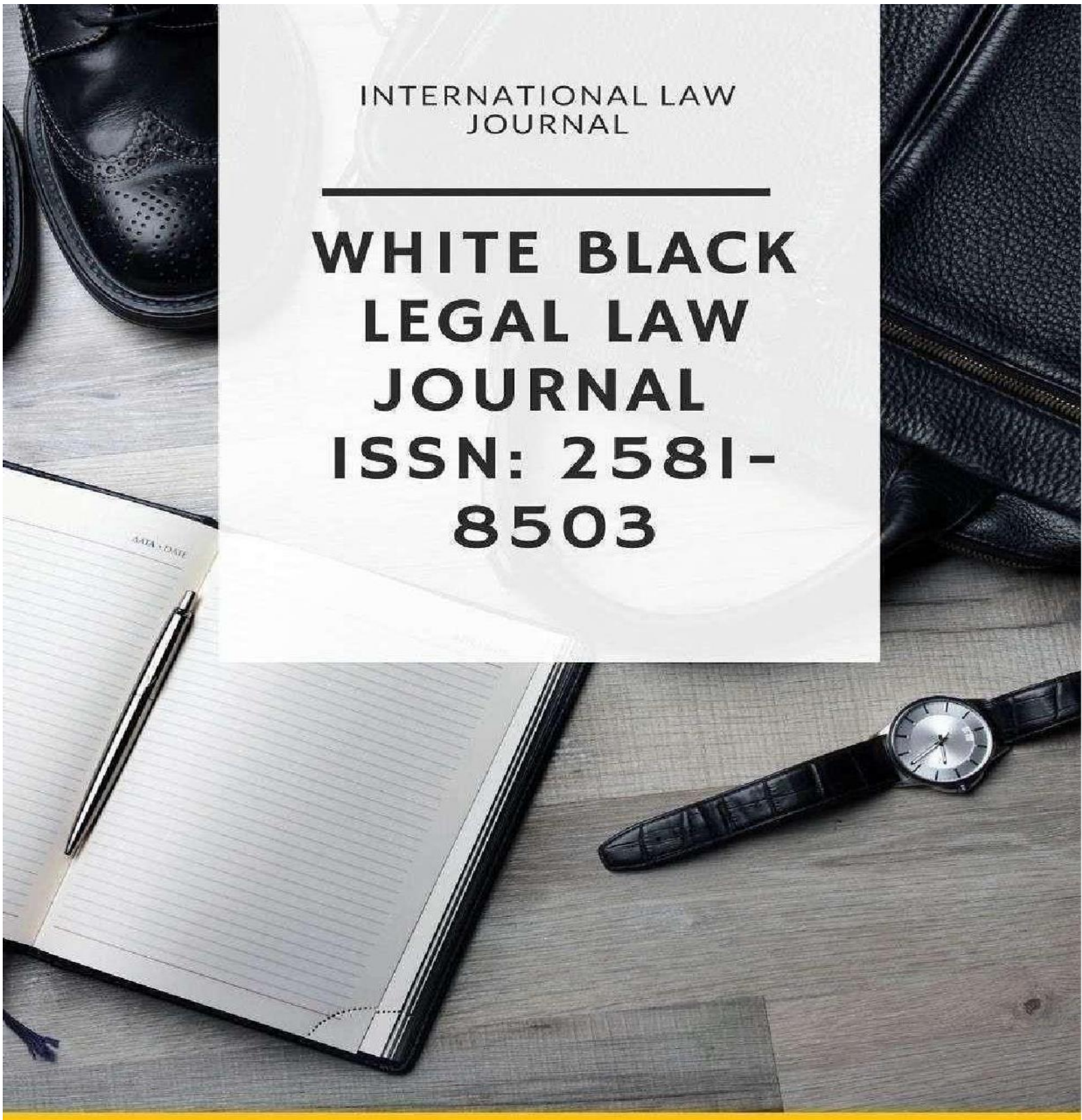

INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

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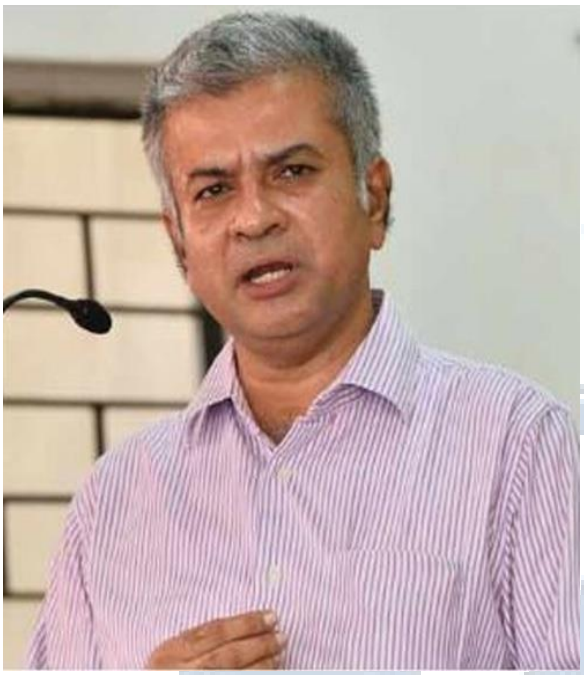

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

CONSTITUTIONAL SAFEGUARDS AGAINST PREVENTIVE DETENTION IN INDIA- A LEGAL ANALYSIS

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ABSTRACT

The major concern regarding preventive detention is that arresting person on mere suspicion is absolute violation of his inalienable right to liberty. There is a conflicting view regarding preventive detention between human right activists, who are in favour of liberty of the individual and exigencies of the state on the other side. This balancing is of the utmost importance because there is a need to maintain momentum between human freedom on one hand and state's obligations towards the national security. Just like other fundamental rights guaranteed by the Constitution, personal liberty is also not an absolute right. It can amount to certain reasonable restrictions which are imposed by state according to the law. But invasion of personal liberty by the state must follow certain basic requirements. Preventive detention is curbing liberty of an individual in an authoritarian way on the name of national security. This study analyses the safeguards provided by the Indian Constitution against the preventive detention.

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INTRODUCTION

Preventive detention allows an arrest if an executive officer is satisfied that a person is a threat to the security of the state. Generally, the grounds of arrest should be communicated to the arrested person immediately but in preventive detention cases the grounds should be communicated as soon as possible, it allows the time period up to 5 days and even for a longer period for communicating the grounds for arrest. This violates the basic human rights of the detenu. The State has time up to 3 months to produce a detainee before the review board. It allows the state to detain a person without review of the grounds for the above said period. Even if the detention order was passed on malafide grounds the detainee had to suffer in the detention till review by the review board and there is no remedy provided for violation of his rights. It is unreasonable that a person shouldbe preventively detained without his case referred to an Advisory Committee. The argument of administrative inconvenience ought not to prevail against the grave infraction of the right to personal liberty where a detenu is denied the rights available even to a person chargedwith the crime. . The power of preventive detention is conferred upon the executives and the safeguards are provided under the Indian Constitutional provisions.

CONSTITUTIONAL PROVISIONS DEALING WITH PREVENIVE DETENTION

Article 22 which provides protection against preventive detention, did not exist in the Draft Constitution. It was added towards the end of the deliberations of the Constituent Assembly. The reasons for the incorporation of this Article were explained by Dr Ambedkar in the Constituent Assembly[2]. He pointed out that Article 21[3] had been violently criticised by the public outside as it merely prevented the executive from making any arrest. All that was necessary was to have a law allowing arrest and that law need not be subject to any conditions or limitations. It was felt that while this matter was included in the chapter on Fundamental Rights, Parliament was being given a carte blanche to make and provide for the arrest of any person under any circumstances as Parliament may think fit. What was being done by Article 22 was a sort of compensation for what was done in Article 21. The Constituent Assembly was providing the substance of "due process" by the introduction of Article 22. This Article merely lifted from the code. of criminal procedure two of the most fundamental principles which every civilised country followed as principles of international justice. By making them a part of the

[2]Constituent Assembly Debates, 30th July 18th Sept 1949. Vol. IX, pp. 1447-98

[3]Article 21 reads: No person shall be deprived of his life or personal liberty except according to procedure established by law.

Constitution, the constituent assembly was making a fundamental change by putting a limitation on the authority of both parliament and state legislatures not to abrogate those provisions. The view of Dr Ambedkar was that the provisions made in Article 22 were sufficient against illegal and arbitrary arrest. Article 22 advance in a way the purpose of Article 21 when it specifies some guaranteed rights available to persons arrested or detained and lays down the manner in which those persons may be dealt with.

Article 21 clubs' life with liberty and when interpreting the colour and content of 'procedure established by law', we must be alive to the deadly peril of life being deprived without minimal processual justice, legislative callousness despising 'hearing' and fair opportunities of defence. And this realisation once sanctioned its exercise will swell till the basic freedom is flooded out.[4]

Clauses (1)[5] and (2)[6] of Article 22 refer to arrest and detention in certain circumstances and provide for certain safeguards, sub-clause(a) and (b) of clause (3) than state, inter-alia that nothing in clauses (1) and (2) shall apply to any person who is an enemy alien or who is arrested or detained under any law. providing for preventive detention[7].

SAFEGUARDS AVAILABLE AGAINST PREVENTIVE DETENTION IN INDIA

The law relating to preventive detention is covered by clauses (4) to (7) of Article 22. The safeguards are provided in Clause (4) and (5) of Article 22.

Clause (4) lays down a prohibition against any law providing for detention for more than three months without the opinion of the Advisory Board.

Clause (5) provides for furnishing the grounds of detention and affording an

[4]Maneka Gandhi Vs Union of India AIR 1978 SC 597

[5]Clause (1) of Article 22 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 be denied the right to consult, and to be defended by, a legal practitioner of his choice.

[6]"Clause (2) of Article 22: 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.

[7]Clause 3(1) & (b) of Article 22; Nothing in clauses (1) and (2) shall apply –(a) to any person who for the time being is an enemy alien. b) to any person who is arrested or detained under any law or providing for preventive detention

opportunity of making a representation against the area of detention.

The safeguards are subject to clauses (6) and (7). Under clause (6) the disclosures of facts which the detaining authority considers against the public interest, may not be made.

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

Sub-clause (b) of clause (7) of Article 22 prescribes the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention.

Sub-clause(c) of clause (7) of Article 22 provides that Parliament may also lay down the procedure to be followed by an Advisory Board.[8]

A distinction has been drawn between the term 'facts' used in clause (6) and the term 'grounds' used in clause (5). The detaining authority can withhold 'facts' in public interest but not the 'grounds'. All 'grounds' of detention must be disclosed to the detenu.

It is the obligation of the detaining authority, and of none else, to consider whether disclosure of any facts is against public interest.[9] The facts not disclosed to the detenu can

COMMUNICATION OF GROUNDS TO THE DETAINEE

Article 22(5) lays down that the detaining authority should, as soon as may be, communicate to the person detained the grounds on which the detention order has been made, and afford him the earliest opportunity to make representation against the order of detention. There is some semblance of natural justice woven into the fabric of preventive detention provisions of the constitution. Some protection has thus been ensured to a person whose personal liberty has been taken away under an administrative order.

[8]By constitution (forty-fourth Amendment) Act, 1978 Sub-clause(a) of clause (7) has been omitted and sub-clause(b) and (c) re-lettered as sub-clauses (a) and (b). But this Amendment has not come into force so far.
[9]Purazlal Lakhanpal Vs Union of India, AIR 1958 SC 163.

Article 22(5) has two limbs. One, the detaining authority is to communicate to the detenu the grounds of his detention as soon as may be': Two, the detenu is to be afforded 'the earliest opportunity' of making a representation against the order of detention. There is an integral relation between these two limbs, viz., grounds are to be communicated to the detenu so as to enable to make a representation to defend himself. The detaining authority must communicate grounds to the detenu in such a manner that his constitutional right to make a representation against his detention is exercised effectively. The words 'as soon as may be' in Art. 22(5) have been held to mean that the detaining authority must communicates the grounds to the detenu with reasonable despatch. Failure to communicate the ground within a reasonable time will vitiate the detention. It is for the court to consider whether in the circumstances of the case, the time taken to communicate the grounds, was 'reasonable' or more than 'reasonable'[10] Further, it has been held that under Art.22(5), communication of grounds means communication to the detenu all the basic facts and materials which went into the subjective satisfaction of the authority to detain him. The detention order will become bad if any factual components constituting the real grounds for detention are not fairly and fully put across to the detenu. the reason being that if some facts are held back from him, his right to make an effective representation against his detention is infringed[11] It is therefore the duty of the court to examine what were the basic facts and materials which actually weighed with the detaining authority in reaching its satisfaction and, to this end, the court can require the detaining authority to produce before the court the entire record of the case which was before it.[12] It is elementary that human mind compartments. does not function. into All such material should be communicated to the detenu. and failure to do so would vitiate the detention.[13]

The Supreme Court has emphasized that Article 22(5) vests a real and not an imaginary right in the detainee. The communication of facts is the cornerstone of his right of representation and orders of detention passed on uncommunicated materials are unfair and illegal. The courts protect this right of the detainees quite jealously.

The courts have further held that once the grounds have been conveyed to the detenu, fresh, new or additional grounds cannot be added thereto later to strengthen the original

[10]Ujagar Singh Vs Punjab, AIR 1952 SC 350
[11]Madhab Roy Vs West Bengal, AIR 1975 SC 225
[12]AIR 1975 SC 255.
[13]Jain, M.P: 'Indian Constitutional Law, N.M. Tripathi Private ltd. Third Edition, 1978, pp 507-508.

detention order.[14] However, the prohibition to serve the additional grounds after the initial communication of grounds, does not apply to furnishing of additional facts, data or particulars on which the grounds were based. The test therefore is whether the subsequent communication contains any additional 'grounds' or only additional 'facts' on which the grounds originally conveyed were based. But even specification of additional 'facts' must be within a reasonable time-limit, otherwise the detenu's right under Article 22(5) to make a representation is breached.[15]

The efficacy of the above norms regarding communication of grounds and facts to the detenu is diluted to some extent by Article 22(6) which permits the detaining authority to withhold those facts which it considers not desirable to disclose in public interest. However, subject to a claim of privilege under Article 22(6), the communication of particulars should be as full and adequate as circumstances permit.

In preventive detention cases, it is absolutely necessary to communicate the grounds of detention to the detenu in clear and unambiguous terms giving as much particulars as will facilitate making of an effective representation in order to satisfy the detaining authority that the order is unfounded or invalid.

THE RIGHT OF REPRESENTATION

The second limb of Article 22(5) gives right to the detenu to be afforded the earliest opportunity of making a representation against the order of detention. Purpose of this representation is to invite the application of the mind by the detaining authority to the explanation given by the detenu that his detention is unjustified and illegal and that he should be released forthwith. Right to make representation therefore also implies that the representation must also be properly and expeditiously considered by the detaining authority and if it is satisfied with it then it must pass order for the immediate release of the detenu. If there is in ordinate delay in considering the representation by the detaining authority it will make detention order invalid,[16]

If the basic facts have been given in a particular case constituting the grounds of the detention which enable the detenu to make an effective representation, and if the representation

[14]Bombay Vs Vaidya, AIR 1951 SC 157.
[15]AIR 1952 SC 350, AIR 1951 SC 174.
[16]Raj Kishore Prasad Vs State of Bihar, AIR 1983 SC 320

of the detenu is considered by the authority as prescribed by law without any loss of time, the detenu cannot make any grievance.

Effective representation must be construed as real and meaningful opportunity to the detenu to explain his case to the detaining authority in his representation. representation" are interpreted in If the words "effective artificial or fanciful manner, then it would defeat the very object not only of Article 22(5) but also of Article 21 of the Constitution,[17]

There is a dual obligation on the appropriate government and the dual right in favour of the detenu, namely, (i) to have his representation considered by the appropriate authority[18]; and ii) To have once again the representation considered by the Advisory Board, if not earlier not accepted by the detaining authority.

If in the light of that representation the Board finds that there is not sufficient cause for detention, the government has to revoke the order of detention and set the detenu at liberty. Thus whereas. the government considers the representation to ascertain whether the order is in conformity with its power under the relevant law, the Board considers such representation from the point of view of arriving at its opinion whether there is sufficient cause for detention. The obligation of the appropriate government to afford to the detenu the opportunity to make representation and to consider that representation is distinct from the government's obligation to constitute a Board and to communicate the representation amongst. other materials to the Board to enable it to form its opinion.[19]

In Kamla Vs State of Maharashtra[20] the Supreme Court expressed grave concern about the non-compliance of the constitutional safeguard contained in Art.22(5) by the detaining authorities. The court suggested that whenever a detention is struck down by the courts, the detaining authority or officer concerned who are associated with the preparation of the grounds of detention must be held personally responsible and action should be taken against them for not complying with the constitutional requirements contained in Article 22(5).

[17]Maneka Gandhi Vs Union of India, AIR 1978 SC 597. Kamla Vs State of Maharashtra AIR 1981 SC 814
[18]Punkaj Kumar Vs. State of West Bengal A.IR. 1979 SC 97.
[19]K.B. Abdulla Kunhi Vs Union of India, (1991) I SCC 476.
[20]AIR 1981 SC 814.

ADVISORY BOARD

The composition of Advisory Board has been provided order sub-clause(a) of Clause (4) of Article 22. It provides that an Advisory Board would consist of persons who are, or have been, or are qualified to be appointed as judge of a High Court, the following changes in the composition of Advisory Board was proposed by the amendment act[21]

An Advisory Board would be constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court. It would consist of a Chairman and not less than two other members, and the Chairman shall be a serving judge of the appropriate High Court and the other members shall be serving or retired judges of any High Court. But this Amendment has not been enforced so far.

RIGHT OF CROSS-EXAMINATION BEFORE THE ADVISORY BOARD

In proceedings before the Advisory Board, the question of consideration of the Board is not whether the detenu is guilty of any. charge buy whether there is sufficient cause for the detention of the person concerned. The detention is based on the subjective satisfaction of the detaining authority that it is necessary to detain a particular person in order to prevent him from acting in a manner prejudicial to certain stated objects. The proceedings of the Advisory Board have therefore to be structured differently from the proceeding of judicial or quasi-judicial tribunals, before which there is a list to adjudicate upon[22]

Chandrachud C.J. speaking for himself and on behalf of Bhagwati and Desai, JJ observed:

"...it is a matter of common experience that in cases of preventive detention, witnesses are either unwilling to come forward or the sources of information of the detaining authority cannot be disclosed without detriment to public interest Indeed, the disclosure of the informant may abort the very process of preventive detention because, no one will be willing to come forward to give information of any prejudicial activity if his identity is going to be disclosed, which may have to be done under the stress of cross examination. It is therefore, difficult in the very nature of things, to give to the detenu the full panoply of rights which an accused is entitled to

[21]The (44th Amendment) Act, 1978.
[22]A.K. Roy Vs Union of India AIR 198 CSC 710 p.15.

have in order to disprove the charge against him... Just as there can be an effective hearing without legal representation. even so there can be an effective hearing without the right of cross-examination. The nature of the inquiry involved in the proceeding in relation to which these rights are claimed determines whether these rights must be given as components of natural justice. "

ADVISORY BOARD'S PROCEEDINGS NOT OPEN TO PUBLIC

The right to a public trial is not one of the guaranteed rights under our constitution as it is under the 6th Amendment of the American Constitution which secures to persons charged with crimes a public, as well as a speedy trial. Even under the American. Constitution the right guaranteed by the 6th Amendment is held to be personal to the Accused, which the public in general cannot share. Considering the nature of inquiry which the Advisory Board has to undertake, the interest of justice will not be served better by giving access to the public to the proceedings of the Advisory Board[23]. So, the detenu cannot claim that the proceedings before Advisory Board should be open to public.

DETENTION AFTER SUBMISSION OF REPORT BY ADVISORY BOARD

When the case is referred to the Advisory Board, it has got to express its opinion only on the point as to whether there is sufficient cause for the detention of the person concerned or not. It is neither called upon nor it competent to say anything regarding the period for which such person should be detained. Once the Advisory Board expresses its view that there is sufficient cause for detention at the date when it makes its report, what action is to be taken subsequently is left entirely to the appropriate government and it can confirm the detention order and continue the detention of the person concerned for such period as it thinks fit[24]

PARLIAMENT'S POWER TO DISPENSE WITH ADVISORY BOARD

Parliament has been authorised under Article 22(7)(a) to prescribe by law the circumstances and the class or classes of cases in which a person may be detained for a period longer than three months without referring his case to an Advisory Board which is a requirement under Article 22(4)(a). Article 22(7)(a) is therefore an exception to Article 22(4)(a). The interpretation of Art.22(7) (a). had created some confusion earlier. In A.K. Gopalan

[23]A.K. Roy Vs Union of India, AIR 1982 SC 710 p.715.
[24]Puranlal lakhanpal Vs Union of India. (1958) SCR 460 p.475

Vs State of Madras[25].The Supreme Court had held by majority that the word 'and' between the words circumstances and class had been used not conjunctively but disjunctively i.e., it meant 'or' not 'and'. It was therefore not obligatory on Parliament to lay down both the 'circumstances' and 'classes' of cases in which a person could be detained for more than three months without referring his case to an Advisory Board. However, the Supreme Court has over ruled this view in Sambhu Nath Sarkar Vs West Bengal.[26] The court observed that Clause (4)(a) of Article 22 lays down a rule to which Clause(4)(b) read with clause (7)(a) is an exception. Under that view. Clause (7)(a) must be construed as restriction on Parliament's power of making Preventive detention laws in the sense that it can depart from the rule laid down in clause (4)(a) and dispense with reference of cases to an advisory Board only by a law which prescribes both the circumstances under which, and the class or classes of cases in which, the person may be detained for a period longer than three months without obtaining, the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause (4) of Article 22.

In view of Article 22(7)(a)(b)(c) Parliament passed four central legislations on preventive detention (The conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, the prevention of black marketing and maintenance of supplies of essential commodities Act, 1980: the National Security Act, 1980: the prevention of Illicit Traffic in Narcotic Drugs and Psychotropic substances Act, 1988) which prescribe the circumstances under which and the class or classes of cases in which a person may be detained for a longer period than 3 months without the opinion of the Advisory Board[27] the maximum period of detention[28] and the procedure to be followed by an Advisory Board.[29]

MAXIMUM PERIOD OF DETENTION

Article 22(7) (b) provides that the Parliament may prescribe the maximum period for which any person may in any class or classes be detained under any law providing for preventive detention. This provision has been held to be merely permissive, and it does not oblige Parliament to prescribe any maximum period of detention in terms of years, months or days. It is valid to fix such period in terms of specific event, as for example, until the expiry of

[25]AIR 1950 SC 27
[26]AIR 1973 SC 1425.
[27]Section 9, COFFPOSA: Section 14A, NSA: Section 10, PITNDPS
[28]S.10. COFEPOSA: S.13 PREBLACT & NSA and S.11 PITNDPS.
[29]S.8(c)(d)(e), COFEPOSA: S.11 PREBLACT & NSA and S.9 (c)(d)(e), PITNDPS

the emergency proclaimed under Article 352.[30]

The Supreme Court once again in Fagu Shaw Vs West Bengal[31] by majority observed that Parliament is not bound to prescribe the maximum period of detention under Article 22(7)(b) of the constitution in order that the proviso to Art.22(4)(a) might operate. Both Parliament and state legislatures have power under entry 3 of list 111 of the seventh schedule to provide for detention of a person for a specified period. The purpose of Article 22(4)(a) is to put a curb on that power by providing that no law shall authorise the detention of a person for a period exceeding three months unless an Advisory Board has reported within the period of three months that there is sufficient cause for detention. And, what the proviso means. is that even if the Advisory Board has reported before the expiration of three months that there is sufficient cause for detention, the period of detention beyond three months shall not exceed the maximum period that might be fixed by any law made by Parliament under Article 22(7)(b). The proviso says in effect that if Parliament fixes the maximum period under Article 22(7)(b), the power of Parliament and state legislatures to fix the period of detention in a law passed under the entry would be curtailed to that extent. The prescription of a maximum period by a law made under Article 22(7)(b) has no particular sanctity so far as Parliament is concerned as it could pass a law for detention the next day providing for a higher 'maximum period' and justify that law as law passed both under the relevant entry relating to preventive detention and under Article 22(7)(b).

CONCLUSION

On analysing the laws relating to preventive detention, it is observed that the preventive detention laws are always in conflict with the right of personal liberty and it also violates various other rights guaranteed under various national and international instruments. In general, preventive detention is good because it prevents individuals from committing crime, but bad because it infringes fundamental rights. Just like two faces of a coin, preventive detention also has its own merits and demerits. It is on the legislature and executive to balance the individual right and security of the state.

[30]West Bengal Vs Ashok Dey, AIR 1972 SC 1660.
[31]AIR 1974 SC 613.