to encumber my judgment by repeating in my own words what has been said so clearly and so well by them. Section 14 may be severable from the other provisions of the Act and it may not be possible to grant any relief to the petitioner on the ground that section 14 is invalid. But I think that section 12 goes to the very root of the legislation inasmuch as it deprives a detenu of an essential safeguard, and in my opinion the petitioner is entitled to a writ of *habeas corpus* on the ground that an essential provision of the Constitution has not been complied with. This writ will of course be without prejudice to any action which the authorities may have taken or may hereafter take against the petitioner under the penal law. I have to add this qualification because there were allegations of his being involved in some criminal cases but the actual facts were not clearly brought out before us.

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I have only to add a few concluding remarks to my judgment. In studying the provisions of the impugned Act, I could not help instituting a comparison in my own mind between it and similar legislation in England during the last two world wars. I could not also help noticing that the impugned Act purports to be a peacetime Act, whereas the legislation to which I have referred was enacted during the war. During the first war as well as the second, a number of persons were detained and a number of cases were brought to Court in connection with their detention, but the two leading cases which will be quoted again and again are *Rex* v. *Halliday* (1) and *Liversidge* v. *Sir John Anderson* (2). We are aware that in America certain standards which do not conform to ordinary and normal law have been applied by the Judges during the period of the war and sometimes they are compendiously referred to as being included in "war power." The two English cases to which I have referred also illustrate the same principle, as will appear from two short extracts which I wish to reproduce. In *Rex* v. *Halliday* (3), Lord Atkinson observed as follows:—"However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrified by legal enactment, namely, national success in the war, or escape from national plunder or enslavement."

In *Liversidge* v. *Sir John Anderson* (4), Lord Macmillan struck the same note in these words:—

"The liberty which we so justly extol is itself the gift of the law and as Magna Charta recognizes may by the law be forfeited or abridged. At a time when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country's cause it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention."

(1) [1917] A. C. 260.
(2) [1942] A. C. 206.
(3) [1917] A. C. 260 at p. 271.
(4) [1942] A. C. 206 at p. 257.

These passages represent the majority view in the two cases, but the very elaborate judgments of Lord Shaw in *Rex* v. *Halliday* and that of Lord Atkin in *Liversidge* v. *Sir John Anderson* show that there was room for difference of opinion as well as for a more dispassionate treatment of the case and the points involved in it. It is difficult to say that there is not a good substratum of sound law in the celebrated dictum of Lord Atkin that even amidst the clash of arms the laws are not silent and that they speak the same language in war as in peace. However that may be, what I find is that in the regulations made in England during the first war as well as the second war there was an elaborate provision for an advisory board in all cases without any exception, which provided a wartime safeguard for persons deprived of their liberty. There was also a provision in the Act of 1939 that the Secretary of State should report at least once in every month as to the action taken under the regulation including the number of persons detained under orders made thereunder. I find that these reports were printed and made available to the public. I also find that the Secretary of State stated in the House of Commons on the 28th January, 1943, that the general order would be to allow British subjects detained under the Regulation to have consultations with their legal advisers out of the hearing of an officer. This order applied to consultations with barristers and solicitors but not to cases where solicitors sent to interview a detained person a clerk who was not an officer of the High Court. The impugned Act suffers in comparison, on account of want of such provisions, though, so far as I can see, no great harm was likely to have been caused by setting up a machinery composed of either administrative or judicial authorities for examining the cases of detained persons so as to satisfy the essentials of fairness and justice. The Act also suffers in comparison with some of the later Provincial Acts in which the safeguard of an advisory board is expressly provided for. I find that there is a provision in section 12 (2) of the Act for the review of the cases of detenus after six months, but this is quite different

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from examining the merits of the case. The object of such a review is obviously to find out whether by reason of any change in the circumstances, a review of the original order is required.

I hope that in pointing out the shortcomings of the Act I will not be misunderstood. I am aware that both in England and in America and also in many other countries, there has been a reorientation of the old notions of individual freedom which is gradually yielding to social control in many matters. I also realize that those who run the State have very onerous responsibilities, and it is not correct to say that emergent conditions have altogether disappeared from this country. Granting then that private rights must often be subordinated to the public good, is it not essential in a free community to strike a just balance in the matter ? That a person should be deprived of his personal liberty without a trial is a serious matter, but the needs of society may demand it and the individual may often have to yield to those needs. Still the balance between the maintenance of individual rights and public good can be struck only if the person who is deprived of his liberty is allowed a fair chance to establish his innocence. and I do not see how the establishment of an appropriate machinery giving him such a chance can be an impediment to good and just government

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PATANJALI SASTRI J.—This is an application under article 32 of the Constitution of India for releasing the petitioner from detention in jail without trial under directions purporting to be issued by the Government of Madras under the Preventive Detention Act, 1950, and it has the distinction of being the first application invoking the guaranteed protection of this Court as the guardian of Fundamental Rights against alleged infringement of the petitioner's right to freedom of movement. As the case involved issues of great public importance and breaking of new ground it was argued with thoroughness and ability on both sides, reference being made to more or less analogous provisions of the Constitutions of

other countries and in particular the Constitution of the United States of America.

The petitioner had been under detention previously under orders passed by the said Government under the Madras Maintenance of Public Order Act, 1947, but as the validity of that Act and all other similar local public safety enactments had been questioned in some of the High Courts in India after the new Constitution came into force, the Parliament enacted a comprehensive measure called the Preventive Detention Act, 1950, (hereinafter referred to as the impugned Act) extending to the whole of India with a certain exception not material here.

The Act came into force on 25th February 1950, and, on the 27th February, the Government of Madras, in purported exercise of the powers conferred by the impugned Act and in supersession of earlier orders, directed the detention of the petitioner, and the order was served on him on 1st March. The petitioner contends that the impugned Act and in particular sections 3, 7, 10, 11, 12, 13 and 14 thereof take away or abridge the fundamental right to freedom of movement in contravention of article 13 (2) of the Constitution and is, therefore, void as declared therein.

Article 13 is one of a fasciculus of articles which are comprised in part III of the Indian Constitution headed "Fundamental Rights." This Part forms a new feature of the Constitution and is the Indian "Bill of Rights." It is modelled on the first ten Amendments of the American Constitution which declare the fundamental rights of the American citizen. Article 12, which is the first article in this Part, defines "the State" as including the Governments and Legislatures of the Union and the States as well as all local and other authorities against which the fundamental rights are enforceable, and article 13 (1) declares that all existing laws inconsistent with the provisions of Part III shall, to the extent of the inconsistency, be void. Clause (2) of the article, on which the petitioner's contention is primarily founded reads as follows :

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"The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

As the constitutional inhibition against deprivation or abridgement relates only to "the rights conferred by this Part," it is necessary first to ascertain the nature and extent of the right which, according to the petitioner, Part III has conferred on him, and, secondly, to determine whether the right so ascertained has been taken away or abridged by the impugned Act or by any of its provisions. The first question turns on the proper interpretation of the relevant articles of the Constitution, and the second involves the consideration of the provisions of the impugned Act.

Mr. Nambiar appearing for the petitioner advanced three main lines of argument. In the first place, the right to move freely throughout the territory of India referred to in article 19 (1) (d) is of the very essence of personal liberty, and inasmuch as the detention authorised by the impugned Act was not a "reasonable restriction" which Parliament could validly impose on such right under clause (5) of the article, the impugned Act is void. Alternatively, the petitioner had a fundamental right under article 21 not to be deprived of his personal liberty except according to procedure established by law, and the impugned Act by authorising detention otherwise than in accordance with proper procedure took away that right and was therefore void. And, lastly, the provisions of the impugned Act already referred to were *ultra vires* and inoperative as Parliament in enacting them has overstepped the limitations placed on its legislative power by article 22 clauses (4) to (7).

Accordingly, the first question for consideration is whether article 19 (1) (d) and (5) is applicable to the present case: "Liberty," says John Stuart Mill, "consists in doing what one desires. But the liberty of the individual must be thus far limited—he must not make himself a nuisance to others." Man, as a rational being, desires to do many things, but in a civil society his desires have to be controlled, regulated

and reconciled with the exercise of similar desires by other individuals. Liberty has, therefore, to be limited in order to be effectively possessed. Accordingly, article 19, while guaranteeing some of the most valued phases or elements of liberty to every citizen as civil rights, provides for their regulation for the common good by the State imposing certain "restrictions" on their exercise. The power of locomotion is no doubt an essential element of personal liberty which means freedom from bodily restraint, and detention in jail is a drastic invasion of that liberty. But the question is: Does article 19, in its setting in Part III of the Constitution, deal with the deprivation of personal liberty in the sense of incarceration? Sub-clause (d) of clause (1) does not refer to freedom of movement *simpliciter* but guarantees the right to move freely "throughout the territory of India." Sub-clause (e) similarly guarantees the right to reside and settle in any part of the territory of India. And clause (5) authorises the imposition of "reasonable restrictions" on these rights in the interests of the general public or for the protection of the interests of any Scheduled Tribe. Reading these provisions together, it is reasonably clear that they were designed primarily to emphasise the factual unity of the territory of India and to secure the right of a free citizen to move from one place in India to another and to reside and settle in any part of India unhampered by any barriers which narrow-minded provincialism may seek to interpose. The use of the word "restrictions" in the various sub-clauses seems to imply, in the context, that the rights guaranteed by the article are still capable of being exercised, and to exclude the idea of incarceration though the words "restriction" and "deprivation" are sometimes used as interchangeable terms, as restriction may reach a point where it may well amount to deprivation. Read as a whole and viewed in its setting among the group of provisions (articles 19-22) relating to "Right to Freedom," article 19 seems to my mind to pre-suppose that the citizen to whom the possession of these fundamental rights is secured retains the substratum

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of personal freedom on which alone the enjoyment of these rights necessarily rests. It was said that sub-clause (f) would militate against this view, as the enjoyment of the right "to acquire, hold and dispose of property" does not depend upon the owner retaining his personal freedom. This assumption is obviously wrong as regards moveable properties, and even as regards immoveables he could not acquire or dispose of them from behind the prison bars; nor could he "hold" them in the sense of exercising rights of possession and control over them which is what the word seems to mean in the context. But where, as a penalty for committing a crime or otherwise, the citizen is lawfully deprived of his freedom, there could no longer be any question of his exercising or enforcing the rights referred to in clause (1). Deprivation of personal liberty in such a situation is not, in my opinion, within the purview of article 19 at all but is dealt with by the succeeding articles 20 and 21. In other words, article 19 guarantees to the citizens the enjoyment of certain civil liberties *while they are free,* while articles 20-22 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 to 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, as it seems to me, make a *reductio ad absurdum* of that provision. If imprisonment were to be regarded as a "restriction" of the right mentioned in article 19 (1) (d), it would equally be a restriction on the rights mentioned by the other sub-clauses of clause (1), with the result that all penal laws providing for imprisonment as a mode of punishment would have to run the gauntlet of clauses (2) to (6) before their validity could be accepted. For instance, the law which imprisons for theft would, on that view, fall to be justified under clause (2) as a law sanctioning restriction of freedom of speech and expression. Indeed, a Division Bench of the Allahabad High Court, in a recent unreported decision brought to our notice,

applied the test of undermining the security of the State or tending to overthrow it in determining the validity or otherwise of the impugned Act. The learned Judges construed article 19 as covering cases of deprivation of personal liberty and held, logically enough, that inasmuch as the impugned Act, by authorising preventive detention, infringed the right to freedom of speech and expression, its validity should be judged by the reservations in clause (2), and as it failed to stand that test, it was unconstitutional and void.

Mr. Nambiar did not seek to go so far. He drew a distinction between the right conferred by sub-clause (d) and those conferred by the other sub-clauses. He urged, referring to Blackstone's Commentaries, that personal liberty consisted "in moving one's person to whatever place one's inclination might direct," and that any law which deprived a person of such power of locomotion was a direct invasion of the right mentioned in sub-clause (d), whereas it interfered only indirectly and consequentially with the rights mentioned in the other sub-clauses. There is no substance in the distinction suggested. It would be illogical, in construing article 19, to attribute to one of the sub-clauses a scope and effect totally different from the scope and effect of the others or to draw a distinction between one right and another in the group. All the rights mentioned in clause (1) are equally essential elements in the liberty of the individual in any civilised and democratic community, and imprisonment operates as an extinction of all of them alike. It cannot therefore, be said that deprivation of personal liberty is an infringement of the right conferred by sub-clause (d) alone but not of the others. The learned Judges of the Allahabad High Court realised this and were perfectly logical in holding that the constitutional validity of a law providing for deprivation of personal liberty or imprisonment must be judged by the tests laid down not only in clause (5) of article 19 but also in the other clauses including clause (2), though their major premise that deprivation of personal liberty was a "restriction" within the meaning of article 19 is, in my judgment, erroneous.

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It was said that preventive detention being a drastic restriction of the right to move freely was, in its "pith and substance", within article 19 (1) (d) read with clause. (5) and not within article 21 which deals with crime and its punishment and prevention. There is no room here, in my opinion, for the application of the rule of "pith and substance." As pointed out by the Privy Council in *Prafulla Kumar Mukherjee* v. *The Bank of Commerce Ltd., Khulna* (1), approving the observations of the Federal Court in *Subrahmanyan Chettiar* v. *Muttuswamy Goundan* (2), the rule was evolved by the Board for determining whether an impugned statute was, in its true character, legislation with respect to matters within the jurisdiction of one legislature or another in a scheme of divided legislative power. No such question arises here. What the Court has to ascertain is the true scope and meaning of article 19 in the context of Part III of the Constitution, in order to decide whether deprivation of personal liberty falls within that article, and the pith and substance rule will be more misleading than helpful in the decision of that issue. Article 19, as I have already indicated, guarantees protection for the more important civil liberties of citizens who are in the enjoyment of their freedom, while at the same time laying down the restrictions which the legislature may properly impose on the exercise of such rights, and it has nothing to do with deprivation of personal liberty or imprisonment which is dealt with by the succeeding three articles.

There is also another consideration which points to the same conclusion. The Drafting Committee of the Constituent Assembly, to whose Report reference was freely made by both sides during the argument, recommended "that the word liberty should be qualified by the insertion of the word 'personal' before it, for otherwise it might be construed very widely so as to include even the freedoms already dealt with in article 13" (now article 19). The acceptance of this suggestion shows that whatever may be the generally accepted

(1) 74 I.A. 23. (2) [1940] F.C.R. 188.

connotation of the expression "personal liberty", it was used in article 21 in a sense which excludes the freedoms dealt with in article 19, that is to say, personal liberty in the context of Part III of the Constitution is something distinct from the freedom to move freely throughout the territory of India.

It was further submitted that article 19 declared the substantive rights of personal liberty while article 21 provided the procedural safeguard against their deprivation. This view of the correlation between the two articles has found favour with some of the Judges in the High Courts which have had occasion to consider the constitutional validity of the impugned Act. It is, however, to be observed that article 19 confers the rights therein specified only on the citizens of India, while article 21 extends the protection of life and personal liberty to all persons—citizens and *non-citizens* alike. Thus, the two articles do not operate in a conterminous field, and this is one reason for rejecting the correlation suggested. Again, if article 21 is to be understood as providing only procedural safeguards, where is the substantive right to personal liberty of *non-citizens* to be found in the Constitution ? Are they denied such right altogether ? If they are to have no right of personal liberty, why is the procedural safeguard in article 21 exended to them ? And where is that most fundamental right of all, the right to life, provided for in the Constitution ? The truth is that article 21, like its American prototype in the Fifth and Fourteenth Amendments of the Constitution of the United States, presents an example of the fusion of procedural and substantive rights in the same provision. The right to live, though the most fundamental of all, is also one of the most difficult to define and its protection generally takes the form of a declaration that no person shall be deprived of it save by due process of law or by authority of law. "Process" or "procedure" in this context connotes both the act and the manner of proceeding to take away a man's life or personal liberty. And the first and essential step in a procedure established by law for such deprivation must be a law made by a competent legislature

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authorising such deprivation. This brings me to the consideration of articles 21 and 22 to which was devoted the greater part of the debate at the Bar.

These articles run as follows :

"21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

22. (1) 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.

(2) 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.

(3) 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.

(4) 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 :

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7) ; or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) 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.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4) :

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention ; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

Mr. Nambiar urged that the word "law" in article 21 should be understood, not in the sense of an enactment but as signifying the immutable and universal principles of natural justice—the *jus naturale* of the civil law—and that the expression "procedure established by law" meant the same thing as that famous phrase "due process of law" in the American Constitution in its procedural aspect. Numerous American decisions were cited to show that the phrase implied the basic requirements of (1) an objective and ascertainable standard of conduct to which it is possible to conform, (2) notice to the party of the accusation against him, (3) a reasonable opportunity for him to establish his innocence, and (4) an impartial tribunal capable of giving an unbiased judgment. Mr. Nambiar conceded that these requirements might have to be modified or adapted to suit the nature of the particular proceeding and the object it had in

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view, as for instance, in a case of preventive detention, previous notice, which might result in the person concerned going underground might be dispensed with. Learned counsel insisted that these requirements, being the very core of the principles of natural justice which transcended all State-made laws, must be substantially complied with by any law governing the process of deprivation of life or personal liberty, subject, of course, to any express provision in the Constitution sanctioning their relaxation or dispensation in any case or class of cases. He also appealed to the Preamble of the Constitution as the guiding star in its interpretation to support his thesis that, in view of the democratic Constitution which the people of India have purported to give themselves guaranteeing to the citizens certain fundamental rights which are justiciable, the provisions of Part III must be construed as being paramount to the legislative will, as otherwise the so-called fundamental right to life and personal liberty would have no protection against legislative action, and article 13(2) would be rendered nugatory.

There can be no doubt that the people of India have, in exercise of their sovereign will as expressed in the Preamble, adopted the democratic ideal which assures to the citizen the dignity of the individual and other cherished human values as a means to the full evolution and expression of his personality, and in delegating to the legislature, the executive and the judiciary their respective powers in the Constitution, reserved to themselves certain fundamental rights, so-called, I apprehend, because they have been retained by the people and made paramount to the delegated powers, as in the American model. Madison (who played a prominent part in framing the First Amendment of the American Constitution) pointing out the distinction, due to historical reasons, between the American and the British ways of securing "the great and essential rights of the people," observed "Here they are secured not by laws paramount to prerogative but by Constitutions paramount to laws": Report on the Virginia Resolutions, quoted in *Near* v. *Minnesota* (1).

(1) 283 U.S. 697.

This has been translated into positive law in Part III of the Indian Constitution, and I agree that in construing these provisions the high purpose and spirit of the Preamble as well as the constitutional significance of a Declaration of Fundamental Rights should be borne in mind. This, however, is not to say that the language of the provisions should be stretched to square with this or that constitutional theory in disregard of the cardinal rule of interpretation of any enactment, constitutional or other, that its spirit, no less than its intendment should be collected primarily from the natural meaning of the words used.

Giving full effect to these principles, however, I am unable to agree that the term "law" in article 21 means the immutable and universal principles of natural justice. "Procedure established by law" must be taken to refer to a procedure which has a statutory origin, for no procedure is known or can be said to have been established by such vague and uncertain concepts as "the immutable and universal principles of natural justice." In my opinion, "law" in article 21 means "positive or State-made law."

No doubt, the American Judges have adopted the other connotation in their interpretation of the due process clause in the Fifth and Fourteenth Amendments of the American Constitution ("Nor shall any person be deprived of life, liberty or property without due process of law"). But that clause has an evolutionary history behind it. The phrase has been traced back to 28 Edw. III Ch. 3, and Coke in his Institutes identified the term with the expression "the law of the land" in the great Charter of John. Even in England where the legislative omnipotence of Parliament is now firmly established. Coke understood these terms as implying an inherent limitation on all legislation, and ruled in *Dr. Bonham's* Case (1) that "the common law will control Acts of Parliament and sometimes adjudge them to be utterly void when they are against common right and reason." Though this doctrine was later discarded in England as being "a warning

(1) 8 Rep. 118 (a).

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rather than an authority to be followed" [per Willes J. in *Lee* v. *Dude and Torrington Ry.* (1)] it gained ground in America, at first as a weapon in the hands of the Revolutionists with which to resist the laws of Parliament, and later as an instrument in the hands of the Judges for establishing the supremacy of the judiciary [see *Calder* v. *Bull* (2)]. In the latter half of the 19th century, this doctrine of a transcendental common law or natural justice was absorbed in the connotation of the phrase "due process of law" occurring in the Fifth and Fourteenth Amendments. By laying emphasis on the word "due", interpreting "law" as the fundamental principles of natural justice and giving the words "liberty" and "property" their widest meaning, the Judges have made the due process clause into a general restriction on all legislative power. And when that power was threatened with prostration by the excesses of due process, the equally vague and expansive doctrine of "police power", *i.e.*, the power of Government to regulate private rights in public interest, was evolved to counteract such excesses. All this has been criticised as introducing great uncertainty in the state of the law in that country, for no one could be sure how due process of law would affect a particular enactment. A century after the phrase had been the subject of judicial interpretation one learned Judge observed in 1877 that it was incapable of precise definition and that its intent and application could only be ascertained by "the gradual process of inclusion and exclusion" [*Davidson* v. *New Orleans* (3)] and, as recently as 1948, another Judge referred to the difficulty of "giving definiteness to the vague contours of due process" and "of spinning judgment upon State action out of that gossamer concept:" *Haley* v. *State of Ohio* (4).

It is not a matter for surprise, therefore, that the Drafting Committee appointed by the Constituent Assembly of India recommended the substitution of the expression "except according to procedure

(1) (1871) L.R. 6 C.P. 576. 582.
(2) 96 U.S. 97.
(3) (1798) 3 Dalhas 86.
(4) 332 U.S.596.

established by law" taken from the Japanese Constitution, 1946, for the words "without due process of law" which occurred in the original draft, "as the former is more specific." In their Report the Committee added that they have "attempted to make these rights (fundamental rights) and the limitations to which they must necessarily be subject as definite as possible, since the Courts may have to pronounce upon them" (para. 5). In the face of all these considerations, it is difficult to accept the suggestion that "law" in article 21 stands for the *jus naturale* of the civil law, and that the phrase "according to procedure established by law" is equivalent to due process of law in its procedural aspect, for that would have the effect of introducing into our Constitution those "subtle and elusive criteria" implied in that phrase which it was the deliberate purpose of the framers of our Constitution to avoid.

On the other hand, the interpretation suggested by the Attorney-General on behalf of the intervener that the expression means nothing more than procedure prescribed by any law made by a competent legislature is hardly more acceptable. "Established" according to him, means prescribed, and if Parliament or the Legislature of a State enacted a procedure, however, novel and ineffective for affording the accused person a fair opportunity of defending himself, it would be sufficient for depriving a person of his life or personal liberty. He submitted that the Constituent Assembly definitely rejected the doctrine of judicial supremacy when it rejected the phrase "due process of law" and made the legislative will unchallengeable, provided only "some procedure" was laid down. The Indian Constitution having thus preferred the English doctrine of Parliamentary supremacy, the phrase "procedure established by law" must be construed in accordance with the English view of due process of law, that is to say, any procedure which Parliament may choose to prescribe. Learned counsel drew attention to the speeches made by several members of the Assembly on the floor of the House for explaining, as he put it, the "historical background." A speech

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made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental processes lying behind the majority vote which carried the bill. Nor is it reasonable to assume that the minds of all those legislators were in accord. The Court could only search for the objective intent of the legislature primarily in the words used in the enactment, aided by such historical material as reports of statutory committees, preambles etc. I attach no importance, therefore, to the speeches made by some of the members of the Constituent Assembly in the course of the debate on article 15 (now article 21).

The main difficulty I feel in accepting the construction suggested by the Attorney-General is that it completely stultifies article 13(2) and, indeed, the very conception of a fundamental right. It is of the essence of that conception that it is protected by the fundamental law of the Constitution against infringement by ordinary legislation. It is not correct to say that the Constitution has adopted the doctrine of Parliamentary supremacy. So far, at any rate, as Part III is concerned, the Constitution, as I have already observed, has accepted the American view of fundamental rights. The provisions of articles 13 and 32 make this reasonably clear. Could it then have been the intention of the framers of the Constitution that the most important fundamental rights to life and personal liberty should be at the mercy of legislative majorities as, in effect, they would be if "established" were to mean merely "prescribed?". In other words, as an American Judge said in a similar context, does the constitutional prohibition in article 13 (2) amount to no more than "You shall not take away life or personal freedom unless you choose to take it away," which is mere verbiage. It is no sound answer to say that, if article 21 conferred no right immune from legislative invasion, there would be no question of contravening article 13 (2). The argument seems, to my mind, to beg the question, for it assumes that the article affords no such immunity. It is said that article 21 affords no protection against competent legislative action in

the field of substantive criminal law, for there is no provision for judicial review, on the ground of reasonableness or otherwise, of such laws, as in the case of the rights enumerated in article 19. Even assuming it to be so the construction of the learned Attorney-General would have the effect of rendering wholly ineffective and illusory even the procedural protection which the article was undoubtedly designed to afford. It was argued that "law" in article 31 which provides that no person shall be deprived of his property "save by authority of law" must mean enacted law and that if a person's property could be taken away by legislative action, his right to life and personal liberty need not enjoy any greater immunity. The analogy is misleading. Clause (2) of article 31 provides for payment of compensation and that right is justiciable except in the two cases mentioned in clauses (4) and (6) which are of a transitory character. The constitutional safeguard of the right to property in the said article is, therefore, not so illusory or ineffective as clause (1) by itself might make it appear, even assuming that "law" there means ordinary legislation.

Much reliance was placed on the Irish case *The King* v. *The Military Governor of Hare Park Camp* (1) where the Court held that the term "law" in article 6 of the Irish Constitution of 1922 which provides that "the liberty of the person is inviolable and no person shall be deprived of his liberty except in accordance with law" meant a law enacted by the Parliament, and that therefore the Public Safety Act of 1924 did not contravene the Constitution. The Court followed *The King* v. *Halliday* (2) where the House of Lords by a majority held that the Defence of the Realm (Consolidation) Act, 1914, and the Regulations framed thereunder did not infringe upon the *Habeas Corpus* Acts and the *Magna Carta* "for the simple reason that the Act and the Orders become part of the law of the land." But that was because, as Lord Dunedin pointed out "the British Constitution has entrusted to the two Houses of Parliament subject to the assent

(1) [1924] 2 I.R. 104. (2) [1917] A.C. 260.

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of the King, an absolute power untrammelled by any written instrument obedience to which may be compelled by some judicial body," whereas the Irish Constitution restricted the legislative powers of the Irish Parliament by a formal declaration of fundamental rights and by providing for a judicial review of legislation in contravention of the Constitution (article 65). This radical distinction was overlooked.

The Attorney-General further submitted that, even on his interpretation, article 21 would be a protection against violation of the rights by the executive and by individuals, and that would be sufficient justification for the article ranking as a fundamental safeguard. There is no substance in the suggestion. As pointed out in *Eshugbayi Eleko* v. *Government of Nigeria* (*Officer Administering*) (1), the executive could only act in pursuance of the powers given by law and no constitutional protection against such action is really needed. Even in monarchical Britain the struggle between prerogative and law has long since ended in favour of the latter. "In accordance with British jurisprudence" said Lord Atkin in the case cited above, "no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice." As for protection against individuals, it is a misconception to think that constitutional safeguards are directed against individuals. They are as a rule directed against the State and its organs. Protection against violation of the rights by individuals must be sought in the ordinary law. It is therefore difficult to accept the suggestion that article 21 was designed to afford protection only against infringements by the executive or individuals. On the other hand, the insertion of a declaration of Fundamental Rights in the forefront of the Constitution, coupled with an express prohibition against legislative interference with these rights (article 13) and the provision of a constitutional sanction for the enforcement of such prohibition by means of a judicial review (article 32) is, in my

(1) [1931] A.C. 662.

opinion, a clear and emphatic indication that these rights are to be paramount to ordinary State-made laws.

After giving the matter my most careful and anxious consideration, I have come to the conclusion that there are only two possible solutions of the problem. In the first place, a satisfactory *via media* between the two extreme positions contended for on either side may be found by stressing the word "established" which implies some degree of firmness, permanence and general acceptance, while it does not exclude origination by statute. "Procedure established by law" may well be taken to mean what the Privy Council referred to in *King Emperor* v. *Benoari Lal Sharma* (1) as "the ordinary and well-established criminal procedure," that is to say, those settled usages and normal modes of proceeding sanctioned by the Criminal Procedure Code which is the general law of criminal procedure in the country. Their Lordships were referring to the distinction between trial by special Courts provided by an Ordinance of the Governor-General and trial by ordinary Courts under the Criminal Procedure Code. It can be no objection to this view that the Code prescribes no single and uniform procedure for all types of cases but provides varying procedures for different classes of cases. Certain basic principles emerge as the constant factors common to all those procedures, and they form the core of the procedure established by law. I realise that even on this view, the life and liberty of the individual will not be immune from legislative interference, for a competent legislature may change the procedure so as to whittle down the protection if so minded. But, in the view I have indicated, it must not be a change *ad hoc* for any special purpose or occasion, but a change in the general law of procedure embodied in the Code. So long as such a change is not effected. The protection under article 21 would be available. The different measures of constitutional protection which the fundamental right to life and personal liberty will enjoy under article 21 as interpreted in the three ways

(1) [1945] F.C.R. 161, 175.

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referred to above will perhaps be best illustrated by a concrete example. Suppose that article 22 (1) was not there and Parliament passed an Act, as a temporary measure, taking away in certain cases the right of an accused person to be defended by a legal practitioner. According to the petitioner's learned counsel the Act would be void as being contrary to the immutable principles of natural justice embodied in article 21, whereas on the construction contended for by the Attorney-General, the Act would be perfectly valid, while, on the view I have indicated above, the Act would be bad, but if the denial of such right of defence is made a normal feature of the ordinary law of criminal procedure by abrogating section 340 (1) of the Code, article 21 would be powerless to protect against such legislative action. But in a free democratic republic such a drastic change in the normal law of procedure, though theoretically possible, would be difficult to bring about, and that practical difficulty will be the measure of the protection afforded by article 21.

It was said that the safeguards provided in clauses (1) and (2) of article 22 are more or less covered by the provisions of the Criminal Procedure Code, and this overlapping would have been avoided if article 21 were intended to bear the construction as indicated above. The argument overlooks that, while the provisions of the Code would be liable to alteration by competent legislative action, the safeguards in clauses (1) and (2) of article 22, being constitutional, could not be similarly dealt with and this sufficiently explains why those safeguards find a place in the Constitution.

The only alternative to the construction I have indicated above, if a constitutional transgression is to be avoided, would be to interpret the reference to "law" as implying a constitutional amendment *pro tanto,* for it is only a law enacted by the procedure provided for such amendment (article 368) that could modify or override a fundamental right without contravening article 13 (2).

The question next arises as to how far the protection under article 21, such as it has been found to be, is available to persons under preventive detention. The learned Attorney-General contended that article 21 did not apply to preventive detention at all, as article 22 clauses (4) to (7) formed a complete code of constitutional safeguards in respect of preventive detention and, provided only these provisions are conformed to, the validity of any law relating to preventive detention could not be challenged. I am unable to agree with this view. The language of article 21 is perfectly general and covers deprivation of personal liberty or incarceration, both for punitive and preventive reasons. If it was really the intention of the framers of the Constitution to exclude the application of article 21 to cases of preventive detention, nothing would have been easier than to add a reference to article 21 in clause (3) of article 22 which provides that clauses (1) and (2) of the latter shall not apply to any person who is arrested or detained under any law providing for preventive detention. Nor is there anything in the language of clauses (4) to (7) of article 22 leading necessarily to the inference that article 21 is inapplicable to preventive dentention. These clauses deal only with certain aspects of preventive detention such as the duration of such detention, the constitution of an advisory board for reviewing the order of detention in certain cases, the communication of the grounds of detention to the person detained and the provision of an opportunity to him of making a representation against the order. It cannot be said that these provisions form an exhaustive code dealing with all matters relating to preventive detention and cover the entire area of protection which article 21, interpreted in the sense I have indicated above, would afford to the person detained. I am, therefore, of opinion that article 21 is applicable to preventive detention as well.

I will now proceed to examine whether the impugned Act or any of its provisions under which the petitioner has been ordered to be detained, takes away any of the rights conferred by articles 21 and 22 or infringes the protection afforded thereby. The

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outstanding fact to be borne in mind in this connection is that preventive detention has been given a 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 doubtless designed to prevent an abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant Republic. It is in this spirit that clauses (3) to (7) of article 22 should, in my opinion, be construed and harmonised as far as possible with article 21 so as not to diminish unnecessarily the protection afforded for the legitimate exercise of personal liberty. In the first place, as already stated, clause (3) of article 22 excludes a person detained under any law providing for preventive detention from the benefit of the safeguards provided in clauses (1) and (2). No doubt clause (5) of the same article makes some amends for the deprivation of these safeguards in that it provides for the communication to the person detained the grounds on which the order has been made and for an opportunity being afforded to him of making a representation against the order, but the important right to consult and to be defended by a legal practitioner of his choice is gone. Similarly, the prohibition against detention in custody beyond a period of 24 hours without the authority of a magistrate has also been taken away in cases of preventive detention. It was not disputed that, to the extent to which the express provisions of clauses (4) to (7) authorised the abrogation or abridgement of the safeguards provided under other articles or substitution of other safeguards in a modified form, those express provisions must rule. Of the four essentials of the due process on which Mr. Nambiar insisted, (which also form part of the ordinary and established procedure under the Criminal Procedure Code, though I cannot agree that they are immutable and beyond legislative change) the requirements of notice and an opportunity to establish his innocence must, as already stated, be taken to have

been provided for by clause (5) of article 22. As for an ascertainable standard of conduct to which it is possible to conform, article 22 makes no specific provision in cases of preventive detention, and if such a safeguard can be said to be implicit in the procedure established by law in the sense explained above in preventive detention cases, it could no doubt be invoked. This point will be considered presently in dealing with provisions of the impugned Act. The only other essential requirements, and the most essential of all, is an impartial tribunal capable of giving an unbiassed verdict. This, Mr. Nambiar submitted, was left unprovided for by article 22, the advisory board referred to in clause (4) (a) being, according to him, intended to deal solely with the question of duration of the detention, that is to say, whether or not there was sufficient cause for detaining the person concerned for more than three months, and not with judging whether the person detained was innocent. A tribunal which could give an unbiassed judgment on that issue was an essential part of the protection afforded by article 21 in whichever way it may be interpreted, and reference was made in this connection to the preventive provisions of the Criminal Procedure Code (Ch. VIII). The impugned Act, not having provided for such a tribunal contravened article 21 and was therefore void. It will be seen that the whole of this argument is based on the major premise that the advisory board mentioned in clause (4) (a) of article 22 is not a tribunal intended to deal with the issue of justification of detention. Is that view correct ?

It was argued that the words "sufficient cause for such detention" in sub-clause (a) of clause (4) had reference to the detention beyond three months mentioned in clause (4) and that this view was supported by the language of sub-clause (a) of clause (7) whereby Parliament is authorised to prescribe the circumstances under which and the class or classes of cases in which a person may be detained for a period longer than three months without the opinion of an advisory board. In other words, learned counsel submitted,

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the combined effect of clauses (4) and (7) was that no person could be detained for a period over three months without obtaining the opinion of an advisory board that there was sufficient cause for detention for the longer period, except in cases where Parliament passed a law authorising detention for such period even without the opinion of an advisory board. Thus, these two clauses were concerned solely with the duration of the preventive detention, and so was the advisory board which those clauses provided for that purpose. I am unable to accept this view. I am inclined to think that the words "such detention" in sub-clause (a) refer back to the preventive detention mentioned in clause (4) and not to detention for a longer period than three months. An advisory board, composed as it has to be of Judges or lawyers, would hardly be in a position to judge how long a person under preventive detention, say for reasons connected with defence, should be detained. That must be a matter for the executive authorities, the Department of Defence, to determine, as they alone are responsible for the defence of the country and have the necessary data for taking a decision on the point. All that an advisory board can reasonably be asked to do, as a safeguard against the misuse of the power, is to judge whether the detention is justified and not arbitrary or mala fide. The fact that the advisory board is required to make its report before the expiry of three months and so could submit it only a day or two earlier cannot legitimately lead to an inference that the board was solely concerned with the issue whether or not the detention should continue beyond that period. Before any such tribunal could send in its report a reasonable time must elapse, as the grounds have to be communicated to the person detained, he has to make his representation to the detaining authority which has got to be placed before the board through the appropriate departmental channel. Each of these steps may, in the course of official routine, take some time, and three months' period might well have been thought a reasonable period to allow before the board could be required to submit its report.

Assuming, however, that the words "such detention" had reference to the period of detention, there is no apparent reason for confining the enquiry by the advisory board to the sole issue of duration beyond three months without reference to the question as to whether the detention was justified or not. Indeed, it is difficult to conceive how a tribunal could fairly judge whether a person should be detained for more than three months without at the same time considering whether there was sufficient cause for the detention at all. I am of opinion that the advisory board referred to in clause (4) is the machinery devised by the Constitution for reviewing orders for preventive detention in certain cases on a consideration of the representations made by the persons detained. This is the view on which Parliament has proceeded in enacting the impugned Act as will be seen from sections 9 and 10 thereof, and I think it is the correct view. It follows that the petitioner cannot claim to have his case judged by any other impartial tribunal by virtue of article 21 or otherwise.

Mr. Nambiar, however, objected that, on this view, a law could authorise preventive detention for three months without providing for review by any tribunal, and for even longer periods if Parliament passed an Act such as is contemplated in sub-clause (a) of clause (7). That may be so, but, however deplorable such a result may be from the point of view of the person detained, there could be no remedy if, on a proper construction of clauses (4) and (7), the Constitution is found to afford no higher protection for the personal liberty of the individual.

Turning next to the provisions of the impugned Act, whose constitutional validity was challenged, it will be necessary to consider only those provisions which affect the petitioner before us. In the first place, it was contended that section 3, which empowers the Central Government or the State Government to detain any person if it is "satisfied" that it is necessary to do so with a view to preventing him from acting in any manner prejudicial to (among other

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things) the security of the State or the maintenance of public order, cannot be said to comply with the procedure established by law, as the section prescribes no objective and ascertainable standard of conduct to which it will be possible to conform, but leaves it to the will and pleasure of the Government concerned to make an order of detention. The argument proceeds on the assumption that the procedure established by law is equivalent to the due process of law. I have already endeavoured to show that it is not. Apart from this, the argument overlooks that for the purposes of *preventive* detention it would be difficult, if not impossible to lay down objective rules of conduct failure to conform to which should lead to such detention. As the very term implies, the detention in such cases is effected with a view to prevent the person concerned from acting prejudicially to certain objects which the legislation providing for such detention has in view. Nor would it be practicable to indicate or enumerate in advance what acts or classes of acts would be regarded as prejudicial. The responsibility for the security of the State and the maintenance of public order etc. having been laid on the executive Government it must naturally be left to that Government to exercise the power of preventive detention whenever they think the occasion demands it.

Section 12 came in for a good deal of criticism. That section, which governs the duration of the petitioner's detention reads as follows :—

"*Duration of detention in certain cases.*—Any person detained in any of the following classes of cases or under any of the following circumstances may be detained without obtaining the opinion of an Advisory Board for a period longer than three months, but not exceeding one year from the date of his detention, namely, where such person has been detained with a view to preventing him from acting in any manner prejudicial to—

(a) the defence of India, relations of India with foreign powers or the security of India ; or

(b) the security of a State or the maintenance of public order.

(2) The case of every person detained under a detention order to which the provisions of sub-section (1) apply shall, within a period of six months from the date of his detention, be reviewed where the order was made by the Central Government or a State Government, by such Government, and where the order was made by any officer specified in sub-section (2) of section 3, by the State Government to which such officer is subordinate, in consultation with a person who is, or has been, or is qualified to be appointed as a Judge of a High Court nominated in that behalf by the Central Government or the State Government, as the case may be."

It was urged that this did not comply with the requirements of clause (7) of article 22 as it merely repeated the "matters" or legislative topics mentioned in Entry 9 of List I and Entry 3 of List III of the Seventh Schedule to the Constitution. What Parliament has to do under clause (7) of article 22 is to prescribe "the circumstances under which and the class or classes of cases in which" a person may be detained for a period longer than three months without obtaining the opinion of an advisory board. It was said that clause (4) (a) provided for ordinary cases of preventive detention where such detention could not continue beyond three months without obtaining the opinion of an advisory board, whereas clause (7) (a) made provision for special cases of detention for more than three months without the safeguard of the advisory board's opinion, for aggravated forms of prejudicial conduct. In other words, clause (4) (a) laid down the rule and clause (7) (a) enacted an exception. It was therefore necessary for Parliament to indicate to the detaining authority for its guidance the more aggravated forms of prejudicial activity, and mere mention of the subjects in respect of which Parliament is authorised under the legislative lists to make laws in respect of preventive detention could hardly afford any guidance to such authority and should not be regarded as sufficient compliance with the requirements of clause (7). There is a two-fold fallacy in

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this argument. In the first place, the suggested correlation between clause (4) (a) and clause (7) (a) as enacting a rule and an exception is, as a matter of construction, without foundation. Reading clauses (4) and (7) together it is reasonably clear that preventive detention could last longer in two cases: (1) where the opinion of an advisory board is obtained, subject however to a prescribed period [sub-clause (a) of clause (4)] and (2) where a person is detained under a law made by Parliament under sub-clauses (a) and (b) of clause (7) [sub-clause (b) of clause (4)]. These are two distinct and independent provisions. It is significant that sub-clause (b) of clause (4) is not worded as a proviso or an exception to sub-clause (a) of the same clause as it would have been if it was intended to operate as such. The attempt to correlate clause (4) (a) and clause (7) (a) as a rule and an exception respectively is opposed both to the language and the structure of those clauses.

Secondly, the argument loses sight of the fact that clause (7) deals with *preventive* detention which is a purely precautionary measure which "must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof" [per Lord Atkinson in *Rex* v. *Halliday* (1)]. The remarks I have already made with reference to the absence of any objective rules of conduct in section 3 of the impugned Act apply also to this criticism of section 12. It would be difficult, if not impracticable, to mention the various circumstances, or to enumerate the various classes of cases exhaustively in which a person should be detained for more than three months for *preventive* purposes, except in broad outline. Suppose a person belongs to an organization pledged to violent and subversive activity as its policy. Beyond his membership of the party the person might have done nothing until he was arrested and detained. But if released he might indulge in anything from the mildest form of prejudicial activity, like sticking an objectionable handbill on a hoarding, to the most outrageous acts of sabotage.

(1) L. R. 1917 A. C. 260, 275.

How could the insertion in section 12 of a long series of categories of aggravated forms of prejudicial activities, or the enumeration of the various circumstances in which such activities are likely to be indulged in, be of any assistance to the detaining authority in determining whether the person concerned should be detained for three months or for a longer period? All that would be necessary and sufficient for him to know for coming to a decision on the point is that the person is a member of such an organisation and will probably engage in subversive activities prejudicial to the security of the State or the maintenance of public order or, in other words, he belongs to class (b) in section 12. While enumeration and classification in detail would undoubtedly help in grading punishment for offences committed, they would not be of much use in fixing the duration of *preventive* detention. Sufficient guidance in such cases could be given by broadly indicating the general nature of the prejudicial activity which a person is likely to indulge in, and that in effect is what Parliament has done in section 12. Reference was made in this connection to Rule 34 of the Defence of India Rules framed under the Defence of India Act, 1939, where "prejudicial act" is defined by enumeration. But it was also for the purpose of prohibiting such acts [Rule 38 sub-rule (1)] and making them offences (sub-rule 5). And even there, the definition had to end in a residuary clause sweeping in acts likely "to prejudice the efficient prosecution of the war, the defence of British India or the public safety or interest." In Lists I and III of the Seventh Schedule to the Constitution six topics are mentioned in respect of which Parliament could make laws providing for preventive detention, and section 12 of the impugned Act mentions five of them as being the classes of cases or the circumstances in which longer detention is authorised. I fail to see why this could not be regarded as a broad classification of cases or a broad description of circumstances where Parliament considers longer detention to be justifiable. A class can well be designated with reference to the end which one desires to secure, and the matters referred to as classes (a)

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and (b) of sub-section (1) of section 12 being clearly the objects which Parliament desired to secure by enacting the section, it seems to me that the classification with reference to such general aims does not contravene article 22 (7).

It was argued that Parliament did not, in enacting section 12, perform its duty of prescribing *both* the circumstances and the class or classes of cases where detention without obtaining the advisory board's opinion could be for a period longer than three months. The use of the disjunctive "or" between the word "circumstances" and the words "class or classes of cases" showed, it was said, that Parliament proceeded on the view that it need not prescribe both. This was in contravention of article 22 (7) which used the conjunctive "and" between those words. There is no substance in this objection. As I read article 22 (7) it means that Parliament may prescribe either the circumstances or the classes of cases or both, and in enacting section 12 Parliament evidently regarded the matters mentioned in clause (a) and (b) of sub-section (1) as sufficiently indicative both of the circumstances under which and the classes in which a person could be detained for the longer period. To say, for instance, that persons who are likely to act prejudicially to the defence of India may be detained beyond three months is at once to "prescribe a class of persons in which and the circumstances under which" a person may be detained for the longer period. In other words, the classification itself may be such as to amount to a sufficient description of the circumstances for purposes of clause (7). The circumstances which would justify precautionary detention beyond three months without recourse to an advisory board must be far too numerous for anything approaching an exhaustive enumeration, and it can, in my judgment, be no objection to the validity of section 12 that no circumstances are mentioned apart from the matters referred to in clauses (a) and (b) of sub-section (1). It would indeed be singular for the Court to strike down a parliamentary enactment because in its opinion a

certain classification therein made is imperfect or the mention of certain circumstances is unspecific or inadequate.

Lastly, Mr. Nambiar turned his attack on section 14 which prohibits the disclosure of the grounds of detention communicated to the person detained and of the representation made by him against the order of detention, and debars the Court from allowing such disclosure to be made except for purposes of a prosecution punishable under sub-section (2) which makes it an offence for any person to disclose or publish such grounds or representation without the previous authorisation of the Central Government or the State Government as the case may be. The petitioner complains that this provision nullifies in effect the rights conferred upon him under clause (5) of article 22 which entitles him to have the grounds of his detention communicated to him and to make a representation against the order. If the grounds are too vague to enable him to make any such representation, or if they are altogether irrelevant to the object of his detention, or are such as to show that his detention is not *bona fide,* he has the further right of moving this Court and this remedy is also guaranteed to him under article 32. These rights and remedies, the petitioner submits, cannot be effectively exercised, if he is prevented on pain of prosecution, from disclosing the grounds to the Court. There is great force in this contention. All that the Attorney-General could say in answer was that if the other provisions of the Act were held to be valid, it would not be open to the Court to examine the sufficiency of the grounds on which the executive authority was "satisfied" that detention was necessary, as laid down in *Machindar Shivaji Mahar* v. *The King* (1), and so the petitioner could not complain of any infringement of his rights by reason of section 14 which enacted only a rule of evidence. The argument overlooks that it was recognised in the decision referred to above that it would be open to the Court to examine the grounds of detention in order to see whether they were relevant to the object which the legislature had

(1) [1949] F. C. R. 827.

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in view, such as, for instance, the prevention of acts prejudicial to public safety and tranquillity, or were such as to show that the detention was not *bona fide*. An examination of the grounds for these purposes is made impossible by section 14, and the protection afforded by article 22 (5) and article 32 is thereby rendered nugatory. It follows that section 14 contravenes the provisions of article 22 (5) and article 32 in so far as it prohibits the person detained from disclosing to the Court the grounds of his detention communicated to him by the detaining authority or the representation made by him against the order of detention, and prevents the Court from examining them for the purposes aforesaid, and to that extent it must be held under article 13 (2) to be void. This however, does not affect the rest of the Act which is severable. As the petitioner did not disclose the grounds of his detention pending our decision on this point, he will now be free to seek his remedy, if so advised, on the basis of those grounds.

In the result, the application fails and is dismissed.

Mahajan J.

MAHAJAN J.—The people of India having solemnly resolved to constitute India into a Sovereign Democratic Republic on the 26th day of November 1949 gave to themselves a Constitution which came into force on the 26th January 1950. This is the first case in which this Court has been called upon to determine how far the Constitution has secured personal liberty to the citizens of this country.

A. K. Gopalan, the petitioner, who was already under the custody of the Superintendent, Central Jail, Cuddalore, was served with an order of detention under section 3 (1) of the Preventive Detention Act, 1950 (Act IV of 1950) on the 27th February 1950. It was said in the order that the Governor of Madras was satisfied that it was necessary to make the order with a view to preventing him from acting in any manner prejudicial to the security of the State and the maintenance of public order. On 20th March 1950 a petition was presented to this Court under article 32

of the Constitution praying for the issue of a writ of *habeas corpus* directing the State of Madras to produce him before the Court and to set him at liberty. A writ was accordingly issued. The return to the writ is that the detention is legal under Act IV of 1950, enacted by Parliament. The petitioner contends that the Act abridges and infringes certain provisions of Part III of the Constitution and is thus outside the constitutional limits of the legislature and therefore void and unenforceable.

The matter is one of great importance both because the legislative power expressly conferred by the 7th Schedule has been impugned and because the liberty of the citizen is seriously affected. The decision of the question whether Act IV of 1950. takes away or abridges the rights conferred by Part III of the Constitution depends on a consideration of two points :

(1) In what measure has the Constitution secured personal liberty to a citizen of India, and

(2) has the impugned legislation in any way taken away or abridged the rights so secured and if so, to what extent?

Act IV of 1950 provides for preventive detention in certain cases and it has been enacted as a temporary measure. It will cease to have effect on 1st April 1951. It empowers the Central Government and the State Governments to make an order directing a person to be detained with a view to preventing him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers or the security of India. It also gives power to detain a person who acts in any manner prejudicial to the security of the State or the maintenance of public order or the maintenance of supplies and services essential to the community. It came into force on 26th February 1950 and was enacted by virtue of the powers conferred on Parliament by article 22 clause (7) of Part III of the Constitution read with the entries in the 7th Schedule. There can be no doubt that the legislative will expressed herein

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would be enforceable unless the legislature has failed to keep within its constitutional limits. It is quite obvious that the Court cannot declare a statute unconstitutional and void simply on the ground of unjust and oppressive provisions or because it is supposed to violate natural, social or political rights of citizens unless it can be shown that such injustice is prohibited or such rights are guaranteed or protected by the Constitution. It may also be observed that an Act cannot be declared void because in the opinion of the Court it is opposed to the spirit supposed to pervade the Constitution but not so expressed in words. It is difficult on any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition except in so far as the express words of a written Constitution give that authority. Article 13(2) of our Constitution gives such an authority and to the extent stated therein. It says that the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall to the extent of the contravention be void.

Preventive detention laws are repugnant to democratic constitutions and they cannot be found to exist in any of the democratic countries of the world. It was stated at the Bar that no such law was in force in the United States of America. In England for the first time during the first world war certain regulations framed under the Defence of the Realm Act provided for preventive detention at the satisfaction of the Home Secretary as a war measure and they ceased to have effect at the conclusion of hostilities. The same thing happened during the second world war. Similar regulations were introduced during the period of the war in India under the Defence of India Act. The Government of India Act, 1935, conferred authority on the Central and Provincial Legislatures to enact laws on this subject for the first time and since then laws on this subject have taken firm root here and have become a permanent part of the statute book of this country. Curiously enough this subject has found place in the Constitution in the

chapter on Fundamental Rights. Entry 9 of the Union List and Entry 3 of the Concurrent List of the 7th Schedule mention the scope of legislative power of Parliament in respect of this topic. The jurisdiction, however, to enact these laws is subject to the provisions of Part III of the Constitution Article 22 in this Part provides :—

"(1) 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.

(2) 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.

(3) 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.

(4) 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 :

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7) ; or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

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(5) 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.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4) ;

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention ; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

The question of the constitutional validity of the impugned statute has to be approached with great caution in view of these provisions of the Constitution and has to be considered with patient attention. The benefit of reasonable doubt has to be resolved in favour of legislative action, though such a presumption is not conclusive. It seems that the subject of preventive detention became the particular concern of the Constitution because of its intimate connection with deprivation of personal liberty to protect which certain provisions were introduced in the Chapter on Fundamental Rights and because of the conditions prevailing in the newly born Republic. Preventive detention means a complete negation of freedom of movement and of personal liberty and is incompatible with both those subjects and yet it is placed in the same compartment with them in Part III of the Constitution.

Though the Constitution has recognised the necessity of laws as to preventive detention it has also provided certain safeguards to mitigate their harshness by placing fetters on legislative power conferred on this subject. These are—

(1) That no law can provide for detention for a period of more than three months unless the sufficiency for the cause of the detention is investigated by an advisory board within the said period of three months. This provision limits legislative power in the matter of duration of the period of detention. A law of preventive detention would be void if it permits detention for a longer period than three months without the intervention of an advisory board.

(2) That a State law cannot authorize detention beyond the maximum period prescribed by Parliament under the powers given to it in clause (7). This is a limitation on the legislative power of the State legislature. They cannot make a law authorizing preventive detention for a longer period than that fixed by Parliament.

(3) That Parliament also cannot make a law authorizing detention for a period beyond three months without the intervention of an advisory board unless the law conforms to the conditions laid down in clause (7) of article 22. Provision also has been made to enable Parliament to make laws for procedure to be followed by advisory boards. This is a safeguard against any arbitrary form of procedure that may otherwise find place in State laws.

Apart from these enabling and disabling provisions certain procedural rights have been expressly safeguarded by clause (5) of article 22. A person detained under a law of preventive detention has a right to obtain information as to the grounds of his detention and has also the right to make a representation protesting against an order of preventive detention. This right has been guaranteed independently of the duration of the period of detention and irrespective of the existence or non-existence of an advisory board. No machinery, however, has been provided or expressly

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mentioned for dealing with this representation. It seems to me that when a constitutional right has been conferred as a necessary consequence, a constitutional remedy for obtaining redress in case of infringement of the right must be presumed to have been contemplated and it could not have been intended that the right was merely illusory and that a representation made may well find place in cold storage. Consideration of the representation made by virtue of clause (5) by an unbiassed authority is, in my opinion, a necessary consequence of the guaranteed right contained herein. The right has been conferred to enable a detained person to establish his innocence and to secure justice, and no justice can be said to be secured unless the representation is considered by some impartial person. The interpretation that I am inclined to place on clause (5) of article 22 is justified by the solemn words of the declaration contained in the Preamble to the Constitution. It is this declaration that makes our Constitution sublime and it is the guarantees mentioned in the chapter on Fundametal Rights that make it one of the greatest charters of liberty and of which the people of this country may well be proud. This charter has not been forced out of unwilling hands of a sovereign like the Magna Carta but it has been given to themselves by the people of the counrty through their Constituent Assembly. Any interpretation of the provisions of Part III of the Constitution without reference to this solemn declaration is apt to lead one into error. If the right of representation given to a detained person by clause (5) of article 22 is a guaranteed right and has been given for the purpose of securing justice, then it follows that no justice can be held secured to him unless an unbiassed person considers the merits of the representation and gives his opinion on the guilt or the innocence of the persons detained. In my view, the right cannot be defeated or made elusive by presuming that the detaining authority itself will consider the representation with an unbiassed mind and will render justice. That would in a way make the prosecutor a judge in the case and such a procedure is repugnant to all notions

of justice. The Constitution has further curtailed the rights given in clause (5) by providing in clause (6) a privilege on the detaining authority of withholding facts which the said authority considers not in public interests to disclose. This privilege has been conferred for the security of the State and possibly for the security of the Constitution itself, but in view of these stringent provisions no additional clogs can be put on the proper consideration of the representation of the detained person by presuming that the detaining authority itself will properly consider the representation. It has also to be remembered in this context that a person subjected to the law of preventive detention has been deprived of the rights conferred on persons who become subject to the law of punitive detention [*vide* clauses (1) and (2) of article 22]. He has been denied the right to consult a lawyer or be defended by him and he can be kept in detention without being produced before a magistrate.

Having examined the provisions of article 22, I now proceed to consider the first question that was canvassed before us by the learned Attorney-General; *i.e.,* that article 22 of the Constitution read with the entries in the 7th Schedule was a complete Code on the subject of preventive detention, and that being so, the other articles of Part III could not be invoked in the consideration of the validity of the impugned statute. It was conceded by the learned counsel for the petitioner that to the extent that express provisions exist in article 22 on the topic of preventive detention those provisions would prevail and could not be controlled by the other provisions of Part III. It was, however, urged that on matters on which this article had made no special provision on this topic the other provisions of Part III of the Constitution had application, namely, articles 19 and 21 and to that extent laws made on this subject were justiciable. In order to draw the inference that the framers of the Constitution intended the provisions as regards preventive detention in article 22 to be self-contained a clear indication of such an intention has to be gathered. If the provisions embodied in this article have dealt

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with all the principal questions that are likely to arise in matters of procedure or on questions of the reasonableness of the period of detention, the inference of such an indication would be irresistible. Ordinarily when a subject is expressly dealt with in a constitution in some detail, it has to be assumed that the intention was to exclude the application of the general provisions contained therein elsewhere. Express mention of one thing is an exclusion of the other. *Expressio unius est exclusio alterius.* I am satisfied on a review of the whole scheme of the Constitution that the intention was to make article 22 self-contained in respect of the laws on the subject of preventive detention. It was contended that all the articles in the Constitution should be read in an harmonious manner and one article should not be read as standing by itself and as having no connection with the other articles in the same part. It was said that they were all supplementary to one another. In this connection it was argued that a law made under article 22 would not be valid unless it was in accord with the provisions of article 21 of the Constitution. This article provides that no person shall be deprived of life or liberty except according to procedure established by law. It was contended that in substance the article laid down that no person will be deprived of life or liberty without having been given a fair trial or a fair hearing and that unless a law of preventive detention provided such a hearing that law would be in contravention of this article and thus void. Conceding for the sake of argument (but without expressing any opinion on it) that this contention of the learned counsel is correct, the question arises whether there is anything in article 22 which negatives the application of article 21 as above construed to a law on preventive detention. In my opinion, sub-clause (5) of article 22 read with clauses (1) and (2) leads to the inference that the contention raised by the learned counsel is unsound. Clause (5), as already stated, provides that notice has to be given to a detenu of the grounds of his detention. It also provides a limited hearing inasmuch as it gives him an opportunity to

establish his innocence. As, in my opinion, the consideration of a representation made by a detained person by an unbiassed authority is implicit in clause (5), it gives to the detained person all that he is entitled to under the principles of natural justice. The right to consult and to be represented by a counsel of his own choice has been denied in express terms to such a person by the Constitution. He is also denied an opportunity of appearing before a magistrate. When the Constitution has taken away certain rights that ordinarily will be possessed by a detained person and in substitution thereof certain other rights have been conferred on him even in the matter of procedure, the inference is clear that the intention was to deprive such a person of the right of an elaborate procedure usually provided for in judicial proceedings. Clause (6) of article 22 very strongly supports this conclusion. There would have been no point in laying down such detailed rules of procedure in respect of a law of preventive detention if the intention was that such a law would be subject to the provisions of article 21 of the Constitution. In its ultimate analysis the argument of the learned counsel for the petitioner resolves itself to this: that the impugned statute does not provide for an impartial tribunal for a consideration of the representation of the detained person and to this extent it contravenes article 21 of the Constitution. As discussed above, in my opinion, such a provision is implicit within article 22 itself and that being so, the application of article 21 to a law made under article 22 is excluded.

It was next contended that a law of preventive detention encroaches on the right of freedom of movement within the territory of India guaranteed to a citizen under article 19 (1) (d) and that being so, by reason of the provisions of sub-clause (5) of article 19 it was justiciable on the ground of reasonableness. It is true, as already pointed out, that a law of preventive detention is wholly incompatible with the right of freedom of movement of a citizen. Preventive detention in substance is a negation of the freedom of locomotion guaranteed under article 19 (1) (d) but it cannot be said that it merely restricts it. Be that as it may, the

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question for consideration is whether it was intended that article 19 would govern a law made under the provisions of article 22. Article 19 (5) is a saving and an enabling provision. It empowers Parliament to make a law imposing reasonable restriction on the right of freedom of movement while article 22 (7) is another enabling provision empowering Parliament to make a law on the subject of preventive detention in certain circumstances. If a law conforms to the conditions laid down in article 22(7), it would be a good law and it could not have been intended that that law validly made should also conform itself to the provisions of article 19 (5). One enabling provision cannot be considered as a safeguard against another enabling provision. Article 13 (2) has absolutely no application in such a situation. If the intention of the constitution was that a law made on the subject of preventive detention had to be tested on the touchstone of reasonableness, then it would not have troubled itself by expressly making provision in article 22 about the precise scope of the limitation subject to which such a law could be made and by mentioning the procedure that the law dealing with that subject had to provide. Some of the provisions of article 22 would then have been redundant, for instance, the provision that no detention can last longer than three months without the necessity of such detention being examined by an advisory board. This provision negatives the idea that the deprivation of liberty for a period of three months without the consultation of the advisory board would be justiciable on the ground of reasonableness. Again article 22 has provided a safeguard that if an advisory board has to be dispensed with, it can only be so dispensed with under a law made by Parliament and that Parliament also in enacting such a law has to conform to certain conditions. This provision would have been unnecessary in article 22 if a law on this subject was justiciable. In sub-clause (b) of clause (7) of article 22 provision has been made enabling Parliament to fix the maximum period for which a person can be detained under a law on the subject of preventive detention. Under

this express provision it is open to Parliament to fix any period, say, even a period of five to ten years as the maximum period of detention of a person. Can it be said that in view of this express provision of the Constitution such a law was intended to be justiciable by reason of article 19 (5) ? Duration of detention is the principal matter in preventive detention laws which possibly could be examined on the touchstone of reasonableness under article 19(5), but this has been expressly excluded by express provisions in article 22. In my judgment, therefore, an examination of the provisions of article 22 clearly suggests that the intention was to make it self-contained as regards the law of preventive detention and that the validity of a law on the subject of preventive detention cannot be examined or controlled either by the provisions of article 21 or by the provisions of article 19 (5) because article 13 (2) has no application to such a situation and article 22 is not subject to the provisions of these two articles. The Constitution in article 22 has gone to the extent of even providing that Parliament may by law lay down the procedure to be followed by an advisory board. On all important points that could arise in connection with the subject of preventive detention provision has been made in article 22 and that being so, the only correct approach in examining the validity of a law on the subject of preventive detention is by considering whether the law made satisfied the requirements of article 22 or in any way abridges or contravenes them and if the answer is in the affirmative, then the law will be valid, but if the answer is in the negative, the law would be void.

In expressing the view that article 22 is in a sense self-contained on the law of preventive detention I should not however be understood as laying down that the framers of the article in any way overlooked the safeguards laid down in article 21. Article 21 in my opinion, lays down substantive law as giving protection to life and liberty inasmuch as it says that they cannot be deprived except according to the procedure established by law; in other words, it means that before a person can be deprived of his life or liberty

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as a condition precedent there should exist some substantive law conferring authority for doing so and the law should further provide for a mode of procedure for such deprivation. This article gives complete immunity against the exercise of despotic power by the executive. It further gives immunity against invalid laws which contravene the Constitution. It gives also further guarantee that in its true concept there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty. It negatives the idea of fantastic, arbitrary and oppressive forms of proceedings. The principles therefore underlying article 21 have been kept in view in drafting article 22. A law properly made under article 22 and which is valid in all respects under that article and lays down substantive as well as adjective law on this subject would fully satisfy the requirements of article 21, and that being so, there is no conflict between these two articles.

The next question that arises for decision is whether there is anything in Act IV of 1950 which offends against the provisions of article 22 of Part III of the Constitution. The learned counsel for the petitioner contended that section 3 of the Act was bad inasmuch as it made "satisfaction of the Government" as the criterion for detaining a person. It was said that as section 3 laid down no objective rule of conduct for a person and as people were not told as to what behaviour was expected of them, the result was that it could not be known what acts a person was expected to avoid and what conduct on his part was prejudicial to the security of the State or the maintenance of public order; in other words, it was argued that section 3 left the determination of the prejudicial act of a person to the arbitrary judgment of the Government and that even the officer who was to administer this law had been furnished no guide and no standard of conduct in arriving at his own satisfaction whether the conduct was prejudicial to the security of the State etc. This criticism of the learned counsel, in my opinion, is not valid. It is no doubt true that a detention order depends on the satisfaction of the

Government but this provision is in accordance with article 22 of the Constitution which to my mind contemplates detention on the satisfaction of the executive authority. By its very nature the subject is such that it implies detention on the judgment of the authority entrusted with the making of the order. The whole intent and purpose of the law of preventive detention would be defeated if satisfaction of the authority concerned was subject to such an objective standard and was also subject to conditions as to legal proof and procedure. In the 7th Schedule jurisdiction to make the law on this subject has been given for reasons connected with defence etc. and the maintenance of public order. These are subjects which concern the life and the very existence of the State. Every citizen is presumed to know what behaviour is prejudicial to the life of the State or to its existence as an ordered State. Considering that the State is presumed to have a government that conducts itself in a reasonable way and also presuming that its officers usually will be reasonable men, it cannot be said that in making "satisfaction of the government" as the standard for judging prejudicial acts of persons who are subject to the law of preventive detention section 3 in any way contravenes article 22 of the constitution.

Section 7 of the impugned Act gives full effect to the provisions of article 22 sub-clause (5) and enacts that representation has to be made to the Central or State Government as the case may be. It was impeached on the ground that no machinery has been provided herein to consider and adjudicate on the merits of the representation. To this extent, as already indicated, the law is defective. In the absence of a machinery for the investigation of the contentions raised in the representation it may be open to the detenu to move this Court under article 32 for a proper relief. It is, however, unnecessary to express any opinion as to the precise remedy open to a detained person in this respect. The absence of a provision of this nature in the statute however would not make the law wholly void. Section 9 of the Act makes reference

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to the advisory board obligatory in cases falling under sub-clause (iii) of clause (a) or clause (b) of sub-section (1) of section 3 within six weeks of the order. The procedure to be followed by the advisory board is laid down in section 10. Parliament has been authorized to lay down such a procedure to be followed by an advisory board in sub-clause (c) of clause (7). It was contended that the law had not provided a personal hearing to the detenu before an advisory board, nor had it given him a right to lead evidence to establish his innocence. In my opinion, this criticism is not sound and does not in any way invalidate the law. The advisory board has been given the power to call for such information as it requires even from the person detained. It has also been empowered to examine the material placed before it in the light of the facts and arguments contained in the representation. The opportunity afforded is not as full as a person gets under normal judicial procedure but when the Constitution itself contemplates a special procedure being prescribed for preventive detention cases, then the validity of the law on that subject cannot be impugned on the grounds contended for.

Section 11 of the Act was also impugned on the ground that it offended against the Constitution inasmuch as it provided for preventive detention for an indefinite period. This section in my opinion has to be read in the background of the provision in sub-clause (3) of section 1 of the Act which says that the Act will cease to have effect on 1st April, 1951. Besides, the words "for such period as it thinks fit" do not in any way offend against the provisions of article 22 wherein Parliament has been given the power to make a law fixing the maximum period for preventive detention. It has to be noted that Parliament has fixed a period of one year as the maximum period for the duration of detention where detention has to be without reference to an advisory board. In my opinion, there is nothing in section 11 which is outside the constitutional limits of the powers of the supreme legislature.

It is section 12 of the Act which was assailed by the learned counsel for the petitioner rather vehemently. This section is of a very controversial character. It has been enacted on the authority of clause (7) of article 22 and runs thus :—

"(1) Any person detained in any of the following classes of cases or under any of the following circumstances may be detained without obtaining the opinion of an Advisory Board for a period longer than three months, but not exceeding one year from the date of his detention, namely, where such person has been detained with a view to preventing him from acting in any manner prejudicial to—

(a) the defence of India, relations of India with foreign powers or the security of India ; or

(b) the security of a State or the maintenance of public order.

(2) The case of every person detained under a detention order to which the provisions of sub-section (1) apply shall, within a period of six months from the date of his detention, be reviewed where the order was made by the Central Government or a State Government, by such Government, and where the order was made by any officer specified in sub-section (2) of section 3, by the State Government to which such officer is subordinate, in consultation with a person who is, or has been, or is qualified to be appointed as, a Judge of a High Court nominated in that behalf by the Central Government or the State Government, as the case may be."

The section purports to comply with the conditions laid down in clause (7) of article 22. It was, however, argued that in substance and reality it has failed to comply with any of the conditions laid down therein ; that it neither mentions the circumstances under which nor the classes of cases in which preventive detention without recourse to the machinery of an advisory board could be permitted. The crucial question for consideration is whether section 12 mentions any circumstances under which or defined the classes of cases in which authority was conferred by clause (7)

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to dispense with an advisory board. So far as I have been able to gather from opinions of text-book writers on the subject of classification, the rule seems clear that in making classification of cases there has to be some relationship to the classification to the objects sought to be accomplished. The question for consideration therefore is what object was sought to be accomplished when the Constitution included clause (7) in article 22. It seems clear that the real purpose of clause (7) was to provide for a contingency where compulsory requirement of an advisory board may defeat the object of the law of preventive detention. In my opinion, it was incorporated in the Constitution to meet abnormal and exceptional cases, the cases being of a kind where an advisory board could not be taken into confidence. The authority to make such drastic legislation was entrusted to the supreme legislature but with the further safeguard that it can only enact a law of such a drastic nature provided it prescribed the circumstances under which such power had to be used or in the alternative it prescribed the classes of cases or stated a determinable group of cases in which this could be done. The intention was to lay down some objective standard for the guidance of the detaining authority on the basis of which without consultation of an advisory board detention could be ordered beyond the period of three months. In this connection it has to be remembered that the Constitution must have thought of really some abnormal situation and of some dangerous groups of persons when it found it necessary to dispense with a tribunal like an advisory board which functions *in camera* and which is not bound even to give a personal hearing to the detenu and whose proceedings are privileged. The law on the subject of preventive detention in order to avoid even such an innocuous institution could only be justified on the basis of peculiar circumstances and peculiar situations which had to be objectively laid down and that was what in my opinion was intended by clause (7). If the peculiarity lies in a situation outside the control or view of a detained person, then it may be said that the description of such a situation would

amount to a prescription of the circumstances justifying the detention for a longer period than three months by a law without the intervention of an advisory board. If, however, the abnormality relates to the conduct and character of the activities of a certain determinable group of persons, then that would amount to a class of cases which was contemplated to be dealt with under clause (7). In such cases alone arbitrary detention could be held justifiable by law beyond a period of three months.

It was argued by the learned counsel for the petitioner that the phrase "circumstances under which, and the classes of cases in which" used in clause (7) had to be construed in a cumulative sense; on the other hand, the learned Attorney-General contended that the word "and" had been used in this clause in the same sense as "or." He further argued that even if the word "and" is not given that meaning the true construction of the phrase was that Parliament could prescribe either the circumstances or the classes of cases for making a law on the subject of preventive detention authorizing detention for a longer period than three months without the machinery of an advisory board. In Full Bench Reference No. 1 of 1950, Das Gupta J. of the Calcutta High Court held that the intention of the legislature in enacting the clause was that the law of preventive detention authorizing detetion for a longer period than three months without the intervention of an advisory board had to fulfil both the requirements laid down in clause (7) and not only one of the requirements in the alternative. The same view has been expressed by my brother Sir Fazl Ali. I share this view with him. I would, however, like to consider this matter from a different aspect on the assumption that the contention raised by the learned Attorney-General is right.

Dealing first with the question whether section 12 mentions any circumstances, so far as I have been able to see, it does not prescribe any circumstances unless it can be said that the prejudicial acts for reasons connected with the security of State, maintenance of public order, etc. are both the circumstances as well as

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the classes of cases. In my opinion, this line of approach cannot be held to be correct in the construction of clause (7) of article 22. I am inclined to agree with the learned Attorney-General that the phrase "circumstances under which" means some situation extraneous to the detenu's own acts, in other words, it means some happening in the country with which the detenu is not concerned, such as a situation of tense communal feelings, an apprehended internal rebellion or disorder, the crisis of an impending war or apprehended war, etc. In such a situation the machinery of an advisory board could be dispensed with because it may become cumbersome or it may hamper the exercise of necessary powers. In this view of the matter I have no hesitation in holding that no circumstances have been stated in section 12, though the section ostensibly says so. If it was permissible to conjecture, it seems that the draftsman of section 12 repeated the words of clause (7) of article 22 without an application of his mind to the meaning of those words and as the legislation was passed in haste to meet an emergent situation, it suffers from the defects which all hasty legislation suffer from.

I now proceed to consider whether section 12 has classified the cases in which detention for a longer period beyond three months could be suffered by a citizen without the benefit of the machinery of an advisory board. The section has placed five subjects out of the legislative list within its ambit and these are described as the classes of cases. The question is whether it can be said that a mere selection of all or any of the categories of the subjects for reasons connected with which a law of preventive detention could be made under the 7th Schedule amounts to a classification of cases as contemplated in clause (7) of article 22. Entry 9 of the Union List and Entry 3 of the Concurrent List of the 7th Schedule lay down the ambit of legislative power of Parliament on the subject of preventive detention on the following six subjects :—

(1) Defence of India, (2) Foreign Affairs, (3) Security of India, (4) Security of the State, (5) Mainten-

ance of public order, (6) Maintenance of supplies and services essential to the community.

Clause (4) of article 22 enjoins in respect of all the six subjects that no law can provide for preventive detention for a longer period than three months without reference to an advisory board. Clause (7) gives permission to make a law for dispensing with an advisory board by a prescription of the circumstances and by a prescription of the classes of cases in which such a dispensation can be made. The legislative authority under clauses (4) and (7) in my opinion, extends to all these six subjects. The normal procedure to be followed when detention is intended to be beyond a period of three months in respect of the six subjects is provided in sub-clause (4). The extraordinary and unusual procedure was intended to be adopted in certain abnormal cases for which provision could be made by a parliamentary statute under clause (7). It seems to me, however, that section 12 of Act IV of 1950 has reversed this process quite contrary to the intention of the Constitution. By this section Act IV of 1950 has dispensed with the advisory board in five out of the six subjects above mentioned and the compulsory procedure of an advisory board laid down in clause (4) of article 22 has been relegated to one out of these six subjects. This has been achieved by giving a construction to the phrase "circumstances under which and the classes of cases in which" so as to make it co-extensive and coterminous with the "subjects of legislation. In my opinion, this construction of clause (7) is in contravention of the clear provisions of article 22, and makes clause (4) of article 22 to all intents and purposes nugatory. Such a construction of the clause would amount to the Constitution saying in one breath that a law of preventive detention cannot provide for detention for a longer period than three months without reference to an advisory board and at the same breath and moment saying that Parliament, if it so chooses, can do so in respect of all or any of the subjects mentioned in the legislative field. If that was so, it would have been wholly unnecessary to provide such a safeguard in the Constitution on a matter

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which very seriously affects personal liberty. On the other hand, it would be a reasonable construction of the clause to hold that the Constitution authorized Parliament that in serious classes of cases or in cases of those groups of persons who are incorrigible or whose activities are secret the procedure of an advisory board may well be dispensed with, that being necessary in the interests of the State. On the other construction as adopted by the framers of section 12, the Constitution need not have troubled itself by conferring an authority on Parliament for making such a law.

Moreover, if that was the intention, it would have in very clear words indicated this by drafting article 22 clause (4) thus :—

"Unless otherwise provided by Parliament no law providing for preventive detention shall authorize detention for a longer period than three months unless an Advisory Board has investigated the sufficiency of the cause of such detention."

The words "Unless otherwise provided for by Parliament" would have been in accord with the construction which the framers of section 12 have placed on article 22 clause (7).

I am further of the opinion that the construction placed by the learned Attorney-General on clause (7) of article 22 and adopted by the framers of Act IV of 1950 creates a very anomalous situation. The matter may be examined from the point of view of the law of preventive detention for reasons connected with supplies and services essential to the life of the community. This subject has been put under section 9 in Act IV of 1950. Suppose a tense situation arises and there is a danger of the railway system being sabotaged and it becomes necessary to pass detention orders against certain persons. According to Act IV of 1950 in such a serious state of affairs the procedure of an advisory board is compulsory, while on the other hand, if there is an apprehension of disturbance of public order by reason of a wrong decision of an umpire at a cricket match or on account of conduct of persons celebrating the festival of Holi, then detention beyond three

months can be ordered without reference to an advisory board. Could such an anomalous result be in the contemplation of the framers of the Constitution ? The construction that I am inclined to place on the section is in accord with the scheme of the law of punitive detention. Hurt is an offence under the Indian Penal Code and this is one of the subiects of punitive detention. The cases on the subject have been classified in different groups, namely, simple hurt, grievous hurt, grievous hurt with dangerous weapons, grievous hurt to extort a confession, grievous hurt to restrain a public officer from doing his duty, grievous hurt by a rash act, and grievous hurt on provocation. Even simple hurt has been classified in different categories. The subject of assault has also been similarly dealt with. Sections 352 to 356 deal with cases classified according to the gravity of the offence, *i.e.*, cases of simple assault, assault on a public servant, assault on women, assault in attempt to commit theft, assault for wrongfully confining a person and assault on grave provocation have been separately grouped. Another illustration is furnished by the Criminal Procedure Code in the preventive sections 107 to 110. These deal with different groups of persons; vagrants are in one class, habitual offenders in another, bad characters in the third and disturbers of peace in the fourth. It seems that it is on lines similar to these that it must have been contemplated by the Constitution that classes of cases would be prescribed by Parliament, but this has not been done. The Constitution has recognised varying scales of duration of detention with the idea that this will vary with the nature of the apprehended act, detention for a period of three months in ordinary cases, detention for a longer period than three months with the intervention of an advisory board in more serious cases, while detention for a longer period than three months without the intercession of an advisory board for a still more dangerous class and for acts committed in grave situations. It can hardly be said that all cases of preventive detention for reasons connected with the maintenance of public order stand on the same footing in the degree of gravity and deserve the same

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duration of detention and all cases connected with the maintenance of supplies and services essential to the life of the community stand in the matter of their gravity on such a footing as to require a lenient treatment. It is true that in a sense all persons who act prejudicially to the defence of India may be comprehensively said to form one group and similarly persons who act prejudicially to the maintenance of supplies and services essential to the life of the community may form another class but the question is, whether it was in this comprehensive sense that classification was intended by the Constitution in clause (7) or was it intended in a narrower and restricted sense ? It has to be remembered that the law under clause (7) was intended to provide detention for a longer period and such a law very seriously abridges personal liberty and in this situation giving a narrower and restricted meaning to this expression will be in accordance with well established canons of construction of statutes.

The wide construction of clause (7) of article 22 brings within the ambit of the clause all the subjects in the legislative list and very seriously abridges the personal liberty of a citizen. This could never have been the intention of the framers of the Constitution. The narrow and restricted interpretation is in accord with the scheme of the article and it also operates on the whole field of the legislative list and within that field it operates by demarcating certain portions out of each subject which requires severe treatment. If I may say so in conclusion, section 12 treats the lamb and the leopard in the same class because they happen to be quadrupeds. Such a classification could not have been in the thoughts of the Constitutions-makers when clause (7) was introduced in article 22. For the reasons given above, I am of the opinion that section 12 of Act IV of 1950 does not fulfil the requirements of clause (7) of article 22 of the Constitution and is not a law which falls within the ambit of that clause. That being so, this section of Act IV of 1950 is void and by reason of it the detention of the petitioner cannot be justified. There is no other provision in

this law under which he can be detained for any period whatsoever.

It was argued that it was neither practicable nor possible to make a classification on any definite basis in the case of apprehended acts of persons whose activities are of a prejudicial character to the maintenance of public order or to the security of the State or to the defence of India. This contention to my mind is not sound. Such a classification was made in the rules under the Defence of India Act by defining "a prejudicial act" in regulation 34. Mere difficulty in precisely ascertaining the groups or in defining objectively the conduct of such groups is no ground for not complying with the clear provisions of the statute or for disobeying it. I see no difficulty whatsoever if a serious effort was made to comply with the provisions of clause (7). I cannot see that the compulsory requirement of an advisory board is likely to lead to such disastrous or calamitous results that in all cases or at least in five out of the six subjects of legislation it becomes necessary to dispense with this requirement. The requirement of an advisory board is in accordance with the preamble of the Constitution and is the barest minimum that can make a law of preventive detention to some little degree tolerable to a democratic Constitution. Such a law also may have some justification even without the requirement of an advisory board to meet certain defined dangerous situations or to deal with a class of people who are a danger to the State but without such limitation the law would be destructive of all notions of personal liberty. The Constitution must be taken to have furnished an adequate safeguard to its citizens when it laid down certain conditions in clause (7) and it could not be considered that it provided no safeguard to them at all and that the words used in clause (7) were merely illusory and had no real meaning.

Section 14 of Act IV of 1950 has been impugned on the ground that it contravenes and abridges the provisions of articles 22 (5) and 32 of the Constitution. This section is in these terms :—

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"(1) No Court shall except for the purposes of a prosecution for an offence punishable under sub-section (2), allow any statement to be made, or any evidence to be given, before it of the substance of any communication made under section 7 of the grounds on which a detention order has been made against any person or of any representation made by him against such order, and notwithstanding anything contained in any other law, no Court shall be entitled to require any public officer to produce before it, or to disclose the substance of, any such communication or representation made, or the proceedings of an advisory board or that part of the report of an advisory board which is confidential.

(2) It shall be an offence punishable with imprisonment for a term which may extend to one year, or with fine, or with both, for any person to disclose or publish without the previous authorisation of the Central Government or the State Government, as the case may be, any contents or matter purporting to be contents of any such communication or representation as is referred to in sub-section (1):

Provided that nothing in this sub-section shall apply to a disclosure made to his legal adviser by a person who is the subject of a detention order."

This section is in the nature of an iron curtain around the acts of the authority making the order of preventive detention. The Constitution has guaranteed to the detained person the right to be told the grounds of detention. He has been given a right to make a representation [*vide* article 22 (5)], yet section 14 prohibits the disclosure of the grounds furnished to him or the contents of the representation made by him in a Court of law and makes a breach of this injunction punishable with imprisonment.

Article 32 (1) of the Constitution is in these terms :—

"The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed."

Sub-section (4) says:—

"The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

Now it is quite clear that if an authority passes an order of preventive detention for reasons not connected with any of the six subjects mentioned in the 7th Schedule, this Court can always declare the detention illegal and release the detenu, but it is not possible for this Court to function if there is a prohibition against disclosing the grounds which have been served upon him. It is only by an examination of the grounds that it is possible to say whether the grounds fall within the ambit of the legislative power contained in the Constitution or are outside its scope. Again something may be served on the detenus as being grounds which are not grounds at all. In this contingency it is the right of the detained person under article 32 to move this Court for enforcing the right under article 22(5) that he be given the real grounds on which the detention order is based. This Court would be disabled from exercising its functions under article 32 and adjudicating on the point that the grounds given satisfy the requirements of the sub-clause if it is not open to it to see the grounds that have been furnished. It is a guaranteed right of the person detained to have the very grounds which are the basis of the order of detention. This Court would be entitled to examine the matter and to see whether the grounds furnished are the grounds on the basis of which he has been detained or they contain some other vague or irrelevant material. The whole purpose of furnishing a detained person with the grounds is to enable him to make a representation refuting these grounds and of proving his innocence. In order that this Court may be able to safeguard this fundamental right and to grant him relief it is absolutely essential that the detenu is not prohibited under penalty of punishment to disclose the grounds to the Court and no injunction by law can be issued to this Court disabling it from having a look at the grounds. Section 14 creates a substantive offence if the grounds are disclosed and it also lays a duty on the Court not

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to permit the disclosure of such grounds. It virtually amounts to a suspension of a guaranteed right provided by the Constitution inasmuch as it indirectly by a stringent provision makes administration of the law by this Court impossible and at the same time it deprives a detained person from obtaining justice from this Court. In my opinion, therefore, this section when it prohibits the disclosure of the grounds contravenes or abridges the rights given by Part III to citizen and is *ultra vires* the powers of Parliament to that extent.

The result of the above discussion is that, in my opinion, sections 12 and 14 of Act IV of 1950 as above indicated are void and the decision of the detenu's case has to be made by keeping out of sight these two provisions in the Act. If sections 12 and 14 are deleted from the impugned legislation, then the result is that the detention of the petitioner is not legal. The statute has not provided for detention for a period of three months or less in such cases as it could have done under article 22(4) of the Constitution and that being so, the petitioner cannot be justifiably detained even for a period of three months. I would accordingly order his release.

In view of the decision above arrived at I do not consider it necessary to express any opinion on the other points that were argued at great length before us, namely, (1) what is the scope and true meaning of the expression "procedure established by law" in article 21 of the Constitution, and , (2) what is the precise scope of articles 19(1) (d) and 19(5) of the Constitution.

Mukherjea J.

MUKHERJEA J.—This is an application under article 32 of the Constitution praying for a writ of *habeas corpus* upon the respondents with a view to release the petitioner who, it is alleged, is being unlawfully detained in the Central Jail, Cuddalore, within the State of Madras.

The petitioner, it is said, was initially arrested in Malabar on 17th of December, 1947, and prosecution was started against him on various charges for having

delivered certain violent speeches. While these criminal cases were going on, he was served with an order of detention under the Madras Maintenance of Public Order Act on 22nd April, 1948. This order of detention was held to be illegal by the Madras High Court, but on the same day that the judgment was pronounced, a second order of detention was served upon him. On his moving the High Court again for a writ of *habeas corpus* in respect to the subsequent order, his application was dismissed on the ground that as he was not granted bail in one of the three criminal cases that were pending against him, the detention could not be said to be unlawful. Liberty, however, was given to him to renew his application if and when his detention under the criminal proceedings ceased. In two out of the three criminal cases the trial before the magistrate ended on February 23, 1949, and the petitioner was sentenced to rigorous imprisonment for 6 months in each of the cases. These sentences however, were set aside in appeal on 26th September, 1949. As regards the third case he was tried by the Sessions Judge of North Malabar and sentenced to rigorous imprisonment for 5 years but this sentence was reduced to 6 months' imprisonment by the Madras High Court on appeal. The petitioner made a fresh application to the High Court praying for a writ of *habeas corpus* in respect of his detention under the Madras Maintenance of Public Order Act and this application, which was heard after he had served out his sentences of imprisonment referred to above, was dismissed in January, 1950. On 25th February, 1950, the Preventive Detention Act was passed by the Parliament and on the 1st of March following, the detention of the applicant under the Madras Maintenance of Public Order Act was cancelled and he was served with a fresh order of detention under section 3(1) of the Preventive Detention Act 1950. On behalf of the respondents the detention of the petitioner is sought to be justified on the strength of the Preventive Detention Act of 1950. The position taken up on behalf of the petitioner on the other hand is that the said Act is invalid and *ultra vires* the constitution by reason of its being in conflict with certain

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fundamental rights which are guaranteed by the Constitution. It is argued, therefore, that the detention of the petitioner is invalid and that he should be set at liberty.

The contentions that have beel put forward by Mr. Nambiar who appeared in support of the petition, may be classified under four heads. His first contention is that as preventive detention is, in substance, a restriction on the free movements of a person throughout the Indian territory, it comes within the purview of article 19(1) (d) of Part III of the Constitution which lays down the fundamental rights. Under clause (5) of the article, any restriction imposed upon this right of free movement must be reasonable and should be prescribed in the interests of the general public. The question as to whether it is reasonable or not is a justiciable matter which is to be determined by the Court. This being the legal position the learned Counsel invites us to hold that the main provisions of the impugned Act, particularly those which are contained in sections 3, 7, 10, 11, 12, 13 and 14 are wholly unreasonable and should be invalidated on that ground.

The second contention advanced by the learned Counsel is that the impugned legislation is in conflict with the provision of article 21 of the Constitution inasmuch as it provides for deprivation of the personal liberty of a man not in accordance with a procedure established by law. It is argued that the word 'law' here does not mean or refer to any particular legislative enactment but it means the general law of the land, embodying those principles of natural justice with regard to procedure which are regarded as fundamental, in all systems of civilised jurisprudence.

It is conceded by the learned counsel that the procedure, if any, with regard to preventive detention as has been prescribed by article 22 of the Constitution which itself finds a place in the chapter on Fundamental Rights must override those general rules of procedure which are contemplated by article 21 but with regard to matters for which no provision is made in article 22, the general provision made in article 21

must apply. He has indicated in course of his arguments what the essentials of such procedure are and the other point specifically raised in this connection is that the provision of section 12 of the Preventive Detention Act is in conflict with article 22(7) of the Constitution.

The last argument in support of this application is that the provisions of sections 3 and 14 of the Preventive Detention Act are invalid as they take away and render completely nugatory the fundamental right to constitutional remedies as is provided for in article 32 of the Constitution.

In discussing these points it should be well to keep in mind the general scheme of the Indian Constitution relating to the protection of the fundamental rights of the citizens and the limitations imposed in this respect upon the legislative powers of the Government. The Constitution of India is a written Constitution and though it has adopted many of the principles of the English Parliamentary system, it has not accepted the English doctrine of the absolute Supremacy of Parliament in matters of legislation. In this respect it has followed the American Constitution and other systems modelled on it. Notwithstanding the representative character of their political institutions, the Americans regard the limitations imposed by their Constitution upon the action of the Government, both legislative and executive, as essential to the preservation of public and private rights. They serve as a check upon what has been described as the despotism of the majority; and as was observed in the case of *Hurtado* v. *The People of California* ([1]) "a government which holds the lives, the liberty and the property of its citizens, subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism." In India it is the Constitution that is supreme and Parliament as well as the State Legislatures must not only act within the limits of their respective legislative spheres as demarcated in the three

([1]) 110 U.S. 516.

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lists occuring in the Seventh Schedule to the Constitution, but Part III of the Constitution guarantees to the citizens certain fundamental rights which the legislative authority can on no account transgress. A statute law to be valid must, in all cases, be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is unconstitutional or not. Article 13(2) is imperative on this point and provides expressly that the State shall not make any law which takes away or abridges the right conferred by this Part and any law made in contravention of this clause shall to the extent of the contravention, be void. Clause (1) of the article similarly invalidates all existing laws which are inconsistent with the provisions of this Part of the Constitution.

The fundamental rights guaranteed by the Constitution have been classified under seven heads or categories. They are:

(1) Right to equality;
(2) Right to freedom;
(3) Right against exploitation;
(4) Right to freedom of religion;
(5) Cultural and educational rights;
(6) Right to property; and
(7) Right to constitutional remedy.

The arrangement differs in many respects from that adopted in the American Constitution and bears a likeness on certain points to similar declarations in the Constitutions of other countries.

Of the different classes of fundamental rights spoken of above, we are concerned here primarily with right to freedom which is dealt with in four articles beginning from article 19 and also with the right to constitutional remedy which is embodied in article 32.

Article 10 enumerates certain forms of liberty or freedom, the protection of which is guaranteed by the Constitution. In article 20, certain protections are given in cases of persons accused of criminal offences. Article 21 lays down in general terms that no person shall be deprived of his life or personal liberty, except

according to procedure established by law. Article 22 provides for certain additional safeguards in respect to arrest and detention and by way of exception to the rules so made, makes certain special provisions for the particular form of detention known as Preventive Detention.

The first contention advanced by Mr. Nambiar involves a consideration of the question as to whether Preventive Detention, which is the subject matter of the impugned legislative enactment, comes within the purview of article 19(1) (d) of the Constitution, according to which a right to move freely throughout the territory of India is one of the fundamental rights guaranteed to all citizens. If it comes within that sub-clause, it is not disputed that clause (5) of article 19 would be attracted to it and it would be for the courts to decide whether the restrictions imposed upon this right by the Parliament are reasonable restrictions and are within the permissible limits prescribed by clause (5) of the article.

There is no authoritative definition of the term 'Preventive Detention' in Indian law, though as description of a topic of legislation it occurred in the Legislative Lists of the Government of India Act, 1935, and has been used in Item 9 of List I and Item 3 of List III in the Seventh Schedule to the Constitution. The expression has its origin in the language used by Judges or the law Lords in England while explaining the nature of detention under Regulation 14 (B) of the Defence of Realm Consolidation Act, 1914, passed on the outbreak of the First World War; and the same language was repeated in connection with the emergency regulations made during the last World War. The word 'preventive' is used in contradistinction to the word 'punitive.' To quote the words of Lord Finlay in *Rex* v. *Halliday* (1), it is not a punitive but a precautionary measure." 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

(1) [1917] A. C. 260 at p. 269.

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or reasonable probability and not criminal conviction which can only be warranted by legal evidence (1). Detention in such form 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, but it is not our business to speculate on questions of policy or to attempt to explore the reasons which led the representatives of our people to make such a drastic provision in the Constitution itself, which cannot but be regarded as a most unwholesome encroachment upon the liberties of the people.

The detention of a man even as a precautionary measure certainly deprives him of his personal liberty, and as article 21 guarantees to every man, be he a citizen or a foreigner, that he shall not be deprived of his life and personal liberty, except in accordance with the procedure established by law, the requirements of article 21 would certainly have to be complied with, to make preventive detention valid in law. What these requirements are I will discuss later on. Article 22 comes immediately after article 21. It secures to all persons certain fundamental rights in relation to arrest and detention, and as already said, by way of exception to the rights thus declare, makes certain specific provisions relating to preventive detention. The subject of preventive detention is specified in and constitutes Item No. 9 in the Union Legislative List and it also forms Item No. 3 in the Concurrent List. Under article 246 of the Constitution, the Parliament and the State Legislatures are empowered to legislate on this subject within the ambit of their respective authorities. Clause (3) of article 22 expressly enjoins that the protective provisions of clauses (1) and (2) of the article would not be available to persons detained under any law providing for preventive detention. The only fundamental rights which are guaranteed by the Constitution in the matter of preventive detention and which to that extent impose restraints upon the exercise of legislative powers in that respect are

(1) Vide Lord Macmillan in *Liversine* v. *Anderson* [1942] A.C. 206 at p.254.

contained in clauses (4) to (7) of article 22. Clause (4) lays down that no law of preventive detention shall authorise the detention of a person for a period longer than three months, unless an advisory board constituted in the manner laid down in sub-clause (a) of the clause has reported before the expiration of the period that there is sufficient cause for such detention. The period of detention cannot, in any event, exceed the maximum which the Parliament is entitled to prescribe under clause (7) (b). The Parliament is also given the authority to prescribe the circumstances and the class of cases under which a person can be detained for a period longer than three months under any law of preventive detention without obtaining the opinion of the advisory board. There is one safeguard provided for all cases which is contained in clause (5) and which lays down that the authority making the order of detention shall, as soon as possible 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. But even here, the authority while giving the grounds of detention need not disclose such facts which it considers against public interest to disclose.

The question that we have to consider is whether a law relating to preventive detention is justiciable in a Court of law on the ground of reasonableness under article 19 (5) of the Constitution inasmuch as it takes away or abridges the right to free movement in the territory of India guaranteed by clause (1) (d) of the article. It will be seen from what has been said above that article 22 deals specifically with the subject of preventive detention and expressly takes away the fundamental rights relating to arrest and detention enumerated in clauses (1) and (2) of the article from persons who are detained under any law which may be passed by the Parliament or State Legislatures acting under article 246 of the Constitution read with the relevant items in the legislative lists. I will leave aside for the moment the question as to how far the court can examine the reasonableness or otherwise of the procedure that is prescribed by any law relating

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to preventive detention, for that would involve a consideration of the precise scope and meaning of article 21; but this much is beyond controversy that so far as substantive law is concerned, article 22 of the Constitution gives a clear authority to the legislature to take away the fundamental rights relating to arrest and detention, which are secured by the first two clauses of the article. Any legislation on the subject would only have to conform to the requirements of clauses (4) to (7) and provided that is done, there is nothing in the language employed nor in the context in which it appears which affords any ground for suggestion that such law must be reasonable in its character and that it would be reviewable by the Court on that ground. Both articles 19 and 22 occur in the same Part of the Constitution and both of them purport to lay down the fundamental rights which the Constitution guarantees. It is well settled that the Constitution must be interpreted in a broad and liberal manner giving effect to all its parts, and the presumption should be that no conflict or repugnancy was intended by its framers. In interpreting the words of a Constitution, the same principles undoubtedly apply which are applicable in construing a statute, but as was observed by Lord Wright in *James* v. *Commonwealth of Australia*(1), "the ultimate result must be determined upon the actual words used not in *vacuo* but as occurring in a single complex instrument in which one part may throw light on the other." "The Constitution," his Lordship went on saying, "has been described as the federal compact and the construction must hold a balance between all its parts."

It seems to me that there is no conflict or repugnancy between the two provisions of the Constitution and an examination of the scheme and language of the catena of articles which deal with the rights to freedom would be sufficient to show that what clause (1) (d) of article 19 contemplates is not freedom from detention, either punitive or preventive; it relates to and speaks of a different aspect or phase of civil liberty.

(1) [1936] A. C. 578 at p. 613.

Article 19, which is the first of this series of articles, enumerates seven varieties or forms of freedom beginning with liberty of speech and expression and ending with free right to practise any trade, profession or business. The rights declared in articles 19 to 22 do not certainly exhaust the whole list of liberties which people possess under law. The object of the framers of the Constitution obviously is to enumerate and guarantee those forms of liberty which come under well-known categories recognised by constitutional writers and are considered to be fundamental and of vital importance to the community.

There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint, for that would lead to anarchy and disorder. The possession and enjoyment of all rights, as was observed by the Supreme Court of America in *Jacobson* v. *Massachusetts* ([1]), are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, general order and morals of the community. The question, therefore arises in each case of adjusting the conflicting interests of the individual and of the society. In some cases, restrictions have to be placed upon free exercise of individual rights to safeguard the interests of the society; on the other hand, social control which exists for public good has got to be restrained, lest it should be misused to the detriment of individual rights and liberties. Ordinarily, every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by any other person. On the other hand for the very protection of these liberties the society must arm itself with certain powers. No man's liberty would be worth its name if it can be violated with impunity by any wrong-doer and if his property or possessions could be preyed upon by a thief or a marauder. The society, therefore, has got to exercise certain powers for the protection of these liberties and to arrest, search imprison and

([1])197 U.S. 11.

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punish those who break the law. If these powers are properly exercised, they themselves are the safeguards of freedom, but they can certainly be abused. The police may arrest any man and throw him into prison without assigning any reasons; they may search his belongings on the slightest pretext; he may be subjected to a sham trial and even punished for crimes unkonwn to law. What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control.

To me it seems that article 19 of the Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law so that they may not conflict with public welfare or general morality. On the other hand, articles 20, 21 and 22 are primarily concerned with penal enactments or other laws under which personal safety or liberty of persons could be taken away in the interests of the society and they set down the limits within which the State control should be exercised. Article 19 uses the expression "freedom" and mentions the several forms and aspects of it which are secured to individuals, together with the limitations that could be placed upon them in the general interests of the society. Articles 20, 21 and 22 on the other hand do not make use of the expression "freedom" and they lay down the restrictions that are to be placed on State control where an individual is sought to be deprived of his life or personal liberty. The right to the safety of one's life and limbs and to enjoyment of personal liberty in the sense of freedom from physical restraint and coercion of any sort, are the inherent birth-rights of a man. The essence of these rights consists in restraining others from interfering with them and hence they cannot be described in terms of "freedom" to do particular things. There is also no question of imposing limits on the activities of individuals so far as the exercise of these rights is concerned. For these reasons, I think, these rights have not been mentioned in article 19 of the Constitution. An individual can be deprived of his life or personal liberty only by action

of the State, either under the provisions of any penal enactment or in the exercise of any other coercive process vested in it under law. What the Constitution does therefore is to put restrictions upon the powers of the State for protecting the rights of the individuals. The restraints on State authority operate as guarantees of individual freedom and secure to the people the enjoyment of life and personal liberty which are thus declared to be inviolable except in the manner indicated in these articles. In my opinion, the group of articles 20 to 22 embody the entire protection guaranteed by the Constitution in relation to deprivation of life and personal liberty both with regard to substantive as well as to procedural law. It is not correct to say, as I shall show more fully later on, that article 21 is confined to matters of procedure only. There must be a substantive law, under which the State is empowered to deprive a man of his life and personal liberty and such law must be a valid law which the legislature is competent to enact within the limits of the powers assigned to it and which does not transgress any of the fundamental rights that the Constitution lays down. Thus a person cannot be convicted or punished under an *ex post facto* law, or a law which compels the accused to incriminate himself in a criminal trial or punishes him for the same offence more than once. These are the protections provided for by article 20. Again a law providing for arrest and detention must conform to the limitations prescribed by clauses (1) and (2) or article 22. These provisions indeed have been withdrawn expressly in case of preventive detention and protections of much more feeble and attenuated character have been substituted in their place; but this is a question of the policy adopted by the Constitution which does not concern us at all. The position, therefore, is that with regard to life and personal liberty, the Constitution guarantees protection to this extent that no man could be deprived of these rights except under a valid law passed by a competent legislature within the limits mentioned above and in accordance with the procedure which such law lays down. Article 19, on the other hand,

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enunciates certain particular forms of civil liberty quite independently of the rights dealt with under article 21. Most of them may be connected with or dependent upon personal liberty but are not identical with it; and the purpose of article 19 is to indicate the limits within which the State could, by legislation, impose restrictions on the exercise of these rights by the individuals. The reasonableness or otherwise or such legislation can indeed be determined by the Court to the extent laid down in the several clauses or article 19, though no such review is permissible with regard to laws relating to deprivation of life and personal liberty. This may be due to the fact that life and personal freedom constitute the most vital and essential rights which people enjoy under any State and in such matters the precise and definite expression of the intention of the legislature has been preferred by the Constitution to the variable standards which the judiciary might lay down. We find the rights relating to personal liberty being declared almost in the same terms in the Irish Constitution article 40 (1) (4) (1) of which lays down that "no citizen shall be deprived of his personal liberty save in accordance with law." In the Constitution of the Free City of Danzig, "the liberty of the person has been declared to be inviolable and no limitation or deprivation of personal liberty may be imposed by public authority except by virtue of a law" (*vide* article 74). Article 31 of the Japanese Constitution is the closest parallel to article 21 of the Indian Constitution and the language is almost identical. This is the scheme adopted by the Constitution in dealing with the rights to freedom described in the chapter on fundamental rights and in my opinion, therefore, the proper test for determining the validity of an enactment under which a person is sought to be deprived of his life and personal liberty has to be found not in article 19, but in the three following articles of the Constitution. Article 20 of course has no application so far as the law relating to preventive detention is concerned.

Mr. Nambiar's endeavour throughout has been to

establish that article 19 (1) (d) of the Constitution read with article 19 (5) enunciates the fundamental rights of the citizens regarding the substantive law of personal liberty, while article 21 embodies the protection as regards procedural law. This, in my opinion, would be looking at these provisions from a wrong angle altogether, Article 19 cannot be said to deal with substantive law merely, nor article 21 with mere matters of procedure. It cannot also be said that the provisions of article 19(1) (d) read with clause (5) and article 21 are complementary to each other. The contents and subject matter of the two provisions are not indentical and they proceed on totally different principles. There is no mention of any "right to life" in article 19, although that is the primary and the most important thing for which provision is made in article 21. If the contention of the learned counsel is correct, we would have to hold that no protection is guaranteed by the Constitution as regards right to life so far as substantive law is concerned. In the second place; even if freedom of movement may be regarded as one of the ingredients of personal liberty, surely there are other elements included in the concept and admittedly no provision for other forms of personal liberty are to be found in article 19(5) of the Constitution. Furthermore article 19 is applicable to citizens only, while the rights guaranteed by article 21 are for all persons, citizens as well as aliens. The only proper way of avoiding these anomalies is to interpret the two provisions as applying to different subjects and this would be the right conclusion if we have in mind the scheme which underlies this group of articles.

I will now turn to the language of article 19(1) (d) and see whether preventive detention really comes within its purview. Article 19(1) (d) provides that all citizens shall have the right to move freely throughout the territory of India. The two sub-clauses which come immediately after sub-clause (d) and are intimately connected with it, are in these terms:

"(e) To reside and settle in any part of the territory of India;

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(f) to acquire, hold and dispose of property." Clause (5) relates to all these three sub-clauses and lays down that nothing in them shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clause either in the interests of the general public or for the protection of the interests of any scheduled tribe.

I agree with the learned Attorney-General that in construing article 19 (1) (d) stress is to be laid upon the expression "throughout the territory of India," and it is a particular and special kind of right, *viz.*, that of free movement throughout the Indian territory, that is the aim and object of the Constitution to secure. In the next sub-clause, right to reside and settle "in any part of the territory of India" is given and here again the material thing is not the right of residence or settlement but the right to reside or settle in any part of the Indian territory. For an analogous provision, we may refer to article 301 which says that subject to the other provisions of this Part, commerce and intercourse throughout the territory of India shall be free. The meaning of sub-clause (d) of article 19 (1) will be clear if we take it along with sub-clauses (e) and (f), all of which have been lumped together in clause (5) and to all of which the same restrictions including those relating to protection of the interest of any scheduled tribe have been made applicable. It will be remembered that these rights are available only to citizens. To an alien or foreigner, no guarantee of such rights has been given. Normally all citizens would have the free right to move from one part of the Indian territory to another. They can shift their residence from one place to any other place of their choice and settle anywhere they like. The right of free trade, commerce and intercourse throughout the territory of India is also secured. What the Constitution emphasises upon by guaranteeing these rights is that the whole of Indian Union in spite of its being divided into a number of States is really one unit so far as the citizens of the Union are concerned. All the

citizens would have the same privileges and the same facilities for moving into any part of the territory and they can reside or carry on business anywhere they like; and no restrictions either inter-State or otherwise would be allowed to set up in these respects between one part of India and another.

So far as free movement throughout the territory is concerned, the right is subject to the provision of clause (5), under which reasonable limitation may be imposed upon these liberties in the interests of the general public or protection of any scheduled tribe. The interests of the public which necessitates such restrictions may be of various kinds. They may be connected with the avoidance of pestilence or spreading of contagious diseases; certain places again may be kept closed for military purposes and there may be prohibition of entry into areas which are actual or potential war zones or where disturbances of some kind or other prevail. Whatever the reasons might be, it is necessary that these restrictions must be reasonable, that is to say, commensurate with the purpose for which they are laid down. In addition to general interest, the Constitution has specified the protection of the interests of the scheduled tribes as one of the factors which has got to be taken into consideration in the framing of these restrictions. The scheduled tribes, as is well known, are a backward and unsophisticated class of people who are liable to be imposed upon be shrewed and designing persons. Hence there are various provisions disabling them from alienating even their own properties except under special conditions. In their interest and for their benefit, laws may be made restricting the ordinary right of citizens to go or settle in particular areas or acquire property in them. The reference to the interest of scheduled tribe makes it quite clear-that the free movement spoken of in the clause relates not to general rights of locomotion but to the particular right of shifting or moving from one part of the Indian territory to another, without any sort of discriminatory barriers.

This view will receive further support if we look to some analogous provisions in the Constitution of

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other countries. It will be seen that sub-clauses (d), (e) and (f) of article 19 (1) are embodied in almost identical language in one single article *viz.*, article 75 of the Constitution of the Free City of Danzig. The article runs as follows :

"All nationals shall enjoy freedom of movement within the free city and shall have the right to stay and to settle at any place they may choose, to acquire real property and to earn their living in any way. This right shall not be curtailed without legal sanctions."

The several rights are thus mentioned together as being included in the same category, while they are differentiated from the "liberty of the person" which is "described to be inviolable except by virtue of a law" in article 74 which appears just previous to this article. An analogous provisions in slightly altered language occurs in article 111 of the Constitution of the German Reich which is worded in the following manner :

"All Germans enjoy the right of change of domicile within the whole Reich. Every one has the right to stay in any part of the Realm that he chooses, to settle there, acquire landed property and pursue any means of livelihood." Here again the right to personal liberty has been dealt with separately in article 114. A suggestion was made in course of our discussions that the expression "throughout the territory of India" occurring in article 19 (1) (d) might have been used with a view to save Passport Regulations or to emphasise that no rights of free emigration are guaranteed by the Constitution. The suggestion does not seem to me to be proper. No State can guarantee to its citizens the free right to do anything outside its own territory. This is true of all the fundamental rights mentioned in article 19 and not merely of the right of free movement. Further it seems to me that the words "throughout the territory of India" have nothing to do with rights of emigration. We find that both in the Danzing as well as in the German Constitution, where similar words have been used with regard to the exercise of the right of free movement throughout the

territory, there are specific provisions which guarantee to all nationals the free right of emigration to other countries (*vide* article 76 of the Danzing Constitution and article 112 of the Constitution of the German Reich). In my opinion, therefore, preventive detention does not come either within the express language or within the spirit and intendment of clause (1) (d) of article 19 of the Constitution which deals with a totally different aspect or form of civil liberty.

It is true that by reason of preventive detention, a man may be prevented from exercising the right of free movement within the territory of India as contemplated by article 19(1) (d) of the Constitution, but that is merely incidental to or consequential upon loss of liberty resulting from the order of detention. Not merely the right under clause (1) (d), but many of the other rights which are enumerated under the other sub-clauses of article 19 (1) may be lost or suspended so long as preventive detention continues. Thus a detenu so long as he is under detention may not be able to practise any profession, or carry on any trade or business which he might like to do; but this would not make the law providing for preventive detention a legislation taking away or abridging the rights under article 19 (1) (g) of the Constitution and it would be absurd to suggest that in such cases the validity of the legislation should be tested in accordance with the requirement of clause (6) of article 19 and that the only restrictions that could be placed upon the person's free exercise of trade and profession are those specified in that clause. Mr. Nambiar concedes that in such cases we must look to the substance of the particular legislation and the mere fact that it incidentally trenches upon some other right to which it does not directly relate is not material. He argues, however, that the essence or substance of a legislation which provides for preventive detention is to take away or curtail the right of free movements and in fact, "personal liberty" according to him, connotes nothing else but unrestricted right of locomotion. The learned counsel refers in this connection to certain passages in Blackstone's Commentaries on the Laws of England, where

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the author discusses what he calls the three absolute rights inherent in every Englishman, namely, rights of personal security, personal liberty and property. "Personal security", according to Blackstone, consists in a person's legal and uninterrupted enjoyment of his life, his limb, his body, his health and his reputation; whereas "personal liberty" consists in the power of locomotion, of changing of situation or moving one's person to whatsoever place one's own inclination may direct without imprisonment or restraint unless by due course of law ([1]). It will be seen that Blackstone uses the expression "personal liberty" in a somewhat narrow and restricted sense. A much wider and larger connotation is given to it by later writers on constitutional documents, particularly in America. In ordinary language "personal liberty" means liberty relating to or concerning the person or body of the individual; and "personal liberty" in this sense is the antithesis of *physical restraint* or *coercion*. According to Dicey, who is an acknowledged authority on the subject "personal liberty" means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification ([2]). It is, in my opinion, this negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory.

In this connection, it may not be irrelevant to point out that it was in accordance with the recommendation of the Drafting Committee that the word "personal" was inserted before "liberty" in article 15 of the Constitution which now stands as article 21. In the report of the Drafting Committee it is stated that the word "liberty" should be qualified by the insertion of the word "personal" before it; otherwise, it might be construed very widely so as to include even the freedoms already dealt with in article 13. Article 13, it should be noted, is the present article 19. If the views of the Drafting Committee were accepted by the

(1) Vide Chase's Blackstone, 4th Edn., pp. 68, 73.
(2) Vide Dicey on Constitutional Law, 9th Edn. pp. 207 208.

Constituent Assembly, the intention obviously was to exclude the contents of article 19 from the concept of "personal liberty" as used in article 21. To what extent the meaning of words used in the Constitution could be discovered from reports of Drafting Committee or debates on the floor of the House is a matter not quite free from doubt and I may have to take up this matter later on when discussing the meaning of the material clause in article 21 of the Constitution. It is enough to say at this stage that if the report of the Drafting Committee is an appropriate material upon which the interpretation of the words of the Constitution could be based, it certainly goes against the contention of the applicant and it shows that the words used in article 19 (1) (d) of the Constitution do not mean the same thing as the expression "personal liberty" in article 21 does. It is well known that the word "liberty" standing by itself has been given a very wide meaning by the Supreme Court of the United States of America. It includes not only personal freedom from physical restraint but the right to the free use of one's own property and to enter into free contractual relations. In the Indian Constitution, on the other hand, the expression "personal liberty" has been deliberately used to restrict it to freedom from physical restraint of person by incarceration or otherwise. Apart from the report of the Drafting Committee, that is the plain grammatical meaning of the expression as I have already explained.

It may not, I think, be quite accurate to state that the operation of article 19 of the Constitution is limited to free citizens only and that the rights have been described in that article on the presupposition that the citizens are at liberty. The deprivation of personal liberty may entail as a consequence the loss or abridgement of many of the rights described in article 19, but that is because the nature of these rights is such that free exercise of them is not possible in the absence of personal liberty. On the other hand the right to hold and dispose of property which is in sub-clause (f) of article 19 (1) and which is not dependent on full possession of personal liberty by the owner may

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not be affected if the owner is imprisoned or detained. Anyway, the point is not of much importance for purposes of the present discussion. The result is that, in my opinion, the first contention raised by Mr. Nambiar cannot succeed and it must be held that we are not entitled to examine the reasonableness or otherwise of the Preventive Detention Act and see whether it is within the permissible bounds specified in clause (5) of article 19.

I now come to the second point raised by Mr. Nambiar in support of the application; and upon this point we had arguments of a most elaborate nature addressed to us by the learned counsel on both sides, displaying a considerable amount of learning and research. The point, however, is a short one and turns upon the interpretation to be put upon article 21 of the Constitution, which lays down that "no person shall be deprived of his.....personal liberty, except according to procedure established by law." On a plain reading of the article the meaning seems to be that you cannot deprive a man of his personal liberty, unless you follow and act according to the law which provides for deprivation of such liberty. The expression "procedure" means the manner and form of enforcing the law. In my opinion, it cannot be disputed that in order that there may be a legally established procedure, the law which establishes it must be a valid and lawful law which the legislature is competent to enact in accordance with article 245 of the Constitution and the particular items in the legislative lists which it relates to. It is also not disputed that such law must not offend against the fundamental rights which are declared in Part III of the Constitution. The position taken up by the learned Attorney-General is that as in the present case there is no doubt about the competency of that Parliament to enact the law relating to preventive detention which is fully covered by Item 9 of List I, and Item 3 of List III, and as no question of the law being reasonable or otherwise arises for consideration by reason of the fact that article 19 (1) (d) is not attracted to this case, the law must be held to be a valid piece of legislation and if the procedure

laid down by it has been adhered to, the validity of the detention cannot possibly be challenged. His further argument is that article 22 specifically provides for preventive detention and lays down fully what the requirements of a legislation on the subject should be. As the impugned Act conforms to the requirements of article 22, no further question of its validity under article 21 of the Constitution at all arises. The latter aspect of his arguments, I will deal with later on. So far as the main argument is concerned, the position taken up by Mr. Nambiar is that article 21 refers to procedure only and not to substantive law; the procedure, however, must be one which is established by law. The expression "law" in this context does not mean or signify, according to the learned counsel, any particular law enacted by the legislature in conformity with the requirements of the Constitution or otherwise possessing a binding authority. It referes to law in the abstract or general sense—in the sense of *jus* and not *lex*—and meaning thereby the legal principles or fundamental rules that lie at the root of every system of positive law including our own, and the authority of which is acknowledged in the jurisprudence of all civilised countries. It is argued that if the word "law" is interpreted in the sense of any State-made law, article 21 could not rank as a fundamental right imposing a check or limitation on the legislative authority of the Government. It will be always competent to the legislature to pass a law laying down a thoroughly arbitrary and irrational procedure opposed to all elementary principles of justice and fairness and the people would have no protection whatsoever, provided such procedure was scrupulously adhered to. In support of this argument the learned counsel has relied upon a large number of American cases, where the Supreme Court of America applied the doctrine of "due process of law" as it appears in the American Constitution for the purpose of invalidating various legislative enactments which appeared to that Court to be capricious and arbitrary and opposed to the fundamental principles of law.

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It may be noted here that in the original draft of the Indian Constitution the words used in article 15 (which now stands as article 21) were "in accordance with due process of law". The Drafting Committee recommended that in place of the "due process" clause, the expression "according to procedure established by law" should be substituted. The present article 21 seems to have been modelled on article 31 of the Japanese Constitution, where the language employed is "no person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law" Mr. Nambiar argues that the expression "procedure established by law" in article 21 of the Constitution bears the same meaning as the "due process" clause does in America, restricted only to this extent, *viz.*, that it is limited to matters of procedure and does not extend to questions of substantive law. To appreciate the arguments that have been advanced for and against this view and to fix the precise meaning that is to be given to this clause in article 21, it would be necessary to discuss briefly the conception of the doctrine of "due process of law" as it appears in the American Constitution and the way in which it has been developed and applied by the Supreme Court of America.

In the history of Anglo-American law, the concept of "due process of law" or what is considered to be its equivalent "law of the land" traces its lineage far back into the beginning of the 13th Century A.D. The famous 39th chapter of the Magna Charta provides that "no free man shall be taken or imprisoned or disseized, or outlawed or exiled or in any way destroyed; nor shall we go upon him nor send upon him but by the lawful judgment of his peers and by the *law of the land.*" Magna Charta as a charter of English liberty was confirmed by successive English monarchs and it is in one of these confirmations (28 Ed. III, Chap. 3) known as "Statute of Westminster of the liberties of London", that the expression "due process of law" for the first time appears. Neither of these phrases was explained or defined in any of the

documents, but on the authority of Sir Edward Coke it may be said that both the expressions have the same meaning. In substance, they guaranteed that persons should not be imprisoned without proper indictment and trial by peers, and that property should not be seized except in proceedings conducted in due form in which the owner or the persons in possession should have an opportunity to show cause why seizure should not be made (1). These concepts came into America as part of the rights of Englishmen claimed by the colonists. The expression in one form or other appeared in some of the earlier State Constitutions and the exact phrase "due process of law" came to be a part of the Federal Constitution by the Fifth Amendment which was adopted in 1791 and which provided that "no person shall.... be deprived of life, liberty or property without due process of law." It was imposed upon the State Constitution in almost identical language by the Fourteenth Amendment in the year 1868.

What "due process of law" exactly means is difficult to define even at the present day. The Constitution contains no description of what is "due process of law" nor does it declare the principles by application of which it could be ascertained. In *Twining* v. *New Jersey* (2) the Court observed :

"Few phrases in the law are so elusive of exact apprehension as this. This Court has always declined to give a comprehensive definition of it and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise."

It is clear, however, that the requirement of "due process of law" in the United States Constitution imposes a limitation upon all the powers of Government, legislative as well as executive and judicial. Applied in England only as protection against executive usurpation and royal tyranny, in America it became a bulwark against arbitrary legislation (3).

(1) Vide Willoughby on the Constitution of the United States, Vol. III, p. 1087.
(2) 211 U. S. 79.
(3) Vide *Hurtado* v. *People of California*, 110 U. S. 516 at p. 532.

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As it is a restraint upon the legislative power and the object is to protect citizens against arbitrary and capricious legislation, it is not within the competence of the Congress to make any process a "due process of law" by its mere will; for that would make the limitation quite nugatory. As laid down in the case cited above, "it is not any act legislative in form that is law; law is something more than mere will exerted as an act of power." It means and signifies the general law of the land, the settled and abiding principles which inhere in the Constitution and lie at the root of the entire legal system. To quote the words of Daniel Webster in a famous argument before the Supreme Court (1):

"By the law of the land is most clearly intended the general law—a law which hears before it condemns, which proceeds upon enquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

What these principles of general law are nobody has ever attempted to enumerate. To a large extent they are the principles of English common law and modes of judicial proceedings obtaining in England, the traditions of which came along with the settlers in America. Some Judges seem to have alluded to the principles of natural justice in explaining what is meant by general law or "law of the land", though the doctrine of a law of nature did not obtain a firm footing at any time. In *Wynehamer* v. *New York*.(2), Justice Hubbard declared himself opposed to the judiciary attempting to set bounds to the legislative authority or declaring a statute invalid upon any fanciful theory of higher law or first principles of natural right outside of the Constitution. Coke's dictum of a supreme fundamental law which obviously referred to principles of English common law certainly did exercise considerable influence upon the minds of the American Judges (3) and there are observations in some cases

(1) *Darmouth College case*, 4 Wheaton p. 518. (2) 13 N. Y. 379.
(3) Willis on Constitutional Law, p. 647.

which go to suggest that the principles of natural justice were regarded as identical with those of common law, except where the rules of common law were not considered to be of fundamental character or were not acted upon as being unsuited to the progress of time or conditions of the American Society (1). In the case of *Loan Association* v. *Topeka*(2), it was observed that there are limitations upon powers of Government which grow out of the essential nature of free Governments—implied reservations of individual rights without which the social compact could not exist and which are respected by all Governments entitled to the name. What is hinted at, is undoubtedly the old idea of a social compact under which political institutions were supposed to come into being; and the suggestion is that when the Americans formed themselves into a State by surrendering a portion of their rights which they possessed at that time and which presumably they inherited from their English ancestors, there were certain rights of a fundamental character still reserved by them which no State could possibly take away.

As has been said already, "due process of law" has never been defined by Judges or Jurists in America. The best description of the expression would be to say that it means in each particular case such an exercise of the powers of Government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs (3).

In the actual application of the clause relating to "due process of law" to particular cases the decisions of the Supreme Court of America present certain peculiar and unusual features and there is total lack of uniformity and consistency in them. Ever since the appearance of the clause in the Fifth Amendment and down to the middle of the 19th century, it was interpreted as a restriction on procedure, and particularly the judicial procedure, by which the Government

(1) Cooley's Constitutional Limitations, Vol. II, pp. 739-40.
(2) 20 Wall, p. 655. (3) Cooley's Constitutional Limitations, Vol. II, p.741.

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exercises its powers. Principally it related to the procedure by which persons were tried for crimes and guaranteed to accused persons the right to have a fair trial in compliance with well established criminal proceedings. The same principle applied to the machinery or proceeding by which property rights were adjudicated and by which the powers of *eminent domain* and taxation were exercised. During this period it was not considered to have any bearing on substantial law at all.

Change, however, came in and the period that followed witnessed a growing recognition of the doctrine that substantive rights of life, liberty and property are protected by the requirement of due process of law against any deprivation attempted at by legislative authority; and the political and economic conditions of the country accounted to a great extent for this change in judicial outlook. The close of the civil war brought in a new period of industrial development leading to accumulation of large capital in the hands of industrialists and the emergence of a definite labouring class. New and important problems arose which the States attempted to deal with by various laws and regulations. Some of them seem to have been ill-advised and arbitrary and there was a clamour amongst businessmen against what they described as legislative encroachments upon their vested private rights. The Supreme Court now began to use the rule of due process of law as a direct restrain upon substantial legislation and any statute or administrative act, which imposed a limitation upon rights of private property or free contractual relations between the employers and employed, was invalidated as not being in accordance with due process of law (1). What constituted a legitimate exercise of the powers of legislation now came to be a judicial question and no statute was valid unless it was reasonable in the opinion of the Court. The question of reasonableness obviously depends largely upon the ideas of particular individuals and the Courts or rather the majority of Judges thus marshalled their own

(1) Vide Encyclopaedia of the Social Sciences, Vol. V, pp. 265-67.

views of social and economic policy in deciding the reasonableness or otherwise of the statutes. In the language of a well-known writer, the Courts became a kind of negative third chamber both to the State Legislatures and the Congress(1). To what extent the Courts laid stress upon the doctrine of freedom of contract is illustrated in the case of *Lochner* v. *New York*(2). In that case the question arose as to the validity of a labour legislation which prohibited the employment of persons in certain fields of activity for more than 60 hours a week. Lochner was indicated for violating this law by employing a man in his Biscuit and Cake Factory who was to work more than 60 hours in a week. The Court by a majority of 5 to 4 held the statute to be invalid on the ground that the "right to purchase or sell labour is part of the liberty protected by the Amendment unless there are circumstances which excluded the right." That decision has been criticized not merely on the ground that it rested upon an economic theory which to quote the language of Holmes J., who was one of the dissentient Judges "was not entertained by a large part of the country;" but it ignored that such regulation was necessary for protecting the health of the employees, that is to say, it was in substance an exercise of police powers with a view to accomplish some object of public interest(3).

It may be mentioned here that while the due process doctrine was being extended by judicial pronouncements, the doctrine of police power which operates to some extent as a check upon the "due process" clause was simultaneously gaining importance. Roughly speaking, police power may be defined as "a right of a Government to regulate the conduct of its people in the interests of public safety, health, morals and convenience. Under this authority, a Government may make regulations concerning the safety of building, the regulation of traffic, the reporting of incurable diseases, the inspection of markets, the sanitation of factories, the hours of work for women

(1) Vide Kelley and Harbinson on the American Constitution, p. 539.
(2) 198 U S. 45.
(3) Vide Willoughby on the Constitution of the U. S., Vol. III, p. 171.

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and children, the sale of intoxicants and such other matters"([1]). Here again, the extent to which the Court can interfere with exercise of police powers by the State has not been clearly defined by judicial pronouncements. The doctrine generally accepted is that although any enactment by legislature under the guise of exercise of police powers would not necessarily be constitutional, yet if the regulation has a direct relation to its proposed object which is the accomplishment of some legitimate public purpose, the wisdom or policy of the legislation should not be examined by the Courts. The rule is not without its exceptions but it is not necessary to elaborate them for our present purpose([2]). The later decisions, though not quite uniform, reveal the growing influence of the police power doctrine. It may be said that since 1936 there has been a definite swing of the judicial pendulum in the other direction. In the case of *West Coast Hotel Company* v. *Parrish*([3]) which related to the legality of a Statute for regulating the minimum wages of women, Chief Justice Hughes, who delivered the opinion of the Court, observed as follows :

"In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is the freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognise an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organisation which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people."

In the succeeding years the indications certainly are that the requirement of due process of law as a substantial restriction on Government control is becoming a thing of the past and the rule is being restricted more

(1) Vide Munroe—The Government of the U. S., p. 522.
(2) Vide Willoughby on the Constitution of the U. S., Vol. III, pp. 1709-70.
(3) 300 U. S. 379.

and more to its original procedural meaning. What will happen in future cannot certainly be predicted at this stage([1]).

Thus it will be seen that the "due process" clause in the American Constitution came to be used as a potent instrument in the hands of the judiciary for exercising control over social legislation. The judicial pronouncements are not guided by any uniform principle, and the economic and social ideas of the Judges, who form the majority in the Supreme Court for the time being, constitute, so to say, the yard-stick for measuring the reasonableness or otherwise of any enactment passed during that period. No writer of American Constitutional Law has been able uptil now to evolve anything like a definite and consistent set of principles out of the large mass of cases, where the doctrine of "due process of law" has been invoked or applied.

It is against this background that we must consider how the constitution-makers in India dealt with and gave final shape to the provisions, on an analogous subject in the Indian Constitution. In the Draft Constitution, article 15 (which now stands as article 21) was apparently framed on the basis of the 5th and 14th Amendments in the American Constitution. The article was worded as follows:

"No person shall be deprived of his life or liberty without due process of law."

The Drafting Committee in their report recommended a change in the language of this article. The first suggestion was that the word "personal" shall be inserted before the word "liberty" and the second was that the expression "in accordance with procedure established by law" shall be substituted for "due process of law", the reason given being that the former expression was more specific.

The learned Attorney-General has placed before us the debates in the Constituent Assembly centering round the adoption of this recommendation of the Drafting Committee and he has referred us to the

(1) Swisher— The Growth of Constitutional power in the United States, pp. 123-25.

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speeches of several members of the Assembly who played an important part in the shaping of the Constitution. As an aid to discover the meaning of the words in a Constitution, these debates are of doubtful value. "Resort can be had to them", says Willoughby, "with great caution and only when latent ambiguities are to be solved. The proceedings may be of some value when they clearly point out the purpose of the provision. But when the question is of abstract meaning, it will be difficult to derive from this source much material assistance in interpretation"([1]).

The learned Attorney-General concedes that these debates are not admissible to explain the meaning of the words used and he wanted to use them only for the purpose of showing that the Constituent Assembly when they finally adopted the recommendation of the Drafting Committee, were fully aware of the implications of the differences between the old form of expression and the new. In my opinion, in interpreting the Constitution, it will be better if such extrinsic evidence is left out of account. In matters like this, different members act upon different impulses and from different motives and it is quite possible that some members accepted certain words in a particular sense, while others took them in a different light.

The report of the Drafting Committee, however, has been relied upon by both parties and there are decided authorities in which a higher value has been attached to such reports than the debates on the floor of the House. In *Caminetti* v. *United States*([2]), it is said that reports to Congress accompanying the introduction of proposed law may aid the Courts in reaching the true meaning of the legislation in case of doubtful interpretation. The report is extremely short. It simply says that the reason for the suggested change is to make the thing more specific.

I have no doubt in my mind that if the "due process" clause which appeared in the original draft was finally retained by the Constituent Assembly, it could be safely presumed that the framers of the Indian

(1) Vide Willoughby on the Constitution of the United States, p. 64.
(2) 242 U. S. 470.

Constitution wanted that expression to bear the same sense as it does in America. But when that form was abandoned and another was deliberately substituted in its place, it is not possible to say that in spite of the difference in the language and expression, they should mean the same thing and convey the same idea. Mr. Nambiar's contention is that in view of the somewhat uncertain and fluidic state of law as prevails in America on the subject, the Drafting Committee recommended an alteration for the purpose of making the language more specific and he would have us hold that it was made specific in this way, namely, that instead of being extended over the whole sphere of law, substantive as well as adjective, it was limited to procedural law merely. That is the reason, he says, why instead of the word "process" the expression "procedure" was adopted, but the world "law" means the same thing as it does in the "due process" clause in America and refers not to any State-made law but to the fundamental principles which are inherent in the legal system and are based upon the immutable doctrines of natural justice.

Attractive though this argument might at first sight appear, I do not think that it would be possible to accept it as sound. In the first place, it is quite clear that the framers of the Indian Constitution did not desire to introduce into our system the elements of uncertainty, vagueness and changeability that have grown round the "due process" doctrine in America. They wanted to make the provision clear, definite and precise and deliberately chose the words "procedure established by law", as in their opinion no doubts would ordinarily arise about the meaning of this expression. The indefiniteness in the application of the "due process" doctrine in America has nothing to do with the distinction between substantive and procedural law. The uncertainty and elasticity are in the doctrine itself which is a sort of hidden mine, the contents of which nobody knows and is merely revealed from time to time to the judicial conscience of the Judges. This theory, the Indian Constitution deliberately discarded

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and that is why they substituted a different form in its place which, according to them, was more specific. In the second place, it appears to me that when the same words are not used, it will be against the ordinary canons of construction to interpret a provision in our Constitution in accordance with the interpretation put upon a somewhat analogous provision in the Constitution of another country, where not only the language is different, but the entire political conditions and constitutional set-up are dissimilar. In the Supreme Court of America stress has been laid uniformly upon the word "due" which occurs before and qualifies the expression "process of law". "Due" means "what is just and proper" according to the circumstances of a particular case. It is this word which introduces the variable element in the application of the doctrine; for what is reasonable in one set of circumstances may not be so in another and a different set. In the Indian Constitution the word "due" has been deliberately omitted and this shows clearly that the Constitution-makers of India had no intention of introducing the American doctrine. The word "established" ordinarily means "fixed or laid down" and if "law" means, as Mr. Nambiar contends, not any particular piece of law but the indefinite and indefinable principles of natural justice which underlie positive systems of law, it would not at all be appropriate to use the expression "established", for natural law or natural justice cannot establish anything like a definite procedure.

It does not appear that in any part of the Constitution the word "law" has been used in the sense of "general law" connoting what has been described as the principles of natural justice outside the realm of positive law. On the other hand, the provision of article 31 of the Constitution, which appears in the chapter on Fundamental Rights, makes it clear that the word "law" is equivalent to State-made law and to deprive a person of his property, the authority for sanction of such law is necessary. As has been said already, the provision of article 21 of the Indian Constitution reproduces, save in one particular, the

language of article 31 of the Japanese Constitution and it is quite clear from the scheme and provisions of the Japanese Constitution that in speaking of law it refers to law passed or recognised as such by the State. In the Irish Constitution also, there is provision in almost similar language which conveys the same idea. Article 40 (4) (1) provides that "no citizen shall be deprived of his personal liberty save in accordance with law," and by law is certainly meant the law of the State.

Possibly the strongest argument in support of Mr. Nambiar's contention is that if law is taken to mean State-made law, then article 21 would not be a restriction on legislation at all. No question of passing any law abridging the right conferred by this article could possibly arise and article 13(2) of the Constitution would have no operation so far as this provision is concerned. To quote the words of an American Judge it would sound very much like the Constitution speaking to the legislature that the later could not infringe the right created by these articles unless it chose to do so([1]).

Apparently this is a plausible argument but it must be admitted that we are not concerned with the policy of the Constitution. The fundamental rights not merely impose limitations upon the legislature, but they serve as checks on the exercise of executive powers as well, and in the matter of depriving a man of his personal liberty, checks on the high-handedness of the executive in the shape of preventing them from taking any step, which is not in accordance with law, could certainly rank as fundamental rights. In the Constitutions of various other countries, the provisions relating to protection of personal liberty are couched very much in the same language as in article 21. It is all a question of policy as to whether the legislature or the judiciary would have the final say in such matters and the Constitution-makers of India deliberately decided to place these powers in the hands of the legislature. Article 31 of the Japanese Constitution, upon which article 21 of our Constitution is modelled, also

(1) Vide per Bronson J. in *Taylor* v. *Porte* 4 Hill 140.

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proceeds upon the same principle. The Japanese Constitution, it is to be noted, guarantees at the same time other rights in regard to arrest, detention and access to Court which might serve as checks on legislative authority as well. Thus article 32 provides :

"No person shall be denied the right of access to the Courts."

Article 34 lays down :

"No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel, nor shall he be detained without adequate cause; and upon demand of any person, such cause must be immediately shown in open Court in his presence and in the presence of his counsel."

It was probably on the analogy of article 34 of the Japanese Constitution that the first two clauses of article 22 of the Indian Constitution were framed. Article 22 was not in the original Draft Constitution at all; and after the "due process" clause was discarded by the Constituent Assembly and the present form was substituted in its place in article 21, article 22 was introduced with a view to provide for some sort of check in matters of arrest and detention and the protection it affords places limitations upon the authority of the legislature as well. These protections indeed have been denied to cases of preventive detention but that again is a question of policy which does not concern us as a Court. My conclusion, therefore, is that in article 21 the word "law" has been used in the sense of State-made law and not as an equivalent of law in the abstract or general sense embodying the principles of natural justice. The article presupposes that the law is a valid and binding law under the provisions of the Constitution having regard to the competency of the legislature and the subject it relates to and does not infringe any of the fundamental rights which the Constitution provides for.

In the view that I have taken, the question raised by Mr. Nambiar that the Preventive Detention Act is invalid, by reason of the fact that the procedure it lays

down is not in conformity with the rules of natural justice, does not fall for consideration. It is enough, in my opinion, if the law is a valid law which the legislature is competent to pass and which does not transgress any of the fundamental rights declared in Part III of the Constitution. It is also unnecessary to enter into a discussion on the question raised by the learned Attorney-General as to whether article 22 by itself is á self-contained Code with regard to the law of Preventive Detention and whether or not the procedure it lays down is exhaustive. Even if the procedure is not exhaustive, it is not permissible to supplement it by application of the rules of natural justice. On the third point raised by Mr. Nambiar, the only question, therefore, which requires consideration is whether section 12 of the Preventive Detention Act is *ultra vires* of the Constitution by reason of its being not in conformity with the provision of article 22(7) (a). Article 22(7) (a) of the Constitution empowers the Parliament to prescribe the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an advisory board in accordance with the provisions of sub-clause (a) of clause (4). Section 12 of the Preventive Detention Act which purports to be an enactment in pursuance of article 22(7) (a) of the Constitution provides as follows :

"(1) Any person detained in any of the following classes of cases or under any of the following circumstances may be detained without obtaining the opinion of an advisory board for a period longer than three months, but not exceeding one year from the date of his detention, namely, where such person has been detained with a view to preventing him from acting in any manner prejudicial to—

(a) the defence of India, relations of India with foreign powers or the security of India; or

(b) the security of a State or the maintenance of public order."

It will be noticed that there are altogether six

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heads or subjects in the two Items in the legislative lists, namely, item No. 9 of List I and Item No. 3 of List III which deal with preventive detention. Item No. 9 of List I mentions reasons connected with defence, foreign affairs and security of India, while Item No. 3 of List III speaks of reasons connected with security of a State, the maintenance of public order and the maintenance of supplies and services essential to the community. With the exception of the last head, all the remaining five have been listed in section 12 of the Preventive Detention Act and they have been mentioned both as circumstances and classes of cases in which detention for more than three months would be permissible without the opinion of any advisory board. Mr. Nambiar's argument is that the mentioning of five out of the six legislative heads in section 12 does not amount to prescribing the circumstances under which, or the classes of cases in which, a person could be detained for more than three months as contemplated by article 22(7) (a). It is also contended that in view of the fact that the two items "circumstances" and "classes" are separated by the conjunction "and", what the Constitution really contemplated was that both these items should be specified and a statement or specification of any one of them would not be a proper compliance with the provisions of the clause. It is further pointed out that the mentioning of the same matters as "circumstances" or "classes" is not warranted by article 22(7) of the Constitution and is altogether illogical and unsound.

I must say that section 12 has been drafted in a rather clumsy manner and certainly it could have been framed in a better and more proper way. Under article 22(7)(a), the Parliament may specify the circumstances under which, and the classes of cases in which, the necessity of placing the cases of detention for examination by the advisory board could be dispensed with. By "classes of cases" we mean certain determinable groups, the individuals comprised in each group being related to one another in a particular way which constitutes the determining factor of that group. "Circumstances" on the other hand

connote situations or conditions which are external to the persons concerned. Preventive detention can be provided for by law for reasons connected with six different matters specified in the relevant items in the legislative lists, and whatever the reasons might be, there is a provision contained in article 22(4)(a) which lays down that detention for more than three months could not be permitted except with the sanction of the advisory board. An alternative however has been provided for by clause (b) and Parliament has been given the option to take away the protection given by clause (a) and specify the circumstances and the cases when this rule will not apply. I am extremely doubtful whether the classification of cases made by Parliament in section 12 of the Act really fulfils the object which the Constitution had in view. The basis of classification has been the apprehended acts of the persons detained described with reference to the general heads mentioned in the items in the legislative lists as said above. Five out of the six heads have been taken out and labelled as classes of cases to which the protection of clause (4) (a) of the article would not be available. It is against common sense that all forms of activities connected with these five items are equally dangerous and merit the same drastic treatment. The descriptions are very general and there may be acts of various degrees of intensity and danger under each one of these heads.

Although I do not think that section 12 has been framed with due regard to the object which the Constitution had in view. I am unable to say that the section is invalid as being *ultra vires* the Constitution. The Constitution has given unfettered powers to Parliament in the matter of making the classifications and it is open to the Parliament to adopt any method or principle as it likes. If it chose the principle implied in the enumeration of subjects under the relevant legislative heads, it cannot be said that Parliament has exceeded its powers.

I am also unable to hold that both "circumstances" as well as "classes" have to be prescribed in order to

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comply with the requirement of sub-clause (a) of article 22(7). The sub-clause (a) of the article lays down a purely enabling provision and Parliament, if it so chooses, may pass any legislation in terms of the same. Where an optional power is conferred on certain authority to perform two separate acts, ordinarily it would not be obligatory upon it to perform both; it may do either if it so likes. Here the classes have been specified and the classes apparently are composed of persons who are detained for the purpose of preventing them from committing certain apprehended acts. I am extremely doubtful whether the classes themselves could be described as "circumstances" as they purport to have been done in the section. "Circumstances" would ordinarily refer to conditions like war, rebellion, communal disturbances and things like that, under which extra precaution might be necessary and the detention of suspected persons beyond the period of three months without the sanction of the advisory board might be justified. It is said that the likelihood of these persons committing the particular acts which are specified might constitute "circumstances." In my opinion, that is not a plain and sensible interpretation. But whatver that may be, as I am of opinion that it is not obligatory on Parliament to prescribe both the circumstances and the classes of cases, I am unable to hold that section 12 is *ultra vires* the Constitution because the circumstances are not mentioned. As I have said at the beginning, the draft is rather clumsy and I do not know why Parliament used the word "or" when in the Constitution itself the word "and" has been used.

In the fourth and last point raised by Mr. Nambiar the principal question for consideration is the validity of section 14 of the Preventive Detention Act. Sub-section (1) of section 14 prohibits any Court from allowing any statement to be made or any evidence to be given before it of the substance of any communication made under section 7 of the grounds on which a detention order has been made against any person or any representation made by him against such order. It further provides that no Court shall be

entitled to require any public officer to produce before it or to disclose the substance of any such communication or representation made or the proceedings of an advisory board or that part of the report of an advisory board which is confidential. Sub-section (2) further provides that.

"It shall be an offence punishable with imprisonment for a term which may extend to one year, or with fine, or with both, for any person to disclose or publish without the previous authorisation of the Central Government or the State Government, as the case may be, any contents or matter purporting to be contents of any such communication or representation as is referred to in sub-section (1) :

Provided that nothing in this sub-section shall apply to a disclosure made to his legal adviser by a person who is the subject of a detention order."

The provisions of this section are obviously of a most drastic character. It imposes a ban on the Court and prevents it from allowing any statement to be made or any evidence produced before it of the substance of any communication made to the detenu apprising him of the grounds upon which the detention order was made. The Court is also incompetent to look into the proceedings before the advisory board or the report of the latter which is confidential. Further the disclosure of such materials has been made a criminal offence punishable with imprisonment for a term which may extend to one year. Mr. Nambiar's contention is that these restrictions render utterly nugatory the provisions of article 32 of the Constitution which guarantees to every person the right to move this Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution. It is not disputed that the petitioner has the right of moving this Court for a writ of *habeas corpus*, and unless the Court is in a position to look into and examine the grounds upon which the detention order has been made, it is impossible for it to come to any decision on the point and pass a proper judgment. Though the right to move this

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Court is not formally taken away, the entire proceedings are rendered ineffective and altogether illusory. On behalf of the respondent, it is pointed out that article 32 guarantees only the right to constitutional remedy for enforcement of the rights which are declared by the Constitution. If there are no rights under the Constitution, guaranteed to a person who is detained under any law of preventive detention, no question of enforcing such rights by an approach to this Court at all arises. I do not think that this argument proceeds on a sound basis; and in my opinion, section 14 does take away and materially curtails some of the fundamental rights which are guaranteed by the Constitution itself. Article 22, clause (5), of the Constitution lays down as a fundamental right that when a person is detained 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. Under clause (6), the authority need not disclose such facts as it considers to be against public interest to disclose. But so far as the grounds are concerned, the disclosure is not prohibited under any circumstance. It is also incumbent upon the detaining authority to afford a detenu the earliest opportunity of making a representation against the detention order. It has been held in several cases, and in my opinion quite rightly, that if the grounds supplied to a detained person are of such a vague and indefinite character that no proper and adequate representation could be made in reply to the same, that itself would be an infraction of the right which has been given to the detenu under law. In my opinion, it would not be possible for the Court to decide whether the provisions of article 22, clause (5), have been duly complied with and the fundamental right guaranteed by it has been made available to the detenu unless the grounds communicated to him under the provisions of this article are actually produced before the Court. Apart from this, it is also open to the person detained to contend that the detention

order has been a *mala fide* exercise of power by the detaining authority and that the grounds upon which it is based, are not proper or relevant grounds which would justify detention under the provisions of the law itself. These rights of the detenu would for all practical purposes be rendered unenforceable if the Court is precluded from looking into the grounds which have been supplied to him under section 7 of the Preventive Detention Act. In my opinion, section 14 of the Preventive Detention Act does materially affect the fundamental rights declared under Part III of the Constitution and for this reason it must be held to be illegal and *ultra vires.* It is not disputed, however, that this section can be severed from the rest of the Act without affecting the other provisions of the Act in any way. The whole Act cannot, therefore, be held to be *ultra vires.*

Mr. Nambiar has further argued that section 3 of the Act also contravenes the provisions of article 32 of the Constitution, for it makes satisfaction of the particular authorities final in matters of preventive detention and thereby prevents this Court from satisfying itself as to the propriety of the detention order. This contention cannot succeed as no infraction of any fundamental right is involved in it. As has been pointed out already, this Court cannot interfere unless it is proved that the power has been exercised by the authorities in a *mala fide* manner or that the grounds are not proper or relevant grounds which justify detention. The provisions are undoubtedly harsh, but as they do not take away the rights under articles 21 and 22 of the Constitution, they cannot be held to be illegal or *ultra vires.*

The result, therfore, is that, in my opinion, the Preventive Detention Act must be declared to be *intra vires* the Constitution with the exception of section 14 which is held to be illegal and *ultra vires.* The present petition, however, must stand dismised, though it may be open to the petitioner to make a fresh application if he so chooses and if the grounds that have been supplied to him under section 7 of the Act do furnish adequate reasons for making such application.

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Das J.—I am likewise of opinion that this application should be dismissed.

The contention of learned counsel appearing in support of this application is that the provisions of the Preventive Detention Act, 1950 (Act IV of 1950), are extremely drastic and wholly unreasonable and take away or, in any event, considerably abridge the fundamental rights conferred on the citizens by the provisions of Part III of the Constitution and that this Court should declare the Act wholly void under article 13(2) of the Constitution and set the petitioner at liberty.

It is necessary to bear in mind the scope and ambit of the powers of the Court under the Constitution. The powers of the Court are not the same under all Constitutions. In England Parliament is supreme and there is no limitation upon its legislative powers. Therefore, a law duly made by Parliament cannot be challenged in any Court. The English Courts have to interpret and apply the law; they have no authority to declare such a law illegal or unconstitutional. By the American Constitution the legislative power of the Union is vested in the Congress and in a sense the Congress is the supreme legislative power. But the written Constitution of the United States is supreme above all the three limbs of Government and, therefore, the law made by the Congress, in order to be valid, must be in conformity with the provisions of the Constitution. If it is not, the Supreme Court will intervene and declare that law to be unconstitutional and void. As will be seen more fully hereafter, the Supreme Court of the United States, under the leadership of Chief Justice Marshall, assumed the power to declare any law unconstitutional on the ground of its not being in "due process of law", an expression to be found in the Fifth Amendment (1791) of the United States Constitution and the Fourteenth Amendment (1868) which related to the State Constitutions. It is thus that the Supreme Court established its own supremacy over the executive and the Congress. In India the position of the Judiciary is somewhere in

between the Courts in England and the United States. While in the main leaving our Parliament and the State Legislatures supreme in their respective legislative fields, our Constitution has, by some of the articles, put upon the Legislatures certain specified limitations some of which will have to be discussed hereafter. The point to be noted, however, is that in so far as there is any limitation on the legislative power, the Court must, on a complaint being made to it, scrutinise and ascertain whether such limitation has been transgressed and if there has been any transgression the Court will courageously declare the law unconstitutional, for the Court is bound by its oath to uphold the Constitution. But outside the limitations imposed on the legislative powers our Parliament and the State Legislatures are supreme in their respective legislative fields and the Court has no authority to question the wisdom or policy of the law duly made by the appropriate legislature. Our Constitution, unlike the English Constitution, recognises the Court's supremacy over the legislative authority, but such supremacy is a very limited one, for it is confined to the field where the legislative power is circumscribed by limitations put upon it by the Constitution itself. Within this restricted field the Court may, on a scrutiny of the law made by the Legislature, declare it void if it is found to have transgressed the constitutional limitations. But our Constitution, unlike the American Constitution, does not recognise the absolute supremacy of the Court over the legislative authority in all respects, for outside the restricted field of constitutional limitations our Parliament and the State Legislatures are supreme in their respective legislative fields and in that wider field there is no scope for the Court in India to play the role of the Supreme Court of the United States. It is well for us to constantly remember this basic limitation on our own powers.

The impugned Act has been passed by Parliament after the Constitution came into force. Article 246 gives exclusive power to Parliament to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule and it gives exclusive power to

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the State Legislatures to make laws with respect to any of the matters specified in List II of that Schedule. It also gives concurrent power to Parliament as well as to the State Legislatures to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule. Residuary powers of legislation are vested in Parliament under article 248.

The first thing to note is that under Entry 9 of List I the Parliament and under Entry 3 in List III both, Parliament and the State Legislatures are empowered to make laws for preventive detention for reasons connected with the several matters specified in the respective entries. This legislation is not conditioned upon the existence of any war with a foreign power or upon the proclamation of emergency under Part XVIII of the Constitution. Our Constitution has, therefore, accepted preventive detention as the subject-matter of peace-time legislation as distinct from emergency legislation. It is a novel feature to provide for preventive detention in the Constitution. There is no such provision in the Constitution of any other country that I know of. Be that as it may, for reasons good or bad, our Constitution has deliberately and plainly given power to Parliament and the State Legislatures to enact preventive detention laws even in peace-time. To many of us a preventive detention law is odious at all times but what I desire to emphasise is that it is not for the Court to question the wisdom and policy of the Constitution which the people have given unto themselves. This is another basic fact which the Court must not overlook.

The next thing to bear in mind is that, if there were nothing else in the Constitution, the legislative powers of Parliament and the State Legislatures in their respective fields would have been absolute. In such circumstances the Court would have been entitled only to scrutinise whether Parliament or the State Legislature had, in making a particular law, overstepped its legislative field and encroached upon the legislative field of the other legislative power, but could not have otherwise questioned the validity of any law made by the Parliament or the State Legislatures.

Thus under Entry 9 of List I the Parliament and under Entry 3 of List III the Parliament and the State Legislature could make as drastic a preventive detention law as it pleased. Such a law might have authorised a policeman, not to speak of a District Magistrate or Sub-Divisional Magistrate or the Commissioner of Police, to take a man, citizen or non-citizen, into custody and keep him in detention for as long as he pleased. This law might not have made any provision for supplying to the detenu the grounds of his detention or affording any opportunity to him to make any representation to anybody or for setting up any advisory board at all. Likewise, under Entries 1 and 2 in List III the Parliament or the State Legislature might have added as many new and novel offences as its fancy might have dictated and provided for any cruel penalty ranging from the maiming of the limbs to boiling to death in oil or repealed the whole of the Code of Criminal Procedure and provided for trial by battle or ordeal or for conviction by the verdict of a sorcerer or a soothsayer. Such law might have forbidden any speech criticising the Government, however mildly, or banned all public meetings or prohibited formation of all associations under penalty of law. Under Entry 33 of List I the Parliament might have made a law for acquiring anybody's properties for the purposes of the Union without any compensation and under Entry 36 in List III the State Legislature could do the same subject to the provisions of Entry 42 in List III which empowers the making of a law laying down principles for payment of compensation which might be anything above nothing. Under Entry 81 Parliament could have made any law restricting or even prohibiting inter-State migration so that a Bengali would not be able to move into and settle in Bihar or *vice versa.* It is needless to multiply instances of atrocious laws which Parliament or the State Legislature might have made under article 246 read with the different lists if there were nothing else in the Constitution. Our Legislatures, subject to the limitation of distribution of legislative powers, would have been as supreme in their respective legislative fields as the

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English Parliament is and has been. The Court in India, in such event, would have had to take the law duly made, interpret it and apply it. It would not have been entitled to utter a word as to the propriety of the particular law, although it might have shuddered at the monstrous atrocities of such law.

Our Constitution, however has not accepted this absolute supremacy of our Parliament or the State Legislature. Thus by article 245 (1) the legislative power is definitely made "subject to the provisions of this Constitution." Turning to the Constitution, article 13(2) provides as follows:

"The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall to the extent of the contravention, be void."

This clearly puts a definite limitation on the wide legislative powers given by article 246. It is certainly within the competency of the Court to judge and declare whether there has been any contravention of this limitation. In this respect again the Court has supremacy over the Legislature.

From the provisions so far referred to, it clearly follows that there are two principal limitation to the legislative power of Parliament, namely,—

(i) that the law must be within the legislative competence of Parliament as prescribed by article 246; and

(ii) that such law must be subject to the provisions of the Constitution and must not take away or abridge the rights conferred by Part III.

There can be no question—and, indeed, the learned Attorney-General does not contend otherwise—that both these matters are justiciable and it is open to the Courts to decide whether Parliament has transgressed either of the limitations upon its legislative power.

Learned counsel for the petitioner does not say that the impugned Act is *ultra vires* the legislative powers of Parliament as prescribed by article 246. His contention is that the impugned Act is void

because it takes away or abridges the fundamental rights of citizens conferred by Part III of the Constitution. It is, therefore, necessary to ascertain first the exact nature, extent and scope of the particular fundamental right insisted upon and then to see whether the impugned Act has taken away or, in any way, abridged the fundamental right so ascertained.

Civil rights of a person are generally divided into two classes, namely, the rights attached to the person (*jus personarum*) and the rights to things, *i.e.*, property (*jus. rerum*). Of the rights attached to the person, the first and foremost is the freedom of life, which means the right to live, *i.e.*, the right that one's life shall not be taken away except under authority of law. Next to the freedom of life comes the freedom of the person, which means that one's body shall not be touched, violated, arrested or imprisoned and one's limbs shall not be injured or maimed except under authority of law. The truth of the matter is that the right to live and the freedom of the person are the primary rights attached to the person. If a man's person is free, it is then and then only that he can exercise a variety of other auxiliary rights, that is to say, he can, within certain limits, speak what he likes, assemble where he likes, form any associations or unions, move about freely as his "own inclination may direct," reside and settle anywhere he likes and practise any profession or carry on any occupation, trade or business. These are attributes of the freedom of the person and are consequently rights attached to the person. It should be clearly borne in mind that these are not all the rights attached to the person. Besides them there are varieties of other rights which are also the attributes of the freedom of the person. All rights attached to the person are usually called personal liberties and they are too numerous to be enumerated. Some of these auxiliary rights are so important and fundamental that they are regarded and valued as separate and independent rights apart from the freedom of the person.

Personal liberties may be compendiously summed up as the right to do as one pleases within the law. I

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say within the law because liberty is not unbridled licence. It is what Edmund Burke called "regulated freedom." Said Montesquieu in Book III, Ch. 3, of his Spirit of the Laws :

"In Governments, that is, in societies directed by laws, liberty can consist only in the power or doing what we ought to will, and in not being constrained to do what we ought not to will. We must have continually present to our minds the difference between independence and liberty. Liberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid, he would no longer be possessed of liberty, because all his fellow-citizens would enjoy the same power."

To the same effect are the following observations of Webster in his Works Vol. II, p. 393:

"Liberty is the creation of law, essentially different from that authorised licentiousness that trespasses on right. It is a legal and refined idea, the offspring of high civilization, which the savage never understands, and never can understand. Liberty exists in proportion to wholesome restraint; the more restraint on others to keep off from us, the more liberty we have. It is an error to suppose that liberty consists in a paucity of laws....The working of our complex system, full of checks and restraints on legislative, executive and judicial power is favourable to liberty and justice. These checks and restraints are so many safeguards set around individual rights and interests. That man is free who is protected from injury."

Therefore, putting restraint on the freedom of wrong doing of one person is really securing the liberty of the intended victims. To curb the freedom of the saboteur or surreptitiously removing the fish plates from the railway lines is to ensure the safety and liberty of movement of the numerously innocent and unsuspecting passengers. Therefore, restraints on liberty should be judged not only subjectively as applied to a few individuals who come within their operations but also objectively as securing the libetry of a far greater number of individuals. Social interest in individual

liberty may well have to be subordinated to other greater social interests. If a law ensures and protects the greater social interests then such law will be a wholesome and beneficent law although it may infringe the liberty of some individuals, for it will ensure for the greater liberty of the rest of the members of the society. At the same time, our liberty has also to be guarded against executive, legislative as well as judicial usurpation of powers and prerogatives. Subject to certain restraints on individuals and reasonable checks on the State every person has a variety of personal liberties too numerous to be catalogued. As will be seen more fully hereafter, our Constitution has recognised personal liberties as fundamental rights. It has guaranteed some of them under article 19(1) but put restraints on them by clauses (2) to (6). It has put checks on the State's legislative powers by articles 21 and 22. It has by providing for preventive detention, recognised that individual liberty may be subordinated to the larger social interests.

Turning now to the Constitution I find that Part III is headed and deals with "Fundamental Rights" under seven heads, besides "General" provisions (articles 12 and 13), namely "Right to Equality" (articles 14 to 18), "Right to Freedom" (articles 19 to 22), "Right against Exploitation" (articles 23 and 24), "Right to Freedom of Religion" (articles 25 to 28), "Cultural and Educational Rights" (articles 29 and 30), "Right to Property" (article 31), "Right to Constitutional Remedies" (articles 32 to 35). Under the heading "Right to Freedom" are grouped four articles, 19 to 22. Article 19(1) is in the following terms:—

"(1) All citizens shall have the right—

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(f) to acquire, hold and dispose of property; and

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(g) to practise any profession, or to carry on any occupation, trade or business."

It will be noticed that of the seven rights protected by clause (1) of article 19, six of them, namely, (a), (b), (c), (d), (e) and (g) are what are said to be rights attached to the person (*jus personarum*). The remaining item, namely, (f) is the right to property (*jus rerum*). If there were nothing else in article 19 these rights would have been absolute rights and the protection given to them would have completely debarred Parliament or any of the State Legislatures from making any law taking away or abridging any of those rights. But a perusal of article 19 makes it abundantly clear that none of the seven rights enumerated in clause (1) is an absolute right, for each of these rights is liable to be curtailed by laws made or to be made by the State to the extent mentioned in the several clauses (2) to (6) of that article. Those clauses save the power of the State to make laws imposing certain specified restrictions on the several rights. The nett result is that the unlimited legislative power given by article 246 read with the different legislative lists in the Seventh Schedule is cut down by the provisions of article 19 and all laws made by the State with respect to these rights must, in order to be valid, observe these limitations. Whether any law has in fact transgressed these limitations is to be ascertained by the Court and if in its view the restrictions imposed by the law are greater than what is permitted by clauses (2) to (6) whichever is applicable the Court will declare the same to be unconstitutional and, therefore, void under article 13. Here again there is scope for the application of the "intellectual yardstick" of the Court. If, however, the Court finds, on scrutiny, that the law has not overstepped the constitutional limitations, the Court will have to uphold the law, whether it likes the law or not.

The first part of the argument is put broadly, namely, that personal liberty is generally guaranteed by the Constitution by article 19(1) and that the Preventive Detention Act, 1950 has imposed unreasonable

restrictions thereon in violation of the provisions of clauses (2) to (6) of that article. The very first question that arises, therefore, is as to whether the freedom of the person which is primarily and directly suspended or destroyed by preventive detention is at all governed by article 19(1). If personal liberty as such is guaranteed by any of the sub-clauses of article 19(1) then why has it also been protected by article 21? The answer suggested by learned counsel for the petitioner is that personal liberty as a substantive right is protected by article 19(1) and article 21 gives only an additional protection by prescribing the procedure according to which that right may be taken away. I am unable to accept this contention. If this argument were correct, then it would follow that our Constitution does not guarantee to any person, citizen or non-citizen, the freedom of his life as a substantive right at all, for the substantive right to life does not fall within any of the sub-clauses of clause (1) of article 19. It is retorted in reply that no constitution or human laws can guarantee life which is the gift of God who alone can guarantee and protect it. On a parity of reasoning no Constitution or human laws can in that sense guarantee freedom of speech or free movement, for one may be struck dumb by disease or may lose the use of his legs by paralysis or as a result of amputation. Further, what has been called the procedural protection of article 21 would be an act of supererogation, for when God takes away one's life whatever opportunity He may have had given to Adam to explain his conduct before sending him down, He is not likely in these degenerate days to observe the requirements of notice or fair trial before any human tribunal said to be required by article 21. The fifth Amendment and the Fourteenth Amendment of the American Constitution give specific protection to life as a substantive right. So does article 31 of the Japanese Constitution of 1946. There is no reason why our Constitution should not do the same. The truth is that article 21 has given that protection to life as a substantive right and that as will be seen hereafter, that article properly understood does not purport to prescribe any particular procedure at all. The

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further astounding result of the argument of counsel for the petitioner will be that the citizen of India will have only the rights enumerated in article 19 clause (1) and no other right attached to his person. As I have already stated, besides the several rights mentioned in the several sub-clauses of article 19(1) there are many other personal liberties which a free man, *i.e.*, a man who has the freedom of his person, may exercise. Some of those other rights have been referred to by Harries C. J. of Calcutta in his unreported judgment in Miscellaneous Case No. 166 of 1950 (*Kshitindra* v. *The Chief Secretary of West Bengal*) while referring the case to a Full Bench in the following words:—

"It must be remembered that a free man has far more and wider rights than those stated in article 19 (1) of the Constitution. For example, a free man can eat what he likes subject to rationing laws, work as much as he likes or idle as much as he likes. He can drink anything he likes subject to the licensing laws and smoke and do a hundered and one things which are not included in article 19. If freedom of person was the result or article 19, then a free man would only have the seven rights mentioned in that article. But obviously the free man in India has far greater rights."

I find myself in complete agreement with the learned Chief Justice on this point. If it were otherwise, the citizen's right to eat what he likes will be liable to be taken away by the excutive fiat of the Civil Supply Department without the necessity of any rationing laws. The Government may enforce prohibition without any prohibition laws or licensing laws and so on. I cannot accept that our Constitution intended to give no protection to the bundle of rights which, together with the rights mentioned in sub-clauses (a) to (e) and (g) make up personal liberaty. Indeed, I regard it as a merit of our Constitution that it does not attempt to enumerate exhaustively and the personal rights but uses the compendious expression 'personal liberty" in article 21, and protects all of them.

It is pointed out that in the original draft the word "liberty" only was used as in the American

Constitution but the Drafting Committee added the word "personal" to make it clear that what was being protected by what is now article 21 was not what had already been protected by what is now article 19. If it were permissible to refer to the Drafting Committee's report, it would be another answer to the contentions of learned counsel for the petitioner that personal liberty as a substantive right was protected by article 19. I do not, however, desire to base my judgment on the Drafting Committee's report and I express no opinion as to its admissibility. Whatever the intentions of the Drafting Committee might have been, the Constitution as finally passed has in article 21 used the words "personal liberty" which have a definite connotation in law as I have explained. It does not mean only liberty of the person but it means liberty or the rights attached to the person (*jus personarum*). The expressions "freedom of life" or "personal liberty" are not to be found in article 19 and it is straining the language of article 19 to squeeze in personal liberty into that article. In any case the right to life cannot be read into article 19.

Article 19 being confined, in its operation, to citizens only, a non-citizen will have no protection for his life and personal liberty except what has been called the procedural protection of article 21. If there be no substantive right what will the procedure protect? I recognise that it is not imperative that a foreigner should have the same priviileges as are given to a citizen, but if article 21 is construed in the way I have suggested even a foreigner will have equal protection for his life and personal liberty before the laws of our country under our Constitution. I am unable, therefore, for all the reasons given above, to agree that personal liberties are the result of article 19 or that that article purports to protect all of them.

It is next urged that the expression "personal liberty" is synonymous with the right to move freely and, therefore, comes directly under article 19(1) (d). Reference is made to the unreported dissenting judgment of Sen J. of Calcutta in Miscellaneous Case No. 166 of 1950 while referring that case to a Full Bench.

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In his judgment Sen J. quoted the following passage from Blackstone's Commentaries:—

"Next to personal security the law of England regards, asserts and preserves, the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." [Page 73 of George Chase's Edition (4th Edition) of Blackstone, Book I, chapter I.]

On the authority of the above passage the learned Judge concluded that personal liberty came within article 19(1)(d). I am unable to agree with the learned Judge's conclusion. On a perusal of Chapter I of Book I of Blackstone's Commentaries it will appear that the learned commentator divided the rights attached to the person (*jus personarum*) into two classes, namely, "personal security" and "personal liberty." Under the head "personal security" Blackstone included several rights, namely, the rights to life, limb, body, health and reputation, and under the head "personal liberty" he placed only the right of free movement. He first dealt with the several rights, classified by him under the head "personal security" and then proceeded to say that next to those rights came personal liberty which according to his classification consisted only in the right of free locomotion. There is no reason to suppose that in article 21 of our Constitution the expression "personal liberty" has been used in the restricted sense in which Blackstone used it in his Commentaries. If "personal liberty" in article 21 were synonymous with the right to move freely which is mentioned in article 19(1) (d), then the astounding result will be that only the last mentioned right has what has been called the procedural protection of article 21 but none of the other rights in the other sub-clauses of article 19 (1) has any procedural protection at all. According to learned counsel for the petitioner the procedure required by article 21 consists of notice and a right of hearing before an impartial tribunal. Therefore, according to him, a man's right of movement cannot be taken away without giving him notice and a fair trial

before an impartial tribunal but he may be deprived of his freedom of speech or his property or any of his other rights without the formality of any procedure at all. The proposition has only to be stated to be rejected. In my judgment, article 19 protects some of the important attributes of personal liberty as independent rights and the expression "personal liberty" has been used in article 21 as a compendious term including within its meaning all the varieties of rights which go to make up the personal liberties of men.

Learned counsel for the petitioner next contends that personal liberty undoubtedly means or includes the freedom of the person and the pith and substance of the freedom of the person is right to move about freely and consequently a preventive detention law which destroys or suspends the freedom of the person must inevitably destroy or suspend the right of free movement and must necessarily offend against the protection given to the citizen by article 19 (1) (d) unless it satisfies the test of reasonableness laid down in clause (5). The argument is attractive and requires serious consideration as to the exact purpose and scope of sub-clause (d) of article 19(1).

There are indications in the very language of article 19 (1) (d) itself that its purpose is to protect not the general right of free movement which emanates from the freedom of the person but only a specific and limited aspect of it, namely, the special right of a free citizen of Indian to move freely throughout the Indian territory, *i.e.*, from one State to another within the Union. In other words, it guarantees, for example, that a free Indian citizen ordinarily residing in the State of West Bengal will be free to move from West Bengal to Bihar or to reside and settle in Madras or the Punjab without any let or hindrance other than as provided in clause (5). It is this special right of movement of the Indian citizen in this specific sense and for this particular purpose which is protected by article 19(1) (d). It is argued on the authority of a decision of a Special Bench of the Calcutta High Court presided over by Sen J. in *Sunil Kumar* v. *The Chief*

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Secretary of West Bengal (1) that the words "throughout the territory of India" occurring in that sub-clause only indicate that our Constitution does not guarantee to its citizens the right of free movement in or into foreign territory and that those words have been added to save passport restrictions. I am unable to accept this interpretation. Our Constitution cannot possibly give to any of its citizens any right of free movement in a foreign country and it was wholly superfluous to specifically indicate this in the Constitution, for that would have gone without saying. The words "throughout the territory of India" are not used in connection with most of the other sub-clauses of clause (1) of article 19. Does such omission indicate that our Constitution guarantees to its citizens freedom of speech and expression, say, in Pakistan? Does it guarantee to its citizens a right to assemble or to form associations or unions in a foreign territory? Clearly not. Therefore, it was not necessary to use those words in sub-clause (d) to indicate that free movement in foreign countries was not being guaranteed. It is said that by the use of those words the Constitution makes it clear that no guarantee was being given to any citizen with regard to emigration from India without a passport and that the freedom of movement was restricted within the territory of India. Does the omission of those words from article 19(1) (a) indicate that the citizen of India has been guaranteed such freedom of speech and expression as will enable him to set up a broadcasting station and broadcast his views and expressions to foreign lands without a licences? Clearly not. Dropping this line of argument and adopting a totally new line of argument it is said that by the use of the words "throughout the territory of India" the Constitution indicates that the widest right of free movement that it could possibly give to its citizens has been given. Does, then, the omission of those words from the other sub-clauses indicate that the Constitution has kept back some parts of those rights even beyond the limits of the qualifying clauses that follow? Do not those other rights prevail throughout the Indian territory?

(1)54 C. W. N. 394.

Clearly they do, even without those words. Therefore, those words must have been used in sub-clause (d) for some other purpose. That other purpose, as far as I can apprehend it, is to indicate that free movement from one State to another within the Union is protected so that Parliament may not by a law made under Entry 81 in List I curtail it beyond the limits prescribed by clause (5) of article 19. Its purpose, as I read it, is not to provide protection for the general right of free movement but to secure a specific and special right of the Indian citizen to move freely throughout the territories of India regarded as an independent additional right apart from the general right of locomotion emanating from the freedom of the person. It is a guarantee against unfair discrimination in the matter of free movement of the Indian citizen throughout the Indian Union. In short, it is a protection against provincialism. It has nothing to do with the freedom of the person as such. That is guaranteed to every person, citizen or otherwise, in the manner and to the extent formulated by article 21.

Clause (5) of article 19 qualifies sub-clause (d) of clause (1) which should, therefore, be read in the light of clause (5). The last mentioned clause permits the State to impose reasonable restrictions on the exercise of the right of free movement throughout the territory of India as explained above. Imposition of reasonable restrictions clearly implies that the right of free movement is not entirely destroyed but that parts of the right remain. This reasonable restriction can be imposed either in the interest of the general public or for the protection of the interests of any Scheduled Tribe. The Scheduled Tribes usually reside in what are called the Scheduled Areas. The provision for imposing restriction on the citizens' right of free movement in the interests of the Scheduled Tribes clearly indicates that the restriction is really on his right of free movement into or within the Scheduled Areas. It means that if it be found necessary for the protection of the Scheduled Tribes the citizens may be restrained from entering into or moving about in the Scheduled Areas although they are left quite free to move about elsewhere. This restraint may well be

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necessary for the protection of the members of the Scheduled Tribes who are generally impecunious and constitute a backward class. They may need protection against money-lenders or others who may be out to exploit them. They may have to be protected against their own impecunious habits which may result in their selling or mortgaging their hearths and homes. Likewise, the free movement of citizens may have to be restricted in the interest of the general public. A person suffering from an infectious disease may be prevented from moving about and spreading the disease and regulations for his segregation in the nature of quarantine may have to be introduced. Likewise, healthy people may be prevented, in the interests of the general public from entering a plague-infected area. There may be protected places, *e.g.*, forts or other strategic places, access whereto may have to be regulated or even prohibited in the interests of the general public. The point to be noted, however, is that when free movement is thus restricted, whether in the interest of the general public or for the protection of the Scheduled Tribes, such restriction has reference generally to a certain local area which becomes the prohibited area but the right of free movement in all other areas in the Union is left unimpaired. The circumstance that clause (5) contemplates only the taking away of a specified area and thereby restricting the field of the exercise of the right conferred by sub-clause (d) of clause (1) indicates to my mind that sub-clause (d) is concerned, not with the freedom of the person or the general right of free movement but with a specific aspect of it regarded as an independent right apart from the freedom of the person. In other words, in sub-clause (d) the real emphasis is on the words "throughout the territory of India." The purpose of article 19(1) (d) is to guarantee that there shall be no State barrier. It gives protection against provincialism. It has nothing to do with the freedom of the person as such.

Finally, the ambit and scope of the rights protected by article 19(1) have to be considered. Does it protect the right of free movement and the other

personal rights therein mentioned in all circumstances irrespective of any other consideration? Does it not postulate a capacity to exercise the rights? Does its protection continue even though the citizen lawfully loses his capacity, for exercising those rights? How can the continuance of those personal rights be compatible with the lawful detention of the person? These personal rights and lawful detention cannot go together. Take the case of a person who has been properly convicted of an offence punishable under a section of the Indian Penal Code as to the reasonableness of which there is no dispute. His right to freedom of speech is certainly impaired. Under clause (2) the State may make a law relating to libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State. Any law on any of these matters contemplated by this clause certainly must have some direct reference to speech and expression. It means that the law may directly curtail the freedom of speech so that the citizen may not talk libel or speak contemptuously of the Court or express indecent or immoral sentiments by speech or other forms of expression or utter seditious words. To say that every crime undermines the security of the State and, therefore, every section of the Indian Penal Code, irrespective of whether it has any reference to speech or expression, is a law within the meaning of this clause is wholly unconvincing and betrays only a vain and forlorn attempt to find an explanation for meeting the argument that any conviction by a Court of law must necessarily infringe article 19(1) (a). There can be no getting away from the fact that a detention as a result of a conviction impairs the freedom of speech far beyond what is permissible under clause (2) of article 19. Likewise a detention on lawful conviction impairs each of the other personal rights mentioned in sub-clauses (b) to (e) and (g) far beyond the limits of clauses (3) to (6). The argument that every section of the Indian Penal Code irrespective of whether it has any reference to any of the rights referred to in sub-clauses (b) to (e) and (g) is a law imposing

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reasonable restriction on those several rights has not even the merit of plausibility. There can be no doubt that a detention as a result of lawful conviction must necessarily impair the fundamental personal rights guaranteed by article 19 (1) far beyond what is permissible under clauses (2) to (6) of that article and yet nobody can think of questioning the validity of the detention or of the section of the Indian Penal Code under which the sentence was passed. Why? Because the freedom of his person having been lawfully taken away, the convict ceases to be entitled to exercise the freedom of speech and expression or any of the other personal rights protected by clause (1) of article 19. On a parity of reasoning he cannot, while the detention lasts, exercise any other personal right, *e.g.,* he cannot eat what he likes or when he likes but has to eat what the Jail Code provides for him and at the time when he is by Jail regulations required to eat. Therefore, the conclusion is irresistible that the rights protected by article (19) (1), in so far as they relate to rights attached to the person, *i.e.,* the rights referred to in sub-clauses (a) to (e) and (g), are rights which only a free citizen, who has the freedom of his person unimpaired, can exercise. It is pointed out, as a counter to the above reasonings, that detention as a result of a lawful conviction does not deprive a person of his right to acquire or hold or dispose of his property mentioned in sub-clause (f). The answer is simple, namely, that that right is not a right attached to the person, (*jus personarum*) and its existence is not dependent on the freedom of the person. Loss of freedom of the person, therefore, does not suspend the right to property. But suppose a person loses his property by reason of its having been compulsorily acquired under article 31 he loses his right to hold that property and cannot complain that his fundamental right under sub-clause (f) of clause (1) of article 19 has been infringed. It follows that the rights enumerated in article 19 (1) subsist while the citizen has the legal capacity to exercise them. If his capacity to exercise them is gone, by reason of a lawful conviction with respect to the rights

in sub-clauses (a) to (e) and (g), or by reason of a lawful compulsory acquisition with respect to the right in sub-clause (f), he ceases to have those rights while his incapacity lasts. It further follows that if a citizen's freedom of the person is lawfully taken away otherwise than as a result of a lawful conviction for an offence, that citizen, for precisely the same reason, cannot exercise any of the rights attached to his person including those enumerated in sub-clauses (a) to (e) and (g) of article 19 (1). In my judgment a lawful detention, whether punitive or preventive, does not offend against the protection conferred by article 19(1) (a) to (e) and (g), for those rights must necessarily cease when the freedom of the person is lawfully taken away. In short, those rights end where the lawful detention begins. So construed, article 19 and article 21 may, therefore, easily go together and there is, in reality, no conflict betwen them. It follows, therefore, that the validity or otherwise of preventive detention does not depend on, and is not dealt with by, article 19.

To summarise, the freedom of the person is not the result of article 19. Article 19 only deals with certain particular rights which, in their origin and inception, are attributes of the freedom or the person but being of great importance are regarded as specific and independent rights. It does not deal with the freedom of the person as such. Article 19(1) (d) protects a specific aspect of the right of free locomotion, namely, the right to move freely throughout the territory of India which is regarded as a special privilege or right of an Indian citizen and is protected as such. The protection of article 19 is co-terminous with the legal capacity of a citizen to exercise the rights protected thereby, for sub-clauses (a) to (e) and (g) of article 19 (1) postulate the freedom of the person which alone can ensure the capacity to exercise the rights protected by those sub-clauses. A citizen who loses the freedom of his person by being lawfully detained, whether as a result of a conviction for an offence or as a result of preventive detention loses his capacity to exercise those rights and, therefore has none of the rights which sub-clauses (a) to (e) and (g) may protect.

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In my judgment article 19 has no bearing on the question of the validity or otherwise of preventive detention and, that being so clause (5) which prescribes a test of reasonableness to be defined and applied by the Court has no application at all.

Article 19 being thus out of the way. I come to article 20 which is concerned with providing protection against what are well known as *ex post facto* laws, double jeopardy and self-incrimination. This article constitutes a limitation on the absolute legislative power which would, but for this article be exercisable by Parliament or the State Legislatures under article 246 read with the legislative lists. If the Legislature disobeys this limitation the Court will certainly prevent it. Article 20 has no bearing on preventive detention laws and I pass on.

Article 21 runs thus:

"21. No person shall be deprived of his life or personal liberty except according to procedure established by law."

The contention of learned counsel for the petitioner is that by this article the Constitution offers to every person, citizen or non-citizen, only a procedural protection. According to the argument, this article does not purport to give any protection to life or personal liberty as a substantive right but only prescribes a procedure that must be followed before a person may be deprived of his life or personal liberty. I am unable to accept this contention. Article 21, as the marginal note states, guarantees to every person "protection of life, and personal liberty." As I read it, it defines the substantive fundamental right to which protection is given and does not purport to prescribe any particular procedure at all. That a person shall not be deprived of his life or personal liberty except according to procedure established by law is the substantive fundamental right to which protection is given by the Constitution. The avowed object of the article, as I apprehend it, is to define the ambit of the right to life and personal liberty which is to be protected as a fundamental right. The right to life and

personal liberty protected by article 21 is not an absolute right but is a qualified right—a right circumscribed by the possibility or risk of being lost according to procedure established by law. Liability to deprivation according to procedure established by law is in the nature of words of limitation. The article delimits the right by a reference to its liability to deprivation according to procedure established by law and by this very definition throws a corresponding obligation on the State to follow a procedure before depriving a man of his life and personal liberty. What that procedure is to be is not within the purpose or purview of this article to prescribe or indicate.

The claim of learned counsel for the petitioner is that article 21 prescribes a procedure. This procedure, according to learned counsel, means those fundamental immutable rules of procedure which are sanctioned or well established by principles of natural justice accepted in all climes and countries and at all times. Apart from the question whether any rule of natural procedure exists which conforms to the notions of justice and fair play of all mankind at all times, it has to be ascertained whether the language of article 21 will permit its introduction into our Constitution. The question then arises as to what is the meaning of the expression "procedure established by law." The word "procedure" in article 21 must be taken to signify some step or method or manner of proceeding leading up to the deprivation of life or personal liberty. According to the language used in the article, this procedure has to be "established by law." The word "establish" according to the Oxford English Dictionary, Vol. III, p. 297, means, amongst other things, "to render stable or firm; to strengthen by material support; to fix, settle, institute or ordain permanently by enactment or agreement." According to Dr. Annandale's edition of the New Gresham Dictionary the word "establish," means, amongst other things, "to found permanently; to institute; to enact or decree; to ordain; to ratify; to make firm." It follows that the word "established" in its ordinary natural sense means, amongst other things, "enacted." "Established by law" will,

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therefore, mean "enacted by law." If this sense of the word "established" is accepted, then the word "law" must mean State-made law and cannot possibly mean the principles of natural justice, for no procedure can be said to have ever been "enacted" by those principles. When section 124-A of the Indian Penal Code speaks of "Government established by law," surely it does not mean "Government set up by natural justice." Therefore, procedure established by law must, I apprehend, be procedure enacted by the State which, by its definition in article 12, includes Parliament. There is no escape from this position if the cardinal rule of construction, namely, to give the words used in a statute their ordinary natural meaning, is applied. And this construction introduces no novelty or innovation, for at the date or the Constitution the law of procedure in this country, both civil and criminal, was mainly if not wholly, the creature of statute. The Hindu or Muhammadan laws of procedure were abrogated and replaced by the Code of Civil Procedure or the Code of Criminal Procedure. Therefore, procedure established by law is quite compatible with procedure enacted by law. If, however, the word "established" is taken to mean "sanctioned" or "settled" or "made firm" then the question will arise as to the meaning of the word "law" in that context. Reference is made to Salmond's Jurisprudence, 10th Edition, p. 37, showing that the term "law" is used in two senses and it is suggested that the word "law" in the expression "established by law" means law in its abstract sense of the principles of natural justice. It is "jus" and not "lex", says learned counsel for the petitioner. It is pointed out that both the English and the Indian law in many cases, some of which have been cited before us, have recognised and applied the principles of natural justice and that this Court should do the same in interpreting the provisions of our constitution. I find it difficult to let in principles of natural justice as being within the meaning of the word "law," having regard to the obvious meaning of that word in the other articles. Article 14 certainly embodies a principle of natural justice which ensures to

every person equality before the law. When natural justice speaks of and enjoins equality before the law, that law must refer to something outside natural justice, and must mean the State-made laws. It is only when the State law gives equality to every person that that law is said to be in accordance with natural justice. There can be no doubt that the words "in accordance with law" in article 17 have reference to State law. Likewise, the word "law" in article 20 (1) can mean nothing but law made by the State. The same remark applies to the words "in accordance with law" in articles 23, 31 and 32. Natural justice does not impose any tax and, therefore, the word "law" in articles 265 and 286 must mean State-made law. If this be the correct meaning of the word "law" then there is no scope for introducing the principles ot natural justice in article 21 and "procedure established by law" must mean procedure established by law made by the State which, as defined, includes Parliament and the Legislatures of the States.

We have been referred to a number of text books and decisions showing the development of the American doctrine of "due process of law" and we have been urged to adopt those principles in our Constitution. The matter has to be considered against its historical background. The English settlers in different parts of America had carried with them the English common law as a sort of personal law regulating their rights and liberties *inter se* as well as between them and the State. After the War of Independence the Constitutions of the United States were drawn up in writing. The majority of those who framed the Constitution were lawyers and had closely studied the Commentaries of the great English jurist Blackstone, who in his famous commentaries had advocated the separation of the three limbs of the State, namely, the executive, the legislature and the judiciary. Montesquieu's Spirit of Laws had already been published wherein he gave a broader and more emphatic expression to the Aristotelain doctrine of separation of powers. The experience of the repressive laws of Parliament had impressed upon the framers of the American Constitution the

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belief that it was the habit of all legislative bodies to grasp and exercise powers that did not belong to them. The interference of the colonial Governors with legislation and the judiciary was also real. This sad experience coupled with the political philosophy of the time induced the framers or the American Constitutions to adopt safeguards not only against the executive but also against the legislature. (See Munro on the Government of the United States, 5th Edition, Chapter IV, p. 53 *et seq.*). Says Judge Cooley in his Constitutional Limitations, 6th Edition, Vol. II, Chapter XI, p. 755:

"The people of the American States, holding the sovereignty in their own hands, have no occasion to exact any pledges from any one for a due observation of individual rights; but the aggressive tendency of power is such that they have deemed it of no small importance, that, in framing the instruments under which their governments are to be administered by their agents, they should repeat and re-enact this guarantee, and thereby adopt it as a principle of constitutional protection."

There can be little doubt that the people of the different States in America intended not to take any risk as to their life, liberty or property even from the legislature. As Munro puts it at pp. 58-61 :—

"The framers of the Constitution set boundaries to the powers of the Congress, and it was their intent that these limitations should be observed. But how was such observance to be enforced by the Courts? The statesmen of 1767 did not categorically answer that question."

The Constitution was silent and there was no express provision as to who was to serve as umpire in case the Congress overstepped the limits of its legislative powers. By the 5th Amendment what is now known as the "due process clause" was introduced in the Federal Constitution and by the 14th Amendment a similar clause was adopted in the State Constitutions. Some of the State Constitutions used the words "due course of law," some repeated the words of Magna Charta, namely, "the law of the land" but most of

them used the expression "due process of law." All the expressions meant the same thing, namely, that no person should be deprived of his life, liberty or property except in due process of law. The Constitution by this clause gave the Supreme Court an opportunity to take upon itself the function of declaring the national laws unconstitutional. And the Supreme Court, under the leadership of Chief Justice John Marshall, seized this opportunity and assumed the right to say the last word on questions of constitutionality, and possesses that right to-day: (Munro, p. 62).

The expression "due process or law" has been interpreted by the American Courts in different ways at different times. Carl Brent Swisher in his book on the Growth of Constitutional Power in the United States at p. 107 says, with reference to the development of the doctrine of due procedure:

"The American history of its interpretation falls into three periods. During the first period covering roughly the first century of Government under the Constitution "due process" was interpreted "principally as a restriction upon procedure—and largely the judicial procedure—by which the Government exercised its powers. During the second period, which, again roughly speaking, extended through 1936, "due process" was expanded to serve as a restriction not merely upon procedure but upon the substance of the activities in which the Government might engage. During the third period extending from 1936 to date, the use of "due process" as a substantive restriction has been largely suspended or abandoned, leaving it principally in its original status as a restriction upon procedure."

In the guise of interpreting "due process of law" the American Courts went much further than even Lord Coke ever thought of doing. The American Courts gradually arrogated to themselves the power to revise all legislations. In the beginning they confined themselves to insisting on a due procedure to be followed before a person was deprived of his life, liberty or property. In course of time, "due process of law" came to be applied to personal liberty, to social control, to procedure

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to jurisdiction and to substantive law: (Willis, p. 642). In the words of Munro "due process of law" became a sort of palladium covering all manner of individual rights. All the while the Supreme Court refused to define the phrase, but used it to enable it to declare unconstitutional any Act of legislation which it thought unreasonable: (Willis, p. 657). In *Holden* v. *Hardy*([1]) we find the following observations:

"This Court has never attempted to define with precision the words 'due process of law'.....It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."

In *Taylor* v. *Peter* ([2]) Bronson J. observed:

"The words 'by the law of the land' as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two Houses: 'You shall be vested with the legislative power of the State, but no one shall be disenfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words you shall not do the wrong unless you choose to do it.'"

It was thus that the Supreme Court of the United States firmly established its own supremacy over the other two limbs of the State, namely, the executive and the Congress. In the words of John Dickinson quoted in Munro at p. 61, "The Judges of Argon. began by setting aside laws and ended by making them." And all this sweeping development could only be possible because of the presence of one little word "due" which, in its content, knows no bound and is not subject to any fixed definition. Whenever a substantive law or some procedure laid down in any law did not find favour with the majority of the learned Judges of the Supreme Court it was not reasonable and, therefore, it was not "due."

(1) 169 U. S. 366 at p. 389.

(2) 4 Hill 140, 145.

The very large and nebulous import of the word "due" was bound to result in anomalies, for what was not "due" on one day according to the Judges then constituting the Supreme Court became "due" say 20 years later according to the new Judges who then came to occupy the Bench, for the Court had to adapt the Constitution to the needs of the society which were continually changing and growing. The larger content of due process of law, which included both procedural and substantive due process of law, had of necessity to be narrowed down, for social interest in personal liberty had to give way to social interest in other matters which came to be considered to be of more vital interest to the community. This was achieved by the Supreme Court of the United States evolving the new doctrine of police powers—a peculiarly American doctrine. The police powers are nowhere exhaustively defined. In *Chicago B. & Q. Ry.* v. *Drainage Commissioner* (1) "police power" has been stated to "embrace regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety." Reference in this connection may be made to Cooley's Constitutional Limitations, 8th Edition, Vol. II, p. 1223 and to Chapter XXVI of Willis at p. 727.

The nett result is that the all-inclusive and indefinable doctrine of due process of law has in America now been brought back to its original status of a procedural due process of law by the enunciation and application of the new doctrine of police power as an antidote or palliative to the former. Who knows when the pendulum will swing again.

Turning now to what has been called the procedural due process of law it will be found that the matter has been described in different languages in different cases. In *Westervelt* v. *Gregg* (2) Edwards J defined it thus:

"Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules

(1) 204 U. S. 561, 592. (2) 12 N.Y. 202

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and forms which have been established for the protection of private rights."

A more specific definition of the expression "the law of the land" meaning procedural due process was given by Webster appearing as counsel for the plaintiff in error in the *Trustees of Dartmouth College* v. *Woodward*(1):

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land."

Willis in Ch. XXIII, p. 661, says :

"The guarantee of due process of law as a matter of procedure means that no part of a person's personal liberty, including ownership, shall be taken away from him except by the observance of certain formalities. Hence its object is the protection of the social interest in personal liberty."

At p. 662 Willis enumerates the requirements of the procedural due process of law as follows: (1) notice, (2) opportunity to be heard, (3) an impartial tribunal and (4) an orderly course of procedure. In short, the procedural due process requires that a person who is to be deprived of his life, liberty or property shall have had "his day in Court." This according to Willough by p. 736, means:

"(1) that he shall have had due notice, which may be actual or constructive, of the institution of the proceedings by which his legal rights may be affected; (2) that he shall be given a reasonable opportunity to appear and defend his rights, including the right himself to testify, to produce witnesses, and to introduce relevant documents and other evidence, (3) that the tribunal in or before which his rights are adjudicated is so constituted as to give reasonable assurance of its

(1) 4 Wheaton 518 at p. 579; 4 L. Edn. 629 at p. 645.

honesty and impartiality; and (4) that it is a Court of competent jurisdiction."

It will be noticed that the fourth item of Willoughby is different from the fourth item of Willis. Such, in short, are the history of the development of the doctrine of the process of law in the United States and the requirements of the procedural due process as insisted on by the Supreme Court of that country.

Learned counsel for the petitioner before us does not contend that we should import this American doctrine of due process of law in its full glory but that we should adopt the procedural part of it and insist that no person shall be deprived of his life or personal liberty except by the observance of the formalities which justice and fair play require to be observed. The arguments of learned counsel for the petitioner are attractive and in the first blush certainly appeal to our sentiment but on serious reflection I find several insuperable objections to the introduction of the American doctrine of procedural due process of law into our Constitution. That doctrine can only thrive and work where the legislature is subordinate to the judiciary in the sense that the latter can sit in judgment over and review all acts of the legislature. Such a doctrine can have no application to a field where the legislature is supreme. That is why the doctrine of "due process of law" is quite different in England where Parliament is supreme. This difference is pointedly described by Mathews J. in *Joseph Hurtado* v. *People of California* (1) at p. 531:

"The concessions of Magna Charta were wrung from the King as guarantees against oppression and usurpation of his prerogatives. It did not enter into the minds of the barons to provide security against their own body or in favour of the commons by limiting the power of Parliament, so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates and other arbitrary Acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land, for (notwithstanding what was attributed to Lord Coke in *Bonham's*

(1) (1882) 110 U.S. 516.

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case, [8 Coke 115, 118 (a),] the omnipotence of Parliament over the Common Law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written Constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments and the provisions of Magna Charta were incorporated in the bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial."

This basic distinction between the two systems should never be lost sight of, if confusion of thought is to be avoided. Although our Constitution has imposed some limitations on the legislative authorities, yet subject to and outside such limitations our Constitution has left our Parliament and the State Legislatures supreme in their respective legislative fields. In the main, subject to the limitations I have mentioned, our Constitution has preferred the supremacy of the Legislature to that of the Judiciary. The English principle of due process of law is, therefore, more in accord with our Constitution than the American doctrine which has been evolved for serving quite a different system. The picturesque language of Bronson J. quoted above, while that is quite appropriate to the American Constitution which does not recognise the supremacy of the Congress, is wholly out of place in, and has no application to, a Constitution such as ours, which, subject only to certain restrictions, recognises the supremacy of the Legislatures in their respective fields. In the next place, it is common knowledge that our Constitution-makers deliberately declined to adopt the uncertain and shifting American doctrine of due process of law and substituted the words "except in due process of law" that were in the original draft by the more specific expression "except in accordance with procedure established by law." To try to bring in the American doctrine in spite or this fact, will be to stultify the intention of the Constitution as expressed in

article 21. In the third place, in view of the plain meaning of the language of that article as construed and explained above it is impossible to let in what have been called the principles of natural justice as adopted in the procedural due process of law by the American Supreme Court. Again, even the all-pervading little word "due" does not find a place in article 21 so as to qualify the procedure. It speaks of procedure and not "due" procedure and, therefore, "the intellectual yardstick" of the Court is definitely ruled out. Finally, it will be incongruous to import the doctrine of due process of law without its palliative, the doctrine of police powers. It is impossible to read the last mentioned doctrine into article 21.

It has also been suggested as a compromise that this Court should adopt a middle course between the flexible principles of natural justice as adopted by the American doctrine of due process of law and the unbending rigidity of mere State-made laws. It is said that we have our Code of Criminal Procedure which embodies within its provisions certain salutary principles of procedure and we must insist that those underlying principles should be regarded as procedure established or settled by our positive law. But who will say what are those fundamental principles? What principles do I reject as inessential and what shall I adopt as fundamental? What is fundamental to me today may not appear to be so to another Judge a decade hence, for principles give way with changing social conditions. In America it was suggested that due process of law should be taken to mean the general body of common law as it stood at the date of the Constitution. In *Bardwell* v. *Collins* (1) it was negatived in the following words:

"'Due process of law' does not mean the general body of the law, common and statute, as it was at the time the Constitution took effect; for that would deny the legislature power to change or amend the law in any particular."

The Court, however, brought in principles of

(1) 44 Minn. 97.

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natural justice under the due process clause. To sanctify what I may today regard as the basic principles underlying our Code of Criminal Procedure will be to make them immutable and to prevent the legislature even to improve upon them. This is nothing but imposing on the legislature a limitation which the Constitution has not placed on it. I do not think it is a permissible adventure for the Court to undertake. It is a dangerous adventure, for it will bring about stagnation which means ruin. We must accept the Constitution which is the supreme law. The Constitution has by article 21 required a procedure and has prescribed certain minimum requirements of procedure in article 22. To add to them is not to interpret the Constitution but to recast it according to our intellectual yardstick and our unconscious predilections as to what an ideal Constitution should be.

Article 21, in my judgment, only formulates a substantive fundamental right to life and personal liberty which in its content is not an absolute right but is a limited right having its ambit circumscribed by the risk of its being taken away by following a procedure established by law made by the appropriate legislative authority and the proximate purpose of article 21 is not to prescribe any particular procedure. It is to be kept in mind that at the date when the Constitution came into effect we had the Indian Penal Code creating diverse offences and a conviction for any of them would deprive a person of his personal liberty. Under article 246 read with Entry 1 of the Concurrent List, Parliament or any State Legislature could add more offences and create further means for taking away personal liberty. But all this deprivation of personal liberty as a result of a conviction could only be done by following the procedure laid down by the Code of Criminal Procedure. Again, at the date of this Constitution there were preventive detention laws in almost every province and a person could be deprived of his personal liberty under those laws. Those laws, however, provided a procedure of a sort which had to be followed. Therefore, before the Constitution came into force, personal liberty could be taken away

only by following the procedure enacted by the Criminal Procedure Code in the case of punitive detention or by the procedure enacted by the different Security Acts in case of preventive detention. Power, however, has been given to Parliament and the State Legislatures under article 246 read with Entry 2 of the Concurrent List to make laws with respect to Criminal Procedure. If that article stood by itself the Parliament or the State Legislature could repeal the whole of the Criminal Procedure Code and also do away even with the skeleton procedure provided in the Security Acts. If article 246 stood by itself then the appropriate legislative authority could have taken away the life and personal liberty of any person without any procedure at all. This absolute supremacy of the legislative authority has, however, been cut down by article 21 which delimits the ambit and scope of the substantive right to life and personal liberty by reference to a procedure and by article 22 which prescribes the minimum procedure which must be followed. In this situation the only power of the Court is to determine whether the impugned law has provided some procedure and observed and obeyed the minimum requirements of article 22 and if it has, then it is not for the Court to insist on more elaborate procedure according to its notion or to question the wisdom of the legislative authority in enacting the particular law, however harsh, unreasonable, archaic or odious the provisions of that law may be.

It is said that if this strictly technical interpretation is put upon article 21 then it will not constitute a fundamental right at all and need not have been placed in the chapter on Fundamental Rights, for every person's life and personal liberty will be at the mercy of the Legislature which, by providing some sort of a procedure and complying with the few requirements of article 22, may, at any time, deprive a person of his life and liberty at its pleasure and whim. There are several answers to this line of argument. Article 21 as construed by me will, if nothing else, certainly protect every person against the executive and as such will be as much a fundamental right deserving

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a place in the Constitution as the famous 39th Chapter of the Magna Charta was and is a bulwark of liberty in English law. It appears to me that article 21 of our Constitution read with article 32 also gives us some protection even against the legislative authority in that a person may only be deprived of his life and personal liberty in accordance with procedure which, although enacted by it, must at least conform to the requirements of article 22. Subject to this limitation our Parliament or any State Legislature may enact any law and provide any procedure it pleases for depriving a person of his life and personal liberty under article 21. Such being the meaning of that article and the ambit and extent of the fundamental right of life and personal liberty which the people of this country have given unto themselves, any law for depriving any person of his life and personal liberty that may be made by the appropriate legislative authority under article 246 and in conformity with the requirements of article 22 does not take away or abridge any right conferred by article 21, for the very right conferred by that article is circumscribed by this possibility or risk and, therefore, such law cannot be regarded as violating the provisions of article 13(2); Our Constitution is a compromise between Parliamentary supremacy of England and the supremacy of the Supreme Court of the United States. Subject to the limitations I have mentioned which are certainly justiciable, our Constitution has accepted the supremacy of the legislative authority and, that being so, we must be prepared to face occasional vagaries of that body and to put up with enactments of the nature of the atrocious English statute to which learned counsel for the petitioner has repeatedly referred, namely, that the Bishop of Rochester's cook be boiled to death. If Parliament may take away life by providing for hanging by the neck, logically there can be no objection if it provides a sentence of death by shooting by a firing squad or by guilloting or in the electric chair or even by boiling in oil. A procedure laid down by the legislature may offend against the Court's sense of justice and fair play

and a sentence provided by the legislature may outrage the Court's notions of penology, but that is a wholly irrelevant consideration. The Court may construe and interpret the Constitution and ascertain its true meaning but once that is done the Court cannot question its wisdom or policy. The Constitution is supreme. The Court must take the Constitution as it finds it, even if it does not accord with its preconceived notions of what an ideal Constitution should be. Our protection against legislative tyranny, if any, lies in ultimate analysis in a free and intelligent public opinion which must eventually asert itself.

The conclusion I have arrived at does not introduce any novelty, for in many other Constitutions the supremacy of the legislature is recognised in the matter of depriving a person of his life, liberty and property. The English Democratic Constitution is one in point. Take the Constitution of the Irish Free State. Article 40 (4) (i) provides that no citizen shall be deprived of personal liberty save in accordance with law, and article 50 (5) guarantees that the dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law. The words "in accordance with law" in both the above clauses must mean the same thing and I have no doubt in my mind reading clause (5) that it means in accordance with the State-made law, for we have not been referred to any rule prescribed by natural justice regulating searches of, or entry into, dwelling houses. Article 107 (2) of the Czechoslovakian Constitution uses the words "in accordance with law" which, read with clause (1) of that article, obviously means the law to be made which will form part of the Constitution. Take the Constitution of the Free City of Danzig. Article 74 of that Constitution which is in Part II headed "Fundamental Rights and Duties" provides as follows :

"The liberty or the person shall be inviolable. No limitation or deprivation of personal liberty may be imposed by public authority, except by virtue of a law."

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The word "law" clearly cannot, in the context, mean principles of natural justice. Again, article 75 of that Constitution protects the freedom of movement within the Free City and the right to stay and to settle at any place, to acquire real property and to earn a living. It concludes by saying that this right shall not be curtailed without legal sanctions. Legal sanctions, in this context, can only mean sanctions of the City laws. Article 114 of the Weimar Constitution is on the same lines and expressed in almost the same language as article 74 of the Danzig Constitution. Take the Japanese Constitution of 1946 from which our article 21 is reputed to have been taken. Article XXXI of that Constitution says:

"No person shall be deprived of life or liberty nor shall any other criminal penalty be imposed, except according to procedure established by law."

Surely the words "except according to procedure established by law" in their application to the imposition of criminal penalty must mean State-made law and the same words in the same sentence in the same article cannot, according to ordinary rules of construction of statutes, mean a different thing in their application to deprivation of life or liberty. I am aware that it is not right to construe one Constitution in the light of another and that is not my purpose when I refer to the other Constitutions; but I do think that after reading the relevant provisions of other written Constitutions one sees quite clearly that there is no pressing special reason applicable to or inherent in written Constitutions which requires the importation of the principles of natural justice or of the American doctrine of due process of law into our Constitution. The several Constitutions referred to above have not adopted that American doctrine but have been content with leaving the life and liberty of their citizens to the care of the laws made by their legislatures. It is no novelty if our Constitution has done the same. For all these reasons, in spite of the very able and attractive arguments of the learned counsel for the petitioner which I freely acknowledge, I am not convinced that there is any scope for the introduction into article 21 of our

Constitution of the doctrine of due process of law even as regards procedure. I may or may not like it but that is the result of our Constitution as I understand it.

The learned Attorney-General has referred to certain debates in the Constituent Assembly on the original clause which has now become article 21, not as evidence to be used in interpreting the language of article 21 but as disclosing the historical background. His purpose, he says, is to show that the framers of our Constitution had the essential difference in the meaning of the phrases "due process of law" and "according to procedure established by law" clearly explained to them, that they knew that the former implied the supremacy of the judiciary and the latter the supremacy of the legislature and with all that knowledge they deliberately agreed to reject the former expression and adopt the latter. As, in my opinion, it is possible to interpret the language of article 21 on the ordinary rules of interpretation of statutes, I do not think it is at all necessary to refer to the debates. As I do not propose to refer to, or rely on, the debates, for the purposes of this case, I express no opinion on the question of the admissibility or otherwise of the debates.

I now pass on to article 22. The contention of learned counsel for the petitioner is that article 21 by reason of the last few words, "according to procedure established by law" attracts the four requirements of the American procedural due process of law as summarised by Willis to which reference has been made earlier, and that those requirements, except to the extent they have been expressly abrogated or modified by article 22, must be strictly followed before a person may be deprived of his life or personal liberties. I have already stated for reasons set forth above, that there is no scope for introducing any rule of natural justice or the American procedural due process of law or any underlying principle of our Code of Criminal Procedure into that article. This being the conclusion I have arrived at, the major premise assumed by learned counsel for the petitioner is missing and this

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line of argument does not begin and cannot be accepted.

The learned Attorney-General, on the other hand, has at one stage of his argument, urged that article 21 has nothing to do with preventive detention at all and that preventive detention is wholly covered by article 22(4) to (7) which by themselves constitute a complete code. I am unable to accede to this extreme point of view also. The true position, as I apprehend it, lies between the two extreme views. Article 21, to my mind, gives protection to life and personal liberty to the extent therein mentioned. It does not recognise the right to life and personal liberty as an absolute right but delimits the ambit and scope of the right itself. The absolute right is by the definition in that article cut down by the risk of its being taken away in accordance with procedure established by law. It is this circumscribed right which is substantively protected by article 21 as against the executive as well as the legislature, for the Constitution has conditioned its deprivation by the necessity for a procedure established by law made by itself. While subclauses (2) to (6) of article 19 have put a limit on the fundamental rights of a citizen, articles 21 and 22 have put a limit on the power of the State given under article 246 read with the legislative lists. Under our Constitution our life and personal liberty are balanced by restrictions on the rights of the citizens as laid down in article 19 and by the checks put upon the State by articles 21 and 22. Preventive detention deprives a person of his personal liberty as effectively as does punitive detention and, therefore, personal liberty, circumscribed as it is by the risk of its being taken away, requires protection against punitive as well as preventive detention. The language of article 21 is quite general and is wide enough to give its limited protection to personal liberty against all forms of detention. It protects a person against preventive detention by the executive without the sanction of a law made by the legislature. It prevents the legislature from taking away a person's personal liberty except in accordance with procedure established by law, although such

law is to be by itself. If, as contended by the learned Attorney-General and held by me, article 19 only protects the rights of a free citizen as long as he is free and does not deal with total deprivation of personal liberty and if, as contended by the learned Attorney-General, article 21 does not protect a person against preventive detention then where is the protection for life and personal liberty as substantive rights which the procedural provisions of article 22 may protect? What is the use of procedural protection if there is no substantive right? In my judgment article 21 protects the substantive rights by requiring a procedure and article 22 gives the minimum procedural protection.

Clauses (1) and (2) of article 22 lay down the procedure that has to be followed when a man is arrested. They ensure four things: (a) right to be informed regarding grounds of arrest, (b) right to consult, and to be defended by, a legal practitioner of his choice, (c) right to be produced before a magistrate within 24 hours and (d) freedom from detention beyond the said period except by order of the magistrate. These, four procedural requirements are very much similar to the requirements of the procedural due process of law as enumerated by Willis. Some of these salutary protections are also to be found in our Code of Criminal Procedure. If the procedure has already been prescribed by article 21 incorporating the principles of natural justice, or the principles underlying our Code of Criminal Procedure what was the necessity of repeating them in clauses (1) and (2) of article 22? Why this unnecessary overlapping? The truth is that article 21 does not prescribe any particular procedure but in defining the protection to life and personal liberty merely envisages or indicates the necessity for a procedure and article 22 lays down the minimum rules of procedure that even Parliament cannot abrogate or overlook. This is so far as punitive detention is concerned. But clause (3) of article 22 expressly provides that none of the procedure laid down in clauses (1) and (2) shall apply to an alien enemy or to a person who is arrested or detained under any law providing for preventive detention. It is thus expressly

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made clear that a detenu need not be produced before the magistrate and he is not to have the assistance of any lawyer for consultation or for defending him. Such being the express provision of our Constitution nobody can question its wisdom. So I pass on.

Clauses (4), (5), (6) and (7) of article 22 in terms relate to preventive detention. Article 246 authorises the appropriate legislature to make a law for preventive detention in terms of Entry 9 in List I and/or Entry 3 in List III of the Seventh Schedule. On this legislative power are imposed certain limitations by article 22 (4) to (7). According to this the legislature, whether it be Parliament or a State Legislature, is reminded that no law made by it for preventive detention shall authorise the detention of a person for a longer period than three months except in two cases mentioned in sub-clauses (a) and (b). The proviso to sub-clause (a) and sub-clause (b) refer to a law made only by Parliament under clause (7). Under clause (7) it is Parliament alone and not any State Legislature that may prescribe what are specified in the three sub-clauses of that clause. Although a State Legislature may make a law for preventive detention in terms of Entry 3. in List III of the Seventh Schedule no such law may authorise detention for more than three months unless the provisions of sub-clauses (a) and (b) of clause (4) sanction such detention. Even a law made by Parliament cannot authorise detention for more than three months unless it is a law made under the provisions of clause (7). In short, clause (4) of article 22 provides a limitation on the legislative power as to the period of preventive detention. Apart from imposing a limitation on the legislative power, clause (4) also prescribes a procedure of detention for a period longer than three months by providing for an advisory board. Then comes clause (5). It lays down the procedure that has to be followed when a person is detained under any law providing for preventive detention, namely, (a) the grounds of the order of detention must be communicated to the detenu as soon as may be, and (b) the detenu must be afforded the earliest opportunity of making a representation against

the order. The first requirement takes the place of notice and the second that of a defence or hearing These are the only compulsory procedural requirements laid down by our Constitution. There is nothing to prevent the Legislature from providing an elaborate procedure regulating preventive detention but it is not obliged to do so. If some procedure is provided as envisaged by article 21 and the compulsory requirements of article 22 are obeyed and carried out nobody can, under our Constitution as I read it, complain of the law providing for preventive detention.

Learned counsel for the petitioner concedes that the four requirements of procedural due process summarised by Willis will have to be modified in their application to preventive detention. Thus he does not insist on a prior notice before arrest, for he recognises that such a requirement may frustrate the very object of preventive detention by giving an opportunity to the person in question to go underground. The provision in clause (5) for supplying grounds is a good substitute for notice. He also does not insist that the Tribunal to judge the reasonableness of the detention should be a judicial tribunal. He will be satisfied if the tribunal or advisory board, as it is called in article 22 of the Constitution, is an impartial body and goes into the merits of the order of the detention and its decision is binding on the executive government. He insists that the detenu must have a reasonable and effective opportunity to put up his defence. He does not insist on the assistance of counsel, for that is expressly taken away, by the Constitution itself. But he insists on what he calls an effective opportunity of being heard in person before an impartial tribunal which will be free to examine the grounds of his detention and whose decision should be binding alike on the detenu and the executive authority which detains. The claim may be reasonable but the question before the Court is not reasonableness or otherwise of the provisions of article 22 (4) to (7). Those provisions are not justiciable, for they are the provisions of the Constitution itself, which is supreme over every body

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The Court can only seek to find out, on a proper construction, what protection has in fact been provided. The Constitution has provided for the giving of the grounds of detention although facts as distinguished from grounds may be withheld under clause (6) and the right of representation against the order of detention. It has provided for the duration of the detention. There the guaranteed fundamental procedural rights end. There is no provision for any trial before any tribunal. One cannot import the condition of a trial by any tribunal from the fact that a right of representation has been given. The right to make representation is nothing more than the right to "lodge objections" as provided by the Danzing Constitution and the Weimar Constitution. The representations made will no doubt be considered by the Government. It is said a prosecutor cannot be himself the judge. Ordinarily, the orders of detention will in a great majority of cases be made by the District Magistrate or Sub-Divisional Officer or the Commissioner of Police. The representation of the detenu goes to the Government. Why should it be assumed that a high government official at the seat of the government will not impartially consider the representation and judge the propriety of the order of detention made by local officials? Clause (5) does not imperatively provide for any oral representation which a hearing will entail. Indeed the exclusion of the provisions of clauses (1) and (2) negatives any idea of trial or oral defence. The Court may not, by temperament and training, like this at all but it cannot question the wisdom or the policy of the Constitution. In my judgment as regards preventive detention laws, the only limitation put upon the legislative power is that it must provide some procedure and at least incorporate the minimum requirements laid down in article 22 (4) to (7). There is no limitation as regards the substantive law. Therefore a preventive detention law which provides some procedure and complies with the requirements of article 22 (4) to (7) must be held to be a good law, however odious it may appear to the Court to be.

Learned counsel for the petitioner contends that the impugned Act does not comply with even the bare requirements of article 22 (4) to (7). It is pointed out that section 3 of the Act does not lay down any objective test but leaves it to the authority to define and say whether a particular person comes within the legislative heads. In other words, it is contended that Parliament has not legislated at all but has delegated its legislative powers to the executive authorities. I do not think there is any substance in this contention. In the first place this is not an objection as to procedure but to substantive law which is not open to the Court's scrutiny. In the next place this contention overlooks the basic distinction between the delegation of power to make the law and the conferring of an authority and discretion as to its execution to be exercised under and in pursuance of the law. The impugned Act has specifically set forth an ascertainable standard by which the conduct of a particular person is to be judged by the detaining authority.

It is next urged that section 12 of the Act does not comply with the requirements of clause (7) of article 22 for two reasons, namely—

(i) that clause (7) contemplates a law prescribing the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months and then another law thereafter providing for preventive detention for a period longer than three months; and

(ii) that under clause (7) Parliament must prescribe both the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months.

As regards the first point I do not see why Parliament must make two laws, one laying down the principles for longer detention and another for detention for such longer period. It may be that a State cannot provide for longer detention until Parliament

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has made the law, but I can see no reason why Parliament cannot do both by the same Act. In fact, clause (4) (b) contemplates the detention itself to be in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7). Therefore, the detention can well be under the very law which the Parliament makes under sub-clauses (a) and (b) of clause (7). As to the second point the argument is that Parliament has a discretion under clause (7) to make a law and it is not obliged to make any law but when our Parliament chooses to make a law it must prescribe both the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months. I am unable to construe clause (7) (a) in the way suggested by learned counsel for the petitioner. It is an enabling provision empowering Parliament to prescribe two things. Parliament may prescribe either or both. If a father tells his delicate child that he may play table tennis and badminton but not the strenuous game of football, it obviously does not mean that the child, if he chooses to play at all, must play both table tennis and badminton. It is an option given to the child. Likewise, the Constitution gives to Parliament the power of prescribing two things. Parliament is not obliged to prescribe at all but if it chooses to prescribe it may prescribe either or both. Clause 7 (a), in my opinion, has to be read distributively as follow: The Parliament may prescribe the circumstance under which a person may be detained for a period longer than three months and Parliament may prescribe the class or classes of cases in which a person may be detained for a period longer than three months. That appears to me to be consonant with sound rules of construction. Further, the circumstances and the class or classes of cases may conceivably coalesce. Indeed the Full Bench case No. 1 of 1950 before the Calcutta High Court (*Kshitindra Narayan* v. *The Chief Secretary*) itself indicates that the same provision may be read as circumstances or as a classification. In that case learned counsel conceded that section 12 had prescribed the circumstances but his complaint was that it had not

prescribed the class or classes of cases. The majority of the Court repelled this contention. One learned Judge, however, held that section 12 had prescribed the class or classes of cases but had not prescribed the circumstances. It is, therefore, clear that the classification itself may indicate the circumstances. Again, the classification may be on a variety of bases. It may be according to provinces the detenus come from. It may be according to the age of the detenus. It may be according to the object they are supposed to have in view or according to the activities they are suspected to be engaged in. In this case Parliament has taken five out of the six legislative heads and divided them into two categories. The detenus are thus classified according to their suspected object or activities endangering the several matters specified in the section. I do not see why classification cannot be made on the footing of the objectives of the detenus falling in some of the legislative heads, for each legislative head has a specific connotation well understood in law. If I am correct that there has been a classification then the fact that a person falls within one or the other class may well be the circumstances under which he may be detained for a period longer than three months. I do not consider it right, as a matter of construction, to read any further limitation in clause 7(a) of article 22. In my judgment Parliament was not obliged under clause (7) to prescribe both circumstances and classes, and in any case has in fact and substance prescribed both.

I am conscious that a law made by Parliament under article 22 (7) will do away with the salutary safeguard of the opinion of an advisory board. But it must be remembered that our Constitution itself contemplates that in certain circumstances or for certain class or classes of detenus even the advisory board may not be safe and it has trusted Parliament to make a law for that purpose. Our preference for an advisory board should not blind us to this aspect of the matter. It is true that circumstances ordinarily relate to extraneous things, like riots, commotion,

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political or communal or some sort of abnormal situation and it is said that the framers of the Constitution had in mind some such situation when the advisory board might be done away with. It is also urged that they had in mind that the more dangerous types of detenus should be denied the privilege of the advisory board. I am free to confess that prescription of specific circumstances or a more rigid and definite specification of classes would have been better and more desirable. But that is crying for the ideal. The Constitution has not in terms put any such limitation as regards the circumstances or the class or classes of cases and it is idle to speculate as to the intention of the Constitution-makers, who, by the way, are the very persons who made this law. It is not for the Court to improve upon or add to the Constitution. If the law duly made by Parliament is repugnant to good sense, public opinion will compel Parliament to alter it suitably.

Finally, an objection is taken that section 14 of the impugned Act takes away or abridges the right of the detenu to move this Court by appropriate proceedings. Both clauses (1) and (2) of article 32 speak of enforcement of rights conferred by Part III. The right to move this Court is given to a person not for the sake of moving only but for moving the Court for the enforcement of some rights conferred by Part III and this Court has been given power to issue directions or orders or writs for the enforcement of any of such rights. In order, therefore, to attract the application of article 32, the person applying must first satisfy that he has got a right under Part III which has to be enforced under article 32. I have already said that article 19 does not deal with the freedom of the person. I have also said that articles 21 and 22 provide for protection by insisting on some procedure. Under article 22 (5) the authority making the order of detention is enjoined, as soon as may be, to communicate to the detenu the grounds on which that order has been made. This provision has some purpose, namely, that the disclosure of the grounds will afford the detenu the

opportunity of making a representation against the order. Supposing the authority does not give any grounds at all as distinct from facts referred to in clause (6). Surely the detenu loses a fundamental right because he is prevented from making a representation against the order of detention. Suppose the authority hands over to the detenu a piece of paper with some scribblings on it which do not amount to any ground at all for detention. Then also the detenu can legitimately complain that his right has been infringed. He can then come to the Court to get redress under article 32, but he cannot show to the Court the piece of paper with the scribblings on it under section 14 of the Act and the Court cannot judge whether he has actually got the grounds which he is entitled to under article 22 (5). In such a case the detenu may well complain that both his substantive right under article 22 (5) as well as his right to constitutional remedies under article 32 have been infringed. He can complain of infringement of his remedial rights under article 32, because he cannot show that there has been an infringement of his substantive right under article 22 (5). It appears to me, therefore, that section 14 of the Act in so far as it prevents the detenu from disclosing to the Court the grounds communicated to him is not in conformity with Part III of the Constitution and is, therefore, void under article 13(2). That section, however, is clearly severable and cannot affect the whole Act. On this question the views of Meredith C. J. and Das J. of Patna in Criminal Miscellaneous No. 124 of 1950 (*Lalit Kumar Barman* v. *The State*) and the majority of the learned Judges of the Calcutta High Court in Full Bench Case No. 1 of 1950 (*Kshitindra Narayan* v. *The Chief Secretary*) appear to be correct and sound.

For the reasons I have given above, in my opinion, the impugned Act is a valid law except as to section 14 in so far as it prevents the grounds being disclosed to the Court. The petitioner before us does not complain that he has not got proper grounds. Further, the period of his detention under the impugned Act

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has not gone beyond three months and, in the circumstances, this application should, in my opinion, stand dismissed.

Petition dismissed.

Agent for the Petitioner : *S. Subrahmanyam.*

Agent for the State of Madras and Union of India : *P. A. Mehta.*

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