A. K. Roy, Etc vs Union Of India And Anr on 28 December, 1981

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Author: Y.V. Chandrachud

Bench: Y.V. Chandrachud, P.N. Bhagwati, A.C. Gupta, V.D. Tulzapurkar, D.A. Desai

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           PETITIONER:
A. K. ROY, ETC.

        Vs.

RESPONDENT:
UNION OF INDIA AND ANR.

DATE OF JUDGMENT28/12/1981

BENCH:
CHANDRACHUD, Y.V. ((CJ)
BENCH:
CHANDRACHUD, Y.V. ((CJ)
BHAGWATI, P.N.
GUPTA, A.C.
TULZAPURKAR, V.D.
DESAI, D.A.

CITATION:
 1982 AIR  710            1982 SCR  (2) 272
 1982 SCC  (1) 271        1981 SCALE  (4)1905
 CITATOR INFO :
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 R          1982 SC1500  (5)
 F          1982 SC1543  (16)
 F          1983 SC 109  (13)
 R          1983 SC 505  (1,2)
 RF         1985 SC 551  (32)
 R          1985 SC 724  (14)
 R          1985 SC1082  (18)
 R          1986 SC 207  (4)
 RF         1986 SC 283  (6,13)
 E&R        1987 SC 217  (5,6,7,12,13)
 D          1987 SC 725  (4)
 E          1988 SC 109  (5,6)
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D	1988	SC1768	(5)
R	1988	SC1883	(176)
APL	1989	SC 389	(6,7,9)
RF	1989	SC 653	(12)
F	1989	SC 764	(19,20)
R	1991	SC 979	(7)

ACT:

Constitution of India, 1950-Constitution (Fortyforth Amendment) Act, 1978-Power conferred on executive to appoint different dates for different provisions of the Act-If amounts to transfer of legislative power to executive.

Ordinance-Whether law-Whether President has power to issue ordinances-National Security ordinance-Validity of-Constitution of Advisory Boards under section 9 of the Act-Validity of.

Natural Justice-Detenu under National Security Act-If entitled to be represented by a legal practitioner before Advisory Board-Detenu, if has a right to consult a lawyer, or be assisted by a friend before the Advisory Board-If could cross-examine witness-If could present evidence before the Advisory Board in rebuttal of allegations against him-Duties and functions of Advisory Boards-Proceedings of Advisory Board, if open to public.

HEADNOTE:

Section 1(2) of the Constitution (Fortyfourth Amendment) Act 1978 provides that "It shall come into force on such date as the Central Government may, by notification in the official Gazette appoint and different dates may be appointed for different provisions of this Act." Section 3 of the Act substituted a new clause (4) for the existing sub-clause (4) of Article 22. By a notification the Central Government had brought into force all the sections of the Fortyfourth Amendment Act except section 3.

In the meantime the Government of India issued the National Security ordinance 2 of 1980 which later became the National Security Act 1980.

The petitioner was detained under the provisions of the ordinance on the ground that he was in dulging in activities prejudicial to public order. In his petition under Article 32 of the Constitution the petitioner contended that the power to issue an ordinance is an executive power, not legislative power, and therefore the ordinance is not law.
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HELD: [per Chandrachud, C.J., Bhagwati & Desai, JJ.]

[Gupta and Tulzapurkar, JJ dissented on the question of bringing into force section 3 read with section 1(2) of the Fortyfourth Amendment Act. Gupta J. dissented on the question whether ordinance is law].

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The power of the President to issue an ordinance under Article 123 of the Constitution is a legislative and not an executive power.

From a conspectus of the provisions of the Constitution it is clear that the Constituent Assembly was of the view that the President's power to legislate by issuing an ordinance is as necessary for the peace and good government of the country as the Parliament's power to legislate by passing laws. The mechanics of the Presidents legislative power was devised evidently in order to take care of urgent situations which cannot brook delay. The Parliamentary process of legislation is comparatively tardy and can conceivably be time consuming. It is true that it is not easy to accept with equanimity the proposition that the executive can indulge in legislative activity but the Constitution is what it says and not what one would like it to be. The Constituent Assembly indubitably thought, despite the strong and adverse impact which the Governor-General's ordinance making power had produced on the Indian community in the pre-independence era, that it was necessary to equip the President with legislative powers in urgent situations. [290 E-G]

R.C. Cooper v. Union of India, [I 9701 3 SCR 530, 559, referred to.

The contention that the word 'law' in Article 21 must construed to mean a law made by the legislature only and cannot include an ordinance, contradicts directly the express provisions of Articles 123 (2) and 367 (2) of the Constitution. Besides, if an ordinance is not law within the meaning of Article 21, it will stand released from the wholesome and salutary restraint imposed upon the legislative power by Article 13(2) of the Constitution. [292 G-H]

The contention that the procedure prescribed by an ordinance cannot be equated with the procedure established by law is equally unsound. The word 'established' is used in Article 21 in order to denote and ensure that the procedure prescribed by law must be defined with certainty in order that those who are deprived of t heir fundamental right to life or liberty must know the precise extent of such deprivation. 1293 A-B]

The argument of the petitioner that the fundamental right conferred by Article 21 can not be taken away by an ordinance really seeks to add a proviso to Article 123(1) to the effect: "that such ordinances shall not deprive any person of his right to life or personal liberty conferred by Article 21 of the Constitution." An amendment substantially to that effect moved in the Constituent Assembly was rejected by the Constituent Assembly. [293 D-E]

A.K. Gopalan [1950] SCR 88, Sant Ram, [1960] 3 SCR 499, 506, State of Nagaland v. Ratan Singh [1966] 3 SCR 830, 851, 852, Govind v. State of Madhya Pradesh & Anr. [1975] 3 SCR

946, 955-56, Ratilal Bhanjl Mithani v. Asstt. Collector of Customs, Bombay & Anr. [1967] 3 SCR 926, 928-931 and Pandit M.S.M. Sharma v. Shri Sri Krisna Sinha & Anr. [1959] Supp. I SCR 806, 860-861, referred to.

Since the petitioners have not laid any acceptable foundation for holding that no circumstances existed or could have existed which rendered it necessary
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for the President to take immediate action by promulgating impugned ordinance, the contention that the ordinance is unconstitutional for the reason that the pre-conditions to the exercise of power conferred by Article 123 are not fulfilled, has no force. [298 D]

There can be no doubt that personal liberty is a precious right. So did the founding fathers believe at any rate because, while their first object was to give unto the people a Constitution whereby a Government was established. their second object, equally important, was to protect the people against the Government. That is why, while conferring extensive powers on the Government like the power to declare an emergency, the power to suspend the enforcement of fundamental rights and the power to issue ordinances, they assured to the people a Bill of Rights by Part III of the Constitution, protecting against executive and legislative despotism those human rights which they regarded as fundamental. The imperative necessity to protect those rights is a lesson taught by all history and all human experience. And therefore, while arming the government with large powers to prevent anarchy from within and conquest from without, they took care to ensure that those powers were not abused to mutilate the liberties of the people. [300 B-D]

Section 1(2) of the Fortyfourth Amendment Act is valid. There is no internal contradiction between the provisions of Article 368(2) and those of section 1(2) of the 44th Amendment Act. Article 368(2) lays down a rule of general application as to the date from which the Constitution would stand amended in accordance with the Bill assented to by the President, section 1(2) of the Amendment Act specifies the manner in which that Act or any of its provisions may be brought into force. The distinction is between the Constitution standing amended in accordance with the terms of the Bill assented to by the President and the date of the coming into force of the Amendment thus introduced into the Constitution. For determining the date with effect from which the Constitution stands amended in accordance with the terms of the Bill, one has to turn to the date on which the President gave, or was obliged to give, his assent to the Amendment. For determining the date with effect from which the Constitution. as amended, came or will come into force, one has to turn to the notification, if any, issued by the Central Government under section 1(2) of the Amendment Act. [310 D-F]

The contention raised by the petitioners, that the power to appoint a date for bringing into force a constitutional amendment is a constituent power and therefore it cannot be delegated to an outside agency is without force. It is true that the constituent power, that is to say, the power to amend any provision of the Constitution by way of an addition, variation or repeal must be exercised by the Parliament itself and cannot be delegated to an outside agency. That is clear from Article 368(1) which defines at once the scope of the Constituent power of the Parliament and limits that power to the Parliament. The power to issue a notification for bringing into force the provisions of a Constitutional amendment is not a constituent power because, it does not carry with it the power to amend the Constitution in any manner. It is, therefore, permissible to the Parliament to vest in an outside agency the power to bring a Constitutional amendment into force, [312 C-E]

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Although the 44th Amendment Act received the assent of the President on April 30, 1979 and more than two and a half years have already gone by without the Central Government issuing a notification for bringing section 3 of the Act into force, this Court cannot intervene by issuing a mandamus to the Central Government obligating it to bring the provisions of section 3 into force. The Parliament having left this question to the unfettered judgment of the Central Government it is not for the Court to compel the Government to do that which according to the mandate of Parliament, lies in its discretion to do when it considers it opportune to do it. The executive is responsible to the Parliament and if the Parliament considers that the executive has betrayed its trust by not bringing any provision of the Amendment into force, it can censure the executive. It would be quite anomalous that the inaction of the executive should have the approval of the Parliament and yet the court should show its disapproval of it by against mandamus. [314 G-H]

In leaving it to the judgment of the Central Government to decide as to when the various provisions of the 44th Amendment should be brought into force, the Parliament could not have intended that the Central Government may exercise a kind of veto over its constituent will by not ever bringing the Amendment or some of its provision into force. The Parliament having seen the necessity of introducing into the Constitution a provision like section 3 of the 44th Amendment, it is not open to the Central Government to sit in judgment over the wisdom of the policy of that section. If only the Parliament were to lay down an objective standard to guide and control the discretion of the Central Government in the matter of bringing the various provisions of the Act into force, it would have been possible to compel the Central Government by an appropriate writ to discharge

the function assigned to it by the Parliament. [316 B-D]

Expressions like 'defence of India', 'security of India' security of the State' and 'relations of India with foreign powers', mentioned in section 3 of the Act, are not of any great certainty or definiteness. But in the very nature of things they are difficult to define. Therefore provisions of section 3 of the Act cannot be struck down on the ground of their vagueness and certainty. However, since the concepts are not defined, undoubtedly because they are not capable of a precise definitions, courts must strive to give to those concepts a narrower construction than what the literal words suggest. While construing laws of preventive detention like the National Security Act, care must be taken to restrict their application to as few situations as possible. Indeed, that can well be the unstated premise for upholding the constitutionally of clauses like those in section 3, which are fraught with grave consequences to personal liberty, if construed liberally. [324 E-H]

What is said in regard to the expressions 'defence of India', `security of India', 'security of the State' and 'relations of India with foreign powers' cannot apply to the expression "acting in any manner prejudicial to the maintenance of supplies and services essential to the community' which occurs in section 3(2) of the Act. The particular clause in sub-section (2) of section 3 of the National Security Act is capable of wanton abuse in that, the detaining authority can place under detention any person for possession of any commodity on the basis that the authority is of the opinion that the maintenance of supply of that commodity

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is essential to the community. This particular clause is not only vague and uncertain but, in the context of the Explanation, capable of being extended cavalierly to supplies. the maintenance of which is not essential to the community. To allow the personal liberty of the people to be taken away by the application of that clause would be a flagrant violation of the fairness and justness of procedure which is implicit in the provisions of Article 21. The power given to detain persons under section 3(2) on the ground that they are acting in any manner prejudicial to the maintenance of supplies and Services essential to the community cannot however be struck down because it is vitally necessary to ensure a steady flow of supplies and services which are essential to the community, and if the State has the power to detain persons on the grounds mentioned in section 3(1) and the other grounds mentioned in section 3(2), it must also have the power to pass order of detention on this particular ground. No person can be detained with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies and services essential to the community unless, by a law order or notification made or published fairly in advance, the

supplies and services, the maintenance of which is regarded as essential to the community and in respect of which the order of detention is proposed to be passed, are made known appropriately, to the public. [325 A-C; 326 BC, FH]

R. C. Cooper v. Union of India, [1970] 3 SCR 530, 559, Haradhan Saha, [1975] 1 SCR 778, Khudiram, j 1975] 2 SCR 832, Sambhu Nath Sarkar, [1974] 1 SCR I and Maneka Gandhi, [1978]2 SCR 621, explained.

Laws of preventive detention cannot, by the back-door, introduce procedural measures of a punitive kind. Detention without trial is an evil to be suffered, but to no greater extent and in no greater measure than is minimally necessary in the interest of the country and the community. It is neither fair nor just that a detenu should have to suffer detention in "such place" as the Government may specify. The normal rule has to be that the detenu will be kept in detention in a place which is within the environs of his or her ordinary place of residence. [330 E-F]

In order that the procedure attendant upon detentions should conform to the mandate of Article 21 in the matter of fairness, justness and reasonableness, it is imperative that immediately after a person is taken in custody in pursuance of an order of detention, the members of his household, preferably the parent, the child or the spouse, must be informed in writing of the passing of the order of detention and of the fact that the detenu has been taken in custody. Intimation must also be given as to the place of detention, including the place where the detenu is transferred from time to time. This Court has stated time and again that the person who is taken in custody does not forfeit, by reason of his arrest, all and every one of his fundamental rights. It is, therefore, necessary to treat the detenu consistently with human dignity and civilized norms of behaviour. [331 C-D]

Since section 3 has not been brought into force by the Central Government in the exercise of its powers under section 1(2) of the 44th Amendment Act, that section is still not a part of the Constitution. The question as to whether section 9 of the National Security Act is bad for the reason that it is inconsistent with the provisions of section 3 of the 44th Amendment Act, has therefore to be decided on the basis that section 3, though a part of the 44th Amendment Act, is not

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a part of the Constitution. If section 3 is not a part of the Constitution, it is difficult to appreciate how. the validity of section 9 of the National Security Act can be tested by applying the standard laid down in that section. It cannot possibly be that both the unamended and the amended provisions of Article 22(4) of the Constitution are parts of the Constitution at one and the same time. So long as section 3 of the 44th Amendment Act has not been brought into force, Article 22(4) in its unamended form will

continue to be a part of the Constitution and so long as that provision is a part of the Constitution, the amendment introduced by section 3 of the 44th Amendment Act cannot become a part of the Constitution Section 3 of the 44th Amendment substitutes a new article 22(4) for the old article 22(4). The validity of the constitution of Advisory Boards has therefore to be tested in the light of the provisions contained in Article 22(4) as it stands now and not according to the amended article 22(4). [335 D-H]

On a combined reading of clauses (I) and (3)(b) of Article 22, it is clear that the right to consult and to be defended by a legal practioner of one's choice, which is conferred by clause (1), is denied by clause (3)(b) to a person who is detained under any law providing for preventive detention. Thus, according to the express intendment of the Constitution itself, no person who is detained under any law, which provides for preventive detention, can claim the right to consult a legal practioner of his choice or to be defended by him. It is therefore difficult to hold, by the application of abstract, general principles or on a priori consideration that the detenu has the right of being represented by a legal practioner in the proceedings before the Advisory Board. [339 D-E]

Yet the fact remains that the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board. The reason behind the provisions contained in Article 22(3)(b) of the Constitution clearly is that a legal practitioner should not be permitted to appear before the Advisory Board for any party. The Constitution does not contemplate that the detaining authority or the Government should have the facility of appearing before the Advisory Board with the aid of a legal practioner but that the said facility should be denied to the detenu. In any case, that is not what the Constitution says and it would be wholly inappropriate to read any such meaning into the provisions of Article 22. Permitting the detaining authority or the Government to appear before the Advisory Board with the aid of a legal practitioner or a legal adviser would be in breach of Article 14, if a similar facility is denied to the detenu. Therefore if the detaining authority or the Government takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner. [344 H; 345 A-C]

The embargo on the appearance of legal practitioners should not be extended so as to prevent the detenu from being aided or assisted by a friend who, in truth and substance, is not a legal practitioner. Every person whose interests are adversely affected as a result of the proceedings which have a serious import, is entitled to be heard in those proceedings and be assisted by a friend. A detenu, taken straight from his cell to the Board's room, may lack the ease and composure to present his point of

view. He may be "tongue tied, nervous, confused or wanting in intelligence" (see Pet v. Greyhound Racing Association Ltd.), and if justice is to be done he must at least have the help of a friend who can assist him to give coherence to his stray and wandering ideas. [345 G-H]
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In the proceedings before the Advisory Board, the detenu has no right to cross-examine either the persons on the basis of whose statement the order of detention is made or the detaining authority.[352D]

Now Prakash Transport Co. Ltd. v. New Suwarna Transport Co. Ltd., [1957] SCR 98, 106, Nagendra Nath Bora v. Commissioner of Hills Division and Appeals, Assam, [1958] SCR 1240, 1261, State of Jammu & Kashmir v. Bakshi Ghulam Mohammad, [1966] Suppl. SCR 401, 415, Union of India v. T.R. Verma, [1958] SCR 499, 507 and Kherr. Chand v. Union of India [1959] SCR 1080, 1096, held inapplicable

There can be no objection for the detenu to lead evidence in rebuttal of the allegation made against him before the Advisory Board. Neither the Constitution nor the National Security Act contains any provision denying such a right to the detenu. The detenue may therefore offer oral and documentary evidence before the Advisory Board in order to rebut the allegations which are made against him. [352 E-F]

It is not possible to accept the plea that the proceedings of the Advisory Board should be thrown open to the public. The right to a public trial is not one of the guaranteed rights under our Constitution. [354 C-D]

Puranlal Lakhanpal v. Union of India, [1958] SCR 460, 475 and Dattatreya Moreshwar Pangarkar v. State of Bombay, [1952] SCR 612, 626, referred to.

Yet the Government must afford the detenus all reasonable facilities for an existence consistent with human dignity. They should be permitted to wear their own clothes, eat their own food, have interviews with the members of their families at least once a week and, last but not the least, have reading and writing material according to their reasonable requirements. [355 B-C]

Persons who are detained under the National Security Act must be segregated from the convicts and kept in a separate part of the place of detention. It is hardly fair that those who are suspected of being engaged in prejudicial conduct should be lodged in the same ward or cell where the convicts whose crimes are established are lodged. [355 D]

Sunil Batra v. Delhi Administration [1980] 3 S CR 557 and Sampat Prakash v. State of Jammu & Kashmir [1969] 3 SCR 754, referred to.

[per Gupta and Tulzapurkar, JJ dissenting]

Section 1(2) of the Constitution (Fortyfourth Amendment) Act 1978 cannot be construed to mean that Parliament has left it to the unfettered discretion or judgment of the Central Government when to bring into force

any provision of the amendment Act. After the President's assent, the Central Government was under an obligation to bring into operation the provisions of the Act within a reasonable time; the power to appoint dates for bringing into force the provisions of the Act was given to the Central Government obviously because it was not considered feasible to give affect to all the provisions immediately. But the
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Central Government could not in its discretion keep it in a state of suspended A animation for any length of time it pleased. [358 A-B]

From the Statement of objects and Reasons it was clear that the Parliament wanted the provisions of the Amendment Act to be made effective as early as possible. When more than two and half years have passed since the Amendment Act received the assent of the President, it is impossible to say that any difficulty should still persist preventing the Government from giving effect to section 3 of the Amendment Act. A provision like section 1(2) cannot be said to have empowered the executive to scotch an amendment of the Constitution passed by Parliament and assented to by the President. That Parliament is competent to take appropriate steps if it considered that the executive had betrayed its trust does not make the default lawful or relieve this Court of its duty. [359 B-C]

[per Gupta J. dissenting.]

Normally it is the legislature that has the power to make laws. The nature of the legislative power of the President has to be gathered from the provisions of Article 123 and not merely from the heading of the chapter, "Legislative Powers of the President". When something is said to have the force and effect of an Act of Parliament that is because it is not really an Act of Parliament. Article 123(2) does not say that an ordinance promulgated under this article shall be deemed to be an Act of Parliament to make the two even fictionally identical. While an ordinance issued under Article 123 has the same force and effect as an Act of Parliament, under Article 357(1)(a) Parliament can confer on the President the power of the legislature of a State to make laws. The difference in the nature of power exercised by the President under Article 123 and under Article 357 is clear and cannot be ignored. [360 B, 361 B-C]

The word "establish" in Article 21 as interpreted by this Court "implies some degree of firmness, permanence and general acceptance". An ordinance which ceases to operate on the happening of one of the conditions mentioned in Article 123(2) can hardly be said to have that "firmness" and "permanence" that the word "establish" implies. lt is not the temporary duration of an ordinance that is relevant; what is relevant is its provisional and tentative character which is apparent from Article 123(2). [362 G] F

A.K. Gopalan v. State [1950] SCR, 88, relied on.

A significant difference between the law made by the President under Article 357 and an ordinance promulgated by him under Article 123 is that while a law made under Article 357 continues to be in force until altered, repealed or amended by a competent legislature or authority, an ordinance promulgated under Article 123 ceases to operate at the expiration of six weeks of reassembly of the Parliament at the latest. [363 B]

The argument that since Article 367(2) provides that any reference in the Constitution to Acts of Parliament should be construed as including a reference to an ordnance made by the President, an ordinance should be equated with an Act of Parliament is without substance because an ordinance has the force and effect only over an area where it can validly operate. An invalid ordinance can
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have no force or effect and if it is not 'law' in the sense the word has been used Article 21, Article 367(2) cannot make it so. [363 E]

[on all other points His Lordship agreed with the conclusions of Hon'ble the Chief Justice].

[Hon'ble Tulzapurkar J. agreed with the majority on all other points]

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petitions Nos 5724, 5874 & 5433 of 1980.

(Under Article 32 of the Constitution of India) R K Garg, V.J. Francis and Sunil R. Jain for the Petitioners in WP. 5724 & 5874 and for interveners 3-12.

N.M. Ghatate, S.V. Deshpande and Shiva Pujan Singh for the petitioner in WP. 5433.

L.N. Sinha, Attorney General, K Parasaran, Solicitor General, M.K Banerjee, Additional Solicitor General, KS. Gurumurthi Miss A. Subhashini and Girish Chandra for Respondent No. 1 in all the WPs.

Subbash C. Maheshwari, Additional, Advocate General, O.P. Rana, Hansraj Bhardwaj and R.K. Bhatt for Respondents 2 & 3 in WP. 5874180.

L.N. Sinha, Attorney General, Ram Balak Mahto, Additional Advocate General, K.G. Bhagat and D. Goburdhan for Respondents 2 & 3 in WP. 5724/80.

For Interveners:

V.M. Tarkunde, P.H. Parekh, Miss Manik Tarkunde and R.N, Karanjawala for Intervener No 1.

Bhim Singh intervener No. 2 (in person) Dr. L.M. Singhvi, Anand Prakash, S.N. Kaekar, G. Mukhoty, B.B. Sinha, A.K Srivastava, Randhir Jain, M.L. Lahoty, Kapil Sibal, L K Pandey and S.S. Khanduja for Intervener No. 13.

Mrs. Subhadra Joshi for Intervener No 14.

Ram Jethmalani and Miss Rani Jethmalani for Intervener No, 15.

L.N. Sinha, Attorney General and Altaf Ahmed for Inter- vener No. 16.

The following Judgments were delivered CHANDRACHUD, C.J. This is a group of Writ Petitions under Article 32 of the Constitution challenging the validity of the National Security ordinance, 2 of 1980, and certain provisions of the National Security Act, 65 of 1980, which replaced the ordinance. Writ Petition No. 5724 of 1980 is by Shri A. K. Roy, a Marxist member of the Parliament, who was detained under the ordinance by an order passed by the District Magistrate, Dhanbad, on the ground that he was indulging in activities which were prejudicial to public order. Ten members of the Parliament, one an Independent and the others belonging to various political parties in opposition applied for permission to intervene in the Writ Petition on the ground that since the ordinance-making power of the President is destructive of the system of Parliamentary democracy, it is necessary to define the scope of that power. We allowed the intervention. So did we allow the applications for intervention by the People's Union of Civil Liberties, the Supreme Court Bar Association and the State of Jammu and Kashmir which is interested in the upholding of the Jammu & Kashmir Public Safety Act, 1978. Shri R.K. Garg argued the Writ Petition, respondents being represented by the Attorney General and the Solicitor General.

After the ordinance became an Act, more writ petitions were filed to challenge the validity of the Act as well. Those petitions were argued on behalf of the petitioners by Dr N. M. Ghatate, Shri Ram Jethmalani, Shri Shiv Pujan Singh and Shri Kapil Sibal. Shri V.M. Tarkunde appeared in person for the People's Union of Civil Liberties and Dr. L.M. Singhvi for the Supreme Court Bar Association.

Broadly, Shri Garg concentrated on the scope and limitations of the ordinance-making power, Shri Ram Jethmalani on the vagueness and unreasonableness of the provisions of the Act and the punitive conditions of detention and Dr. Ghatate on the effect of the 44th Constitution Amendment Act and the validity of its section 1(2). Shri Tarkunde dwelt mainly on the questions relating to the fulfillment of pre-conditions of the exercise of the ordinance making power, the effect of non-implementation by the Central Government of the provisions of the 44th Amendment regarding the composition of the Advisory Boards and the broad,

undefined powers of detention conferred by the Act. Dr. L.M. Singhvi laid stress on the need for the grant of minimal facilities to detenus, the nature of the right of detenus to make an effective representation against the order of detention and the evils of the exercise of the power to issue ordinances.

The National Security ordinance, 1980, was passed in order "to provide for preventive detention in certain cases end for matters connected therewith." It was made applicable to the whole of India except the State of Jammu & Kashmir and it came into force on September 23, 1980. The Parliament was not in session when it was promulgated and its preamble recites that it was being issued because the "President is satisfied that circumstances exist which render it necessary for him to take immediate action".

Shri R.K. Garg, appearing for the petitioners, challenges the power of the President to issue an ordinance depriving any person of his life or liberty. He contends:

(a) The power to issue an ordinance is an executive power, not a legislative power;

(b) Ordinance is not 'law' because it is not made by an agency created by the Constitution for making laws and no law can be made without the intervention of the legislature;

(c) There is a marked shift towards distrust of power in order to preserve the people's rights and therefore, liberty, democracy and the independence of Judiciary are amongst the principal matters which are outside the ordinance-making power;

(d) By Article 21 of the Constitution, a person can be deprived of his life or liberty according only to the procedure established by law. Ordinance is not 'law' within the meaning of Article 21 and therefore no person can be deprived of his life or liberty by an ordinance;

(e) The underlying object of Article 21 is to wholly deny to the executive the power to deprive a person of his life or liberty. Ordinance-making power, which is executive power, cannot therefore be used for that purpose. The executive cannot resort to the power to make ordinances so as or in order to remove the restraints imposed upon it by Article 21;

(f) The procedure prescribed under an ordinance is not procedure established by law because, ordinances have a limited duration in point of time. The procedure prescribed by an ordinance is neither firm nor certain by reason of which the procedure cannot be said to be 'established'. From this it follows that no person can be deprived of his life or liberty by procedure prescribed by an ordinance;

(g) The power to issue an ordinance is ordaining power of the executive which cannot be used to liberate it from the discipline of laws made by a democratic legislature. Therefore, the power to issue ordinances can be used, if at all, on a virgin land only. No ordinance can operate on a subject which is covered by a law made by the legislature;

(h) Equating an ordinance made by the executive with a law made by the legislature will violate the principle of separation of powers between the executive and the legislature, which is a part of the basic structure of the Constitution; and

(i) Articles 14, 19 and 21 of the Constitution will be reduced to a dead letter if the executive is permitted to take away the life and liberty of the people by an ordinance, lacking the support of a law made by the legislature. The ordinance-making power must, therefore, be construed harmoniously with those and other provisions of the Constitution.

This many-pronged attack on the ordinance-making power has one central theme: 'ordinance is not law.' We must therefore consider the basic question as to whether the power to make an ordinance is a legislative power as contended by the learned Attorney General or whether it is an executive power masquerading as a legislative power, as contended on behalf of the petitioners.

In support of these submissions Shri Garg relies on many texts and decisions which we need not discuss at length since, primarily, we have to consider the scheme of our Constitution and to interpret its provisions in order to determine the nature and scope of the ordinance-making power. Counsel drew our attention, with great emphasis, to the statements in Montesquieu's Esprit des lois (1748) and Blackstone's Commentaries on the laws of England' (1756) which are reproduced in 'Modern Political Constitution's by C.F. Strong (8th edition) at page 291. According to Montesquieu, "when the legislative and executive powers are united in the same person or body of persons there can be no liberty, because of the danger that the same monarch or senate should enact tyrannical laws and execute them in a tyrannical manner." Blackstone expresses the same thought by saying that "wherever the right of making and enforcing the law is vested in the same man or one and the same body of men, there can be no public liberty". Reliance was also placed on views and sentiments expressed to the same effect in Walter Bagehot's 'The English Constitution (1867), Wade's Administrative Law' (3rd edition) pages 323-324, 'Constitutional Laws of the British Empire' by Jennings and Young, 'Law and orders' by C.K. Allen (1945) and Harold 'Laski's Liberty in the Modern State' (1961). According to Laski (pages 42-43).

".. if in any state there is a body of men who possess unlimited political power, those over whom they rule can never be free. For the one assured result of historical investigation is the lesson that uncontrolled power is invariably poisonous to those who possess it. They are always tempted to impose their canon of good upon others, and, in the end, they assume that the good of the community depends upon the continuance of their power. Liberty always demands a limitation of political authority, and it is never attained unless the rulers of a state can, where necessary, be

called to account. That is why Pericles insisted that the secret of liberty is courage."

Finally, counsel drew on Jawaharlal Nehru's Presidential Address to the Lucknow Congress (April 19, 1936) in which he referred to the rule by ordinances as "the humiliation of ordinances" (Selected Works of Jawaharlal Nehru, volume 7, page 183).

We are not, as we cannot be, unmindful of the danger to people's liberties which comes in any community from what is called the tryanny of the majority. Uncontrolled power in the executive is a great enemy of freedom and therefore, eternal vigilance is necessary in the realm of liberty. But we cannot transplant, in the Indian context and conditions, principles which took birth in other soils, without a careful examination of their relevance to the interpretation of our Constitution. No two Constitutions are alike, for it is not mere words that make a Constitution. It is the history of a people which lends colour and meaning to its Constitution. We must therefore turn inevitably to the historical origin of the ordinance-making power conferred by our Constitution and consider the scope of that power in the light of the restraints by which that power is hedged. Neither in England nor in the United States of America does the executive enjoy anything like the power to issue ordinances. In India, that power has a historical origin and the executive, at all times, has resorted to it freely as and when it considered it necessary to do so. One of the larger States in India has manifested its addiction to that power by making an overgenerous use of it-so generous indeed, that ordinances which lapsed by efflux of time were renewed successively by a chain of kindred creatures, one after another. And, the ordinances embrace everything under the sun, from Prince to pauper and crimes to contracts. The Union Government too, so we are informed, passed about 200 ordinances between 1960 and 1980, out of which 19 were passed in 1980.

Our Constituent Assembly was composed of famous men who had a variegated experience of life. They were not elected by the people to frame the Constitution but that was their strength, not their weakness. They were neither bound by a popular mandate nor bridled by a party whip. They brought to bear on their task their vast experience of life-in fields social, economic and political. Their deliberation, which run into twelve volumes, are a testimony to the time and attention which they gave with care and concern to evolving a generally acceptable instrument for the regulation of the fundamental affairs of the country and the life and liberty of its people.

The Constituent Assembly had before it the Government of India Act, 1935 and many of its members had experienced the traumas and travails resulting from the free exercise of the ordinance-making power conferred by that Act. They were also aware that such a power was not claimed by the Governments of two lading democracies of the world, the English and the American, And yet, they took the Government of India Act of 1935 as their model, Section 42 of that Act ran thus:

> Power of "42(1) If at any time when the Federal Legis- Governer lature is not in section the Governor- General to General is satisfied that circumstances promulgate exist which render it necessary for him ordinances to take immediate action, he may during recess promulgate such ordinances as the of Legisla- circumstances appear to him to require:

ture.

Provided that the Governor-General-

(a) ... ...

(b) ... ...

(2) An ordinance promulgated under this section shall have the same force and effect as an Act of the Federal Legislature assented to by the Governor- General, but every such ordinance-

(a) shall be laid before the Federal Legislature and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or, if before the expiration of that period resolutions disapproving it are passed by both Chambers, upon the passing of the second of those resolutions;

(b) shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as is it were an Act of the Federal Legislature assented to by the Governor General; and

(c) may be withdrawn at any time by the Governor-General.

(3) If and so far as an ordinance under this section makes any provision which the Federal Legislature would not under this Act be competent to enact, it shall be void".

Section 43 conferred upon the Governor-General the power to issue ordinances for the purpose of enabling him satisfactorily to discharge his functions in so far as he was by or under the Act required to act in his discretion or to exercise his individual judgment.

Article 123, which confers the power to promulgate ordinances, occurs in Chapter III of Part V of the Constitution, called "Legislative Power of the President". It reads thus:

Power of "123 (1) If at any time, except when both Houses President of Parliament are in session, the to promul- President is satisfied that gate Ordi- circumstances exist which render it nances necessary for him to take immediate during action, he may promulgate such recess of ordinances as the circumstances appear parliament. recess of to him to require.

(2) An ordnance promulgated under this Article shall have the same force and effect as an Act of Parliament, but every such ordinance-

(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

(b) may be withdrawn at any time by the President.

Explanation-Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void."

Article 213, which occurs in Part VI, Chapter IV, called "Legislative Power of the Governor" confers similar power on the Governors of States to issue ordinances.

As we have said earlier while setting out the petitioner s case, the thrust of his argument is that the power to issue an ordinance is 7 Dan executive power, not a legislative power, and consequently, is not law. In view of the clear and specific provisions of the Constitution bearing upon this question, it is quite impossible to accept this argument. The heading of Chapter III of Part V is 'Legislative Powers of the President". Clause (2) of Article 123 provides that an ordinance promulgated under Article 123 "shall have the same force and effect as an Act of Parliament". The only obligation on the Government is to lay the ordinance before both Houses of Parliament and the only distinction which the Constitution makes between a law made by the Parliament and an ordinance issued by the President is that whereas the life of a law made by the Parliament would depend upon the terms of that law, an ordinance, by reason of sub clause (a) of clause (2), ceases to operate at the expiration of six weeks from the reassembly of Parliament, unless resolutions disapproving it are passed by both Houses before the expiration of that period. Article 13 (2) provides that the State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention of this provision shall, to the extent of the contravention, be void. Clause (3) of Article 13 provides that in Article 13, "law" includes, inter alia, an ordinance, unless the context otherwise requires. In view of the fact that the context does not otherwise so require, it must follow from the combined operation of clauses (2) 'and (3) of Article 13 that an ordinance issued by the President under Article 123, which is equated by clause (2) of that article with an Act of Parliament, is subject to the same constraints and limitations as the latter. Therefore, whether the legislation is Parliamentary or Presidential, that is to say, whether it is a law made by the Parliament or an ordinance issued by the President, the limitation on the power is that the fundamental rights conferred by part III cannot be taken away or abridged in the exercise of that power. An ordinance, like a law made by the Parliament, is void to the extent of contravention of that limitation' The exact equation, for all practical purposes, between a law made by the Parliament and an ordinance issued by the President is emphasised by yet another provision of the Constitution. Article 367 which supplies a clue to the "Interpretation" of the Constitution provides by clause (2) that-

> "Any reference in this Constitution to Acts or laws of, or made by, Parliament, or to Acts or laws of, or made by, the Legislature of a State, shall be construed as including a reference to an ordinance made by the President or, to an ordinance made by a Governor, as the case may be."

It is clear from this provision, if indeed there was any doubt about the true position, that the Constitution makes no distinction in principle between a law made by the legislature and an ordinance issued by the President. Both, equally, are products of the exercise of legislative power and, therefore, both are equally subject to the limitations which the Constitution has placed upon that power.

It may sound strange at first blush that the executive should possess legislative powers, but a careful look at our Constitution will show that the scheme adopted by it envisages the exercise of legislative powers by the executive in stated circumstances. An ordinance can be issued by the President provided that both Houses of the Parliament are not in session and the President is satisfied that circumstances exist which render It necessary for him to take immediate action An ordinance which satisfies these pre-conditions has the same force and effect as an Act of Parliament. Article 356 empowers the President to issue a proclamation in case of failure of constitutional machinery in the States. By Article 357 (I) (a), if by a proclamation issued under Article 356 (1) it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it is competent for the Parliament to confer on the President the power of the Legislature of the State to make laws. Indeed, by the aforesaid clause (a), the Parliament can not only confer on the President the power of the State Legislature to make laws but it can even authorise the President to delegate the power so conferred to any authority to be specified by him in that behalf. The marginal note to Article 357 speaks of the "Exercise of Legislative powers"

> under the proclamation issued under Article 356. There cannot be the slightest doubt that not only the power exercised by the President under Article 357(1)(a) but even the power exercised by his delegate under that clause is legislative in character. It is therefore not true to say that, under our Constitution, the exercise of legislative power by the legislature properly so called is the only source of law. Ordinances issued by the President and the Governors and the laws made by the President or his delegate under Article 357 (1) (a) partake fully of legislative character and are made in the exercise of legislative power, within the contemplation of the Constitution.
>
> It is thus clear that the Constituent Assembly was of the view that the President's power to legislate by issuing an ordinance is as necessary for the peace and good government of the country as the Parliament's power to legislate by passing laws. The mechanics of the President's legislative power was devised evidently in order to take care of urgent situations which cannot brook delay. The Parliamentary process of legislation is comparatively tardy and can conceivably be time-consuming. It is true that it is not easy to accept with equanimity the preposition that the executive can indulge in legislative activity but the Constitution is what it says and not what one would like it to be. The Constituent Assembly indubitably thought, despite the strong

and adverse impact which the Governor-General's ordinance-making power had produced on the Indian Community in the pre-indepence era, that it was necessary to equip the president with legislative powers in urgent situations. After all, the Constitution makers had to take into account life's realities. As observed by Shri Seervai in 'Constitutional Law of India' (2nd Ed., p. 16), "Grave public inconvenience would be caused if on an Act, like the Bombay Sales Tax Act, being declared void no machinery, existed whereby a valid law could be promptly promulgated to take the place of the law declared void". Speaking for the majority in R.C. Cooper v. Union of India(l), Shah J. said: "The President is under the Constitution not the repostory of the legislative power of the Union, but with a view to meet extraordinary situations demanding immediate enactment of laws, provision is made in the Constitution investing, the President with power to legislate by promulgating ordinances." The Constituent Assembly therefore conferred upon the executive the power to legislate, not of course intending that the said power should be used recklessly or by imagining a state of affairs to exist when, in fact, it did not exist; nor, indeed, intending that it should be used mala fide in order to prevent the people's elected representatives from passing or rejecting a Bill after a free and open discussion, which is of the essence of democratic process. Having conferred upon the executive the power to legislate by ordinances, if the circumstances were such as to make the exercise of that power necessary, the Constituent Assembly subjected that power to the self-same restraints to which a law passed by the legislature is subject. That is the compromise which they made between the powers of Government and the liberties of the people. Therefore, in face of the provisions to which we have already referred, it seems to us impossible to accept Shri Garg's contention that a ordinance made by the President is an executive and not a legislative act. An ordinance issued by the President or the Governor is as much law as an Act passed by the Parliament and is, fortunately and unquestionably, subject to the same inhibitions. In those inhibitions, lies the safety of the people. The debates of the Constituent Assembly (Vol. 8, Part V, Chapter III, pp 201 to 217) would show that the power to issue ordinances was regarded as a necessary evil. That power was to be used to meet extra-ordinary situations and not perverted to serve political ends. The Constituent Assembly held forth, as it were, an assurance to the people that an extraordinary power shall not be used in order to perpetuate a fraud on the Constitution which is conceived with so much faith and vision. That assurance must in all events be made good and the balance struck by the founding fathers between the powers of the Government and the liberties of the people not disturbed or destroyed.

The next contention of Shri Garg is that even assuming that the power to issue ordinances is legislative and not executive in character, ordinance is not 'law' within the meaning of Article 21 of the Constitution. That article provides that "No person shall be deprived of his life or personal liberty except according to procedure established by law". It is contended by the learned counsel that the decision of this Court in A. K. Gopalan(1) establishes that the supremacy of the legislature is enshrined in Article 21 as a fundamental right in order to afford protection to the life

and liberty of the people R against all executive powers and, therefore, the supremacy of the legislature cannot be replaced by making the executive supreme by allowing it to promulgate ordinances which have the effect of depriving the people of their life and liberty. The extent of protection afforded to the right conferred by Article 21 consists, according to counsel, in the obligation imposed upon a democratic legislature to devise a fair, just and reasonable procedure for attenuating the liberties of the people. Since the very object of Article 21 is to impose restrains on the power of the executive in the matter of deprivation of the life and liberty of the people, it is absurd, so the argument goes, to concede to the executive the power to deprive the people of the right conferred by Article 21 by issuing an ordinance. The argument, in other words is that the executive cannot under any conditions or circumstances be permitted to liberate itself from the restraints of Article

21. Shri Garg says that if ordinances are not excluded from the precious area of life and liberty covered by Article 21, it is the executive which will acquire the right to trample upon the freedoms of the people rather than the people acquiring the fundamental right to life and liberty. It is also urged that by elevating ordinances into the status of laws, the principle of separation of powers, which is a part of the basic structure of the Constitution, shall have been violated. An additional limb of the argument is that an ordinance can never be said to 'establish' a procedure, because it has a limited duration and it transient in character.

In one sense, these contentions of Shri Garg stand answered by what we have already said about the true nature and character of the ordinance-making power. The contention that the word 'law' in Article 21 must be construed to mean a law made by the legislature only and cannot include an ordinance, contradicts directly the express provisions of Articles 123 (2) and 367(2) of the Constitution. Besides, if an ordinance is not law within the meaning of Article 21, it will stand released from the wholesome and salutary restraint imposed upon the legislative power by Article 13(2) of the Constitution.

The contention that the procedure prescribed by an ordinance cannot be equated with the procedure established by law is equally unsound. The word 'established' is used in Article 21 in order to denote and ensure that the procedure prescribed by the law must be defined with certainty in order that those who are deprived of their fundamental right to life or liberty must know the precise extent of such deprivation. The decision of this Court in State of Orissa v. Bhupendra Kumar Bose(1), and Mohammadbhai Khudabux Chhipa & Anr. v. The State of Gujarat & Anr(2), illustrate that enduring rights and obligations can be created by ordinances. The fact that any particular law has a temporary duration is immaterial for the purposes of Article 21 so long as the procedure prescribed by it is definite and reasonably ascertainable. In fact, the Preventive Detention laws were in their inception of a temporary character since they had a limited duration. They were only extended from time to time.

The argument of the petitioner that the fundamental right conferred by Article 21 cannot by taken away by an ordinance really seeks to add a proviso to Article 123(1) to the following effect: "Provided that such ordinances shall not deprive any person of his right to life or personal liberty conferred by Article 21 of the Constitution."; An amendment substantially to that effect was moved in the Constituent Assembly by Shri B. Pocker Sahib, but was rejected by the Constituent Assembly, (see Constituent Assembly Debates, Vol. 8, p. 203). Speaking on the amendment moved by Shri Pocker Dr. Ambedkar said: "Clause (3) of Article 102 lays down that any law made by the President under the provisions of Article 102 shall be subject to the same limitations as a law made by the legislature by the ordinary process. Now, any law made in the ordinary process by the legislature is made subject to the provisions contained in the Fundamental Rights articles of this Draft Constitution. That being so, any law made under the provisions of Article 102 would also be automatically subject to the provisions relating to fundamental rights of citizens, and any such law therefore will not be able to over-ride those provisions and there is no need for any provision as was suggested by my friend, Mr. Pocker in his amendment No. 1796" (page 214). It may be mentioned that Draft Article 102 corresponds to the present Article 123 of the Constitution.

Another answer to Shri Garg's contention is that what Article 21 emphasise is that the deprivation of the right to life or liberty must be brought about by a State-made law and not by the rules of natural law (See A.K Gopalan (supra) at pages 111, 169, 199, 229, 236 and 308, 309). Reference may usefully be made in this behalf to a few representative decisions which illustrate that Article 21 takes in laws other than those enacted by the legislature. In Re: Sant Ram(1), the Rules made by the Supreme Court; in State of Nagaland v. Ratan Singh,(2) the Rules made for the governance of Nagaland Hills District; in Govind v. State of Madhya Pradesh & Anr.(3) the Regulations made under the Police Act; in Ratilal Bhanji Mithani v. Asitt. Collector of Customs, Bombay & Anr.,(4) the Rules made by the High Court under Article 225 of the Constitution; and in Pandit M.S.M. Sharma v. Shri SriKrishna Sinha & Anr.(5), the Rules made by a House of Legislature under Article 208, were all regarded as lying down procedure established by 'law' for the purposes of Article 21.

We must therefore reject the contention that ordinance is not 'law' within the meaning of Article 21 of the Constitution.

There is no substance in the argument that the ordinance-making power, if extended to cover matters mentioned in Article 21, will destroy the basic structure of the separation of powers as envisaged by the Constitution. In the first place, Article 123(1) is a part of the Constitution as originally enacted; and secondly, our Constitution does not follow the American pattern of a strict separation of powers.

We may here take up for consideration some of the submissions made by Shri Tarkunde on the validity of the National Security ordinance. He contends that the

power to issue an ordinance under Article 123 is subject to the pre- conditions that circumstances must exist which render it necessary for the president to take immediate action. The power to issue an ordinance is conferred upon the President in order to enable him to act in unusual and exceptional circumstances. Therefore, according to Shri Tarkunde, unusual and exceptional circumstances must be show to exist, they must be relevant on the question of the necessity to issue an ordinance and they must be such as to satisfy a reasonable person that, by A reason thereof it was necessary to take immediate action and issue all ordinance. The legislative power to issue an ordinance being conditional, the question as regards the existence of circumstances which compelled the issuance of ordinance is justiciable and it is open to this Court, says Shri Tarkunde, to determine whether the power was exercised on the basis of relevant circumstances which establish the necessity to take immediate action or whether it was exercised for a collateral purpose. In support of this contention, Shri Tarkunde relies on the circumstance that the amendment introduced in Article 123 by the 38th Constitution Amendment Act, 1975, was deleted by the 44th Constitution Amendment Act, 1978. Section 2 of the 38th Amendment Act introduced clause (4) in Article 123 to the following effect:

"Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in clause (1) shall be final and conclusive and shall not be questioned in any Court on any ground."

This amendment was expressly deleted by section 16 of the 44th Amendment Act. Shri Tarkunde says that the deletion of the particular clause is a positive indication that the Parliament did not consider it safe or proper to entrust untrammeled powers to the executive to issue ordinances. It therefore decided that the President's satisfaction should not be "final and conclusive" and that it should be open to judicial scrutiny. Shri Tarkunde added that the exercise of a conditional power is always subject to the proof of conditions and no distinction can be made in this regard between conditions imposed by a statute and conditions imposed by a constitutional provision. Relying on section 106 of the Evidence Act, Shri Tarkunde says that circumstances which necessitated the passing of the ordinance being especially within the knowledge of the executive, the burden lies upon it to prove the existence of those circumstances.

It is strongly pressed upon us that we should not avoid the decision of these points on the plea that they involve political questions. Shri Tarkunde distinguishes the decision in the Rajasthan Assembly Dissolution Case(2) on this aspect by saying that Article 356 which was under

consideration in that case uses language which is much wider than that of Article 123. He relies on Seervai's observation in the Constitutional Law of India' (2nd Edition, Volume III pages 1795 and 1797) to the effect that "there is no place in our Constitution for the doctrine of The political question", since that doctrine is based on, and is a consequence of, a rigid separation of powers in the U.S Constitution and our Constitution is not based on a rigid separation of powers. Reliance is placed by Shri Tarkunde on the decision in the Privy Purse case(1) in which Shah, J. Observed

that "Constitutional mechanism in a democratic polity does not contemplate existence of any function which may qua the citizens be designated as political and orders made in exercise whereof are not liable to be tested for their validity before the lawfully constituted courts". In the same case Hegde J., said that "There is nothing like a political power under our Constitution in the matter of relationship between the executive and the citizens' We see the force of the contention that the question whether the pre-conditions of the exercise of the power conferred by Article 123 are satisfied cannot be regarded as a purely political question. The doctrine of the political question was evolved in the United States of America on the basis of its Constitution which has adopted the system of a rigid separation of powers, unlike ours. In fact, that is one of the principal reasons why the U.S. Supreme Court had refused to give advisory opinions.(2) In Baker v. Carr(3) Brennan J. said that the doctrine of political question was "essentially a function of the separation of powers". There is also a sharp difference in the position and powers of the American President on one hand and the President of India on the other. The President of the United States exercises executive power in his own right and is responsible not to the Congress but to the people who elect him. In India, the executive power of the Union is vested in the President of India, but he is obliged to exercise it on the aid and advice of his Council of Ministers. The President's "satisfaction" is therefore nothing but the satisfaction of his Council of Ministers in whom the real executive power resides. It must also be mentioned that in the United States itself, the doctrine of the political question has come under a cloud and has been the subject matter of adverse criticism It is said that all that the doctrine really means is that in the exercise of the power of judicial review, the courts must adopt a 'prudential' attitude, which requires that they should be wary of deciding upon the merit of any issue in which claims of principle as to the issue and claims of expediency as to the power and prestige of courts are in sharp conflict. The result, more or less, is that in America the phrase "political question" has become "a little more than a play of words".

The Rajasthan case is often cited as an authority for the proposition that the courts ought not to enter the "polical thicket". It has to be borne in mind that at the time when that case was decided, Article 356 contained clause (5) which was inserted by the 38th Amendment, by which the satisfaction of the President mentioned in clause (1) was made final and conclusive and that satisfaction was not open to be questioned in any court on any ground. Clause (5) has been deleted by the 44th Amendment and, therefore, any observations made in the Rajasthan case on the basis of that clause cannot any longer hold good. It is arguable that the 44th Constitution Amendment Act leaves no doubt that judicial review is not totally excluded in regard to the question relating to the President's satisfaction.

There are, however, two reasons why we do not propose to discuss at greater length the question as regards the justiciabilty of the President's satisfaction under Article 123 (1) of the Constitution. In the first place, the ordinance has been replaced by an Act. It is true, as contended by Shri Tarkunde, that if the question as regards the justiciability of the President's satisfaction is not to be considered

for the reason that the ordinance has become an Act the occasion will hardly ever arise for considering that question, because, by the time the challenge made to an ordinance comes up for consideration before the Court, the ordinance almost invariably shall have been replaced by an Act. All the same, the position is firmly established in the field of constitutional adjudiction that the Court will decide no more than needs to be decided in any particular case. Abstract questions present interesting challenges, but it is for scholars and text-book writers to unravel their mystique. It is not for the courts to decide questions which are but of academic importance.

The other reason why we are not inclined to go into the question as regards the justiciability of the President's satisfaction under Article 123 (1) is that on the material which is placed before us, it is impossible for us to arrive at a conclusion one way or the other. We are not sure whether a question like the one before us would be governed by the rule of burden of proof contained in section 106 of the Evidence Act, though we are prepared to proceed on the basis that the existence of circumstances which led to the passing of the ordinance is especially within the knowledge of the executive. But before casting the burden on the executive to establish those circumstances, at least a prima facie case must be made out by the challenger to show that there could not have existed any circumstances necessitating the issuance of the ordinance. Every casual or passing challenge to the existence of circumstances, which rendered it necessary for the President to take immediate action by issuing an ordinance, will not be enough to shift the burden of proof to the executive to establish those circumstances. Since the petitioners have not laid any acceptable foundation for us to hold that no circumstances existed or could have existed which rendered it necessary for the President to take immediate action by promulgating the impugned ordinance, we are unable to entertain the contention that the ordinance is unconstitutional for the reason that the pre-conditions to the exercise of the power conferred by Article 123 are not fulfilled. That is why we do not feel called upon to examine the correctness of the submission made by the learned Attorney General that in the very nature of things, the "satisfaction" of the President which is the basis on which he promulgates an ordinance is founded upon materials which may not be available to others and which may not be disclosed without detriment to public interest and that, the circumstances justifying the issuance of the ordinance as well as the necessity to issue it lie solely within the President's judgment and are, therefore, not justiciable.

The two surviving contentions of Shri Garg that the power to issue an ordinance can operate on a virgin land only and that Articles 14, 19 and 21 will be reduced to a dead letter if the executive is permitted to take away the life or liberty of the people by an ordinance, need not detain us long. The Constitution does not impose by its terms any inhibition on the ordinance-making power that it shall not be used to deal with a subject matter which is already covered by a law made by the Legislature. There is no justification for imposing any such restriction on the ordinance making power, especially when an ordinance, like any law made by the Legislature, has to comply with the mandate of Article 13 (2) of the Constitution. Besides, legislative activity, properly so called, has proliferated so enormously in recent times that it is difficult to discover a virgin land or a fresh field on which the ordinance making power can operate, as if on a clean slate. To-day, there is possibly no subject under the sun which the Legislature has not touched.

As regards Articles 14, 19 and 21 being reduced to a dead letter, we are unable to appreciate how an ordinance which is subject to the same constraints as a law made by the Legislature can, in its practical operation, result in the obliteration of these articles. The answer to this contention is again to be found in the provisions contained in Article 13 (2).

That disposes of the contentions advanced by the various parties on the validity of the ordinance. We must mention that in a recent judgment dated October 20, 1981 delivered by a Constitution Bench of this Court in Writ Petition No. 355 of 1981 (the Bearer Bonds case(1), the question as regards the nature and scope of the ordinance- making power has been discussed elaborately. We adopt the reasoning of the majority judgment in that case.

The argments advanced on behalf of the various petitioners can be broadly classified under six heads: (1) The scope, limits and justiciability of the ordinance-making power; (2) The validity of Preventive Detention in the light of the severe deprivation of personal liberty which it necessarily entails; (3) The effect of the non-implemention of the 44th Amendment in so far as it bears upon the Constitution of the Advisory Boards; (4) The vagueness of the provisions of the National Security Act, authorizing the detention of persons for the reasons mentioned in section 3 of the Act; (5) The unfairness and unreasonableness of the procedure before the Advisory Boards: and (6) The unreasonableness and harshness of the conditions of detention. We have dealt with the first question fully though the impugned ordinance has been replaced by an Act, since the question was argued over several days and arises frequently as frequently as ordinances are issued. All that needs have been said was said on that question by the various counsel and the relevant data was fully placed before us. We will now turn to the second question relating to the validity of Preventive Detention as a measure for regulating the liberties of the subject.

There can be no doubt that personal liberty is a precious right. So did the founding fathers believe at any rate because, while their first object was to give unto the people a Constitution whereby a Government was established, their second object, equally important, was to protect the people against the Government. That is why, while conferring extensive powers on the Governments like the power to declare an emergency, the power to suspend the enforcement of fundamental rights and the power to issue ordinances, they assured to the people a Bill of Rights by Part III of the Constitution, protecting against executive and legislative despotism those human rights which they regarded as fundamental. The imperative necessity to protect those rights is a lesson taught by all history and all human experience. Our Constitution makers had lived through bitter years and seen an alien government trample upon human rights which the country had fought hard to preserve. They believed like Jefferson that "an elective despotism was not the government we fought for." And therefore, while arming the government with large powers to prevent anarchy from within and conquest from without, they took care to ensure that those powers were not abused to mutilate the liberties of the people.

But, the liberty of the individual has to be subordinated, within reasonable bounds, to the good of the people. Therefore, acting in public interest, the Constituent Assembly made provisions in Entry 9 of List I and Entry 3 of List III, authorising the Parliament and the State legislatures by Article 246 to pass laws of preventive detention. These entries read thus:

Entry 9, List I:

"Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India ' persons subjected to such detention." Entry 3, List III:

"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."

The practical need and reality of the laws of preventive detention find concrete recognition in the provisions of Article 22 of the Constitution. Laws providing for preventive detention are expressly dealt with by that article and their scope appropriately defined. "The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited.....,it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions" (see The Queen v. Burah. The legislative power in respect of preventive detention is expressly limited to the specific purpose mentioned in Entry 9, List I and Entry 3, List III. It is evident that the power of preventive detention was conferred by the Constitution in order to ensure that the security and safety of the country and the welfare of its people are not put in peril. So long as a law of preventive detention operates within the general scope of the affirmative words used in the respective entries of the union and concurrent lists which give that power and so long as it does not violate any condition or restriction placed upon that power by the Constitution, the Court cannot invalidate that law on the specious ground that it is calculated to interfere with the liberties of the people. Khanna J., in his judgment in the Habeas Corpus case has dwelt upon the need for preventive detention in public Interest.

The fact that England and America do not resort to preventive detention in normal times was known to our Constituent Assembly and yet it chose to provide for it, sanctioning its use for specified purposes. The attitude of two other well-known democracies to preventive detention as a means of regulating the lives and liberties of the people was undoubtedly relevant to the framing of our Constitution. But the framers having decided to adopt and legitimise it, we cannot declare it unconstitutional by importing our notions of what is right and wrong. The power to judge the fairness and justness of procedure established by a law for the purposes of Article 21 is one thing: that power can be spelt out from the language of that article. Procedural safeguards are the handmaids of equal justice and since, the power of the government is colossal as compared with the power of an individual, the freedom of the individual can be safe only if he has a guarantee that he will be treated fairly. The power to decide upon the justness of the law itself is quite another thing: that power springs from a 'due process' pro vision such as is to be found in the 5th and 14th Amendments of the American Constitution by which no person can be deprived of life, liberty or property "without due process of law".

In so far as our Constitution is concerned, an amendment was moved by Pandit Thakur Dass Bhargava to draft Article 15, which corresponds to Article 21 of the Constitution, for substituting the words "without due process of law" for the words "except according to procedure established by law". Many members spoke on that amendment on December 6, 1948, amongst whom were Shri K.M. Munshi, who was in favour of the amendment, and Sir Alladi Krishnaswamy Ayyar who, while explaining the view of the Drafting Committee, said that he was "still open to conviction". The discussion of the amendment was resumed by the Assembly on December 13, 1948 when, Dr. Ambedkar, who too had an open mind on the vexed question of 'due process', said:

> "...I must confess that I am somewhat in a difficult position with regard to article 15 and the amendment moved by my friend Pandit Bhargava for the deletion of the words "procedure according to law" and the substitution of the words "due process".
>
> "The question of "due process" raises, in my judgment, the question of the relationship between the legislature and the judiciary. in a federal constitution, it is always open to the judiciary to decide whether any particular law passed by the legislature is ultra vires or intra vires in reference to the powers of legislation which are granted by the Constitution to the particular legislature.... The 'due process' clause, in my judgment, would give the judi-
>
> ciary the power to question the law made by, the legislature on another ground. That ground would be whether that law is in keeping with certain fundamental principles relating to the rights of the individual. In other words, the judiciary would be endowed with the authority to question the law not merely on the ground whether it was in excess of the authority of the legislature, but also on the ground whether the law was good law, apart from the question of the powers of the legislature making the law. The question now raised by the introduction of the phrase 'due process' is whether the judiciary should be given the additional power to question the laws made by the State on the ground that they violate certain fundamental principles. "There are dangers on both sides. For myself I cannot altogether omit the possibility of a Legislature packed by party men making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the Legislature and by dint of their own individual conscience or their bias or their prejudices be trusted to determine which law is good and which law is bad. It is a rather a case where a man has to sail between Charybdis and Seylla and I therefore would not say anything. I would leave it to the House to decide in any way it likes." (See Constituent Assembly Debates Vol. VII, pp. 999-1001) The amendment was then put to vote and was negatived. In view of this background and in view of the fact that the Constitution, as originally conceived and enacted, recognizes preventive detention as a permissible means of abridging the liberties of the people, though subject to the limitations imposed by Part III, we must reject the contention that preventive detention is basically impermissible under the Indian Constitution.

The third contention centres around the 44th Constitution Amendment Act, 1978, with particular reference to section 1(2) and section 3 thereof. Section 1 reads thus "1. Short title and commencement.-

(1) This Act may be called the Constitution (Forty- fourth Amendment) Act, 1978.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act."

Section 3 reads thus:

"3. Amendment of article 22.-In article 22 of the Constitution.-

(a) for clause (4), the following clause shall be substituted, namely:

"(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than two months unless an Advisory Board constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court has reported before the expiration of the said period of two months that there is in its opinion sufficient cause for such detention:

Provided that an Advisory Board shall 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:

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

Explanation.-In this clause, 'appropriate High Court' means,

(i) in the case of the detention of a person in pursuance of an order of detention made by the Government of India or an officer or authority subordinate to that Government, the High Court for the Union territory of Delhi;

(ii) in the case of the detention of a person in pursuance of an order of detention made by the Government of any State (other than a Union territory), the High Court for that State; and

(iii) in the case of the detention of a person in pursuance of an order of detention made by the administrator or a Union territory or an officer or authority subordinate to such administrator, such High Court as may be specified by or under any law made by Parliament in this behalf".

(b) in clause (7),-

(i) sub-clause (a) shall be omitted;

(ii) sub-clause (b) shall be re-lettered as sub-

clause (a); and

(iii) sub-clause (c) shall be re-lettered as sub-

clause (b) and in the sub-clause as so-

relettered, for the words, brackets, letter and figure "sub-clause (a) of clause (4)", the word, brackets and figure "clause (4)"

shall be substitued."

Clause (4) of Article 22 of the Constitution to which the above amendment was made by the 44th Amendments reads thus:

"22. (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)."

Clause (7) of Article 22 to which also amendment was made by the 44th Amendment reads thus-

"22. (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) clause (4);

(b) the maximum period for which any person may in any class or classes of case 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 44th Amendment Act received the assent of the President under Article 368 (2) on April 30, 1979. Most of the provisions of the 44th Amendment were brought into force with effect from June 20, 1979 by a notification issued by the Central Government on June 19. 1979. The rest of the provisions of the Amendment were brought into force with effect from August 1, 1979 except section 3 whereby Article 22 was amended, which has not yet been brought into force. The position, as it stands today from the Government's point of view, is that advisory Boards can be constituted to consist of persons who are, or have been, or are qualified to the appointed as, Judges of a High Court in accordance with the provisions of Article 22 (4) (a) in its original form, The amendment made to that article by section 3 of the 44th Amendment not having been brought into force by the Central Government by issuing a notification under section 1(2), it is not necessary, according to the Union Government, to constitute Advisory Boards in accordance with the recommendation of the Chief Justice of the appropriate High Court and consisting of a Chairman and not less than two other Members, the Chairman being a serving Judge of the appropriate High Court and the other Members being serving or retired Judges of any High Court.

Before adverting to the arguments advanced before us on the question of the 44th Amendment, it must be mentioned that the National Security ordinance which came into force on September 22, a 1980 provided by clause (9) for the constitution of Advisory Boards strictly in accordance with the provisions of section 3 of the 44th Amendment Act, in spite of the fact that the aforesaid section was not brought into force. The National Security Act was passed on December 27, 1980 replacing the ordinance retrospectively. Section 9 of the Act makes a significant departure from clause (9) of the ordinance by providing for the constitution of Advisory Boards in accordance with Article 22(4) in its original form and not in accordance with the amendment made to that article by section 3 of the 44th Amendment Act.

The arguments advanced before us by various counsel, bearing on the 44th Amendment have different facets and shall have to be considered separately. The main thrust of Dr. Ghatate's argument is that the Central Government was under an obligation to bring section 3 of the 44th Amendment into force within a reasonable time after the President gave his assent to the Amendment and since it has failed so far to do so, this Court must, by a mandamus, ask the Central Government to issue a notification under section 1(2) of the Amendment, bringing it into force without any further delay. Alternatively, Dr. Ghatate contends that clause (2) of section I of the 44th Amendment is ultra vires the amending power conferred upon the Parliament by Article 368 of the Constitution. He argues: The power to amend the Constitution is vested in the Parliament by Article 368, which cannot be delegated to the executive. By such delegation, the Parliament has created a parallel constituent body which is impermissible under the terms of Article 368. Sub-section (2) of section I of the 44th Amendment Act vests an uncontrolled power in the executive to amend the Constitution at its sweet will, which is violative of the basic structure of the Constitution. Section 1(2) is also bad because by conferring an unreasonable, arbitrary and unguided power on the executive, it violates Articles 14 and 19 which are in integral part of the basic structure of the Constitution.

Shri Tarkunde does not ask for a mandamus, compelling the Central Government to bring section 3 of the 44 the Amendment 13 Act into force. He challenges the Central Government's failure to bring section 3 into force as mala fide and argues: By refusing to bring section 3 into force within a reasonable time without any valid reason, the Central Government has flouted the constituent decision of the Parliament arbitrarily, which is violative of Article

21. No law of preventive detention can be valid unless it complies with Article 22 of the Constitution, particularly with clause (4) of that Article. Since the National Security Act does not provide for the constitution of Advisory Boards in accordance with section 3 of the 44th Amendment Act, the whole Act is bad. There was an obligation upon the Central Government to bring the whole of the 44th Amendment into force within a reasonable time, since section 1 (2) cannot be construed as conferring a right of veto on the executive to nullify or negate a constitutional amendment. The bringing into force of a constitutional amendment when such power is left to the executive, may be conceivably deferred for reasons arising out of the inherent nature of the provisions which are to be brought into force. But the executive cannot defer or postpone giving effect to a constitutional amendments for policy reasons of its own which are opposed to the policy of the constituent body as reflected in the constitutional amendment. The fact that the National Security Ordinance provided by clause (9) for the constitution of Advisory Boards in accordance with the provisions of the 44th Amendment shows that no administrative difficulty was envisaged or felt in bringing the particular provision into force. The National Security Act dissolves the Advisory Boards Constituted under the ordinance in accordance with the 44th Amendment and substitutes them by Advisory Boards whose composition is contrary to the letter and spirit of that Amendment.

Shri Jethamalani, like Shri Tarkunde, relies upon the provisions of the 44th Amendment in regard to the constitution of Advisory Boards in support of the contention that the National Security Act is bad for not compliance with section 3 of the Amendment, despite the fact that the said section has not been brought into force. No Act passed by a legislature, according to Shri Jethamalani, can flout the constituent view or decision of the Parliament, whether or not the Constitutional Amendment has been brought into force. In any event, contends the learned counsel, even if section 3 of the 44th Amendment Act has not been brought into force, the wisdom of that Amendment, in so far as it bears on the composition of Advisory Boards, is available to the Court. The view of the Constituent body on that question cannot but be regarded as reasonable, and to the extent that the provisions of the impugned Act run counter to that view, that Act must be held to be unreasonable and for that reason, struckdown.

Both Dr, Ghatate and Shri Garg contend that despite the provisions of section 1 (2) of the 44th Amendment Act, Article 22 of the Constitution stood amended on April 30, 1979 when the 44th Amendment Act received the assent of the President and that there was nothing more that remained to be done by the executive. Section 1 (2) which, according to them is misconceived and abortive must be ignored and served from the rest of the Amendment Act and the rest of it deemed to have come into force on April 30, 1979.

In so far as the arguments set out above bear on the reasonableness of the provisions of the National Security Act, we will consider them later when we will take up for examination the contention that

the Act is violative of Articles 19 and 21 on account of the unreasonableness or unfairness of its provisions and of the procedure prescribed by it. At this juncture we will limit ourselves to a consideration of those arguments in so far as they bear upon the interpretation of section 1 (2) of the 44th Amendment Act, the consequences of the failure of Central Government to issue a notification under that provision for bringing into force the provisions of section 3 within a reasonable time and the question as to whether, despite the provisions contained in section 1(2), the 44th Amendment Act must be deemed to have come into force on the date on which the President gave his assent to it. The point last mentioned raises the question as to whether section 1(2) of the 44th Amendment Act is severable from the rest of its provisions, if that section is bad for any reason.

The argument arising out of the provisions of Article 368 (2) may be considered first. It provides that when a Bill whereby the Constitution is amended is passed by the requisite majority, it shall be presented to the President who shall give his assent to the Bill, "and thereupon the Constitution shall stand amended in accordance with the terms of the Bill." This provision shows that a constitutional amendment cannot have any effect unless the President gives his assent to it and secondly, that nothing more than the President's assent to an amendment duly passed by the Parliament is required, in order that the Constitution should stand amended in accordance with the terms of the Bill. It must follow from this that the Constitution stood amended in accordance with the terms of the 44th Amendment Act when the President gave his assent to that Act on April 30, 1979. We must then turn to that Act for seeing how and in what manner the Constitution stood thus amended. The 44th Amendment Act itself prescribes by section 1(2) a pre-condition which must be satisfied before any of its provisions can come into force. That pre-condition is the issuance by the Central Government of notification in the official gazette, appointing the date from which the Act or any particular provision thereof will come into force, with power to appoint different dates for different provisions. Thus, according to the very terms of the 44th Amendment, none of its provisions can come into force unless and until the Central Government issues a notification as contemplated by section 1(2).

There is no internal contradiction between the provisions of Article 368(2) and those. Of section 1(2) of the 44th Amendment Act. Article 368(2) lays down a rule of general application as to the date from which the constitution would stand amended in accordance with the Bill assented to by the President. Section 1(2) of the Amendment Act specifies the manner in which that Act or any of its provisions may be brought into force. The distinction is between the Constitution standing amended in accordance with the terms of the Bill assented to by the President and the date of the coming into force of the Amendment thus introduced into the Constitution. For determining the date with effect from which the Constitution stands amended in accordance with the terms of The Bill one has to turn to the date on which the President gave, or was obliged to give, his assent to the Amendment. For determining the date with effect from which the Constitution, as amended, came or will come into force, one has to turn to the notification, if any, issued by the Central Government under section 1(2) of The Amendment Act.

The Amendment Act may provide that the amendment introduced by it shall come into force immediately upon the President giving his assent to the Bill or it may provide that the amendment shall come the force on a future date. Indeed, no objection can be taken to the Constituent body

itself appointing a specific future date with effect from which the Amendment Act will come into force, and if that be so, different dates can be appointed by it for bringing into force different provisions of the Amendment Act. The point of the matter is that the Constitution standing amended in accordance with the terms of the Bill and the amendment thus introduced into the Constitution coming into force are two distinct things. Just as a law duly passed by the legislature can have no effect unless it comes or is brought into force, similarly, an amendment of the Constitution can have no effect unless it comes or is brought into force. The fact that the Constituent body may itself specify a future date or dates with effect from which the Amendment Act or any of its provisions will come into force shows that there is no antithesis between Article 368(2) of the Constitution and section 1(2) of the 44th Amendment Act. The expression of legislative or constituent will as regards the date of enforcement of the law or Constitution is an integral part thereof. That is why it is difficult to accept the submission that, contrary to the expression of the constituent will, the amendments introduced by the 44th Amendment Act came into force on April 30, 1979 when the President gave his assent to that Act. The true position is that the amendments introduced by the 44th Amendment Act did not become a part of the Constitution on April 30, 1979. They will acquire that status only when the Central Government brings them into force by issuing a notification under section 1(2) of the Amendment Act.

The next question for consideration is whether section 1(2) of the 44th Amendment Act is ultra vires the power conferred of the Parliament by Article 368 to amend the Constitution. The argument is that the constituent power must be exercised by the Constituent body itself and it cannot be delegated by it to the executive or any other agency. For determining this question, it is necessary to bear in mind that by 'constituent power' is meant that power to frame or amend the Constitution. The power of amendment is conferred upon the Parliament by Article 368 (1), which provides that the Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of the Constitution in accordance with the procedure laid down in that article. The power thus conferred on the Parliament is plenary subject to the limitation that it cannot be exercised so as to alter the basic structure or framework of the Constitution. It is well-settled that the power conferred upon the Parliament by Article 245 to make laws is plenary within the field of legislation upon which that power can operate. That power, by the terms of Article 245, is subject only to the provisions of the Constitution. The constituent power, subject to the limitation aforesaid, cannot be any the less plenary that the legislative power, especially when the power to amend the Constitution and the power to legislate are conferred on one and the same organ of the State, namely, the Parliament. The Parliament may have to follow a different procedure while exercising its constituent power under Article 368 than the procedure which it has to follow while exercising its legislative power under Article 245. But the obligation to follow different procedures while exercising the two different kinds of power cannot make any difference to the width of the power. In either event, it is plenary, subject in one case to the constraints of the basic structure of the Constitution and in the other, to the provisions of the Constitution.

The contention raised by the petitioners, that the power to appoint a date for bringing into force a constitutional amendment is a constituent power and therefore it cannot be delegated to an outside agency is without any force. It is true that the constituent power, that is to say, the power to amend any provision of the Constitution by way of an addition, variation or repeal must be exercised by the

Parliament itself and cannot be delegated to an outside agency. That is clear from Article 368 (1) which defines at once the scope of the constituent power of the Parliament and limits that power to the Parliament. The power to issue a notification for bringing into force the provisions of a Constitutional amendment is not a constituent power because, it does not carry with it the power to amend the Constitution in any manner. It is, therefore, permissible to the Parliament to vest in an outside agency the power to bring a Constitutional amendment into force. In the instant case, that power is conferred by the Parliament on another organ of the State, namely, the executive, which is responsible to the Parliament for all its actions. The Parliament does not irretrievably lose its power to bring the Amendment into force by reason of the empowerment in favour of the Central Government to bring it into force. If the Central Government fails to do what, according to the Parliament, it ought to have done, it would be open to the Parliament to delete section 1 (2) of the 44th Amendment Act by following the due procedure and to bring into force that Act or any of its provisions.

We need not enter into the much debated question relating to the delegation of legislative powers. In The Queen v. Burah the Privy Council upheld the delegated power to bring a law into force in a district and to apply to it, the whole or part of the present or future laws which were in force in other districts. In Russell v. The Queen it upheld the provision that certain parts of an Act should come into force only on the petition of a majority of electors. In Hodge v. The Queen, it upheld the power conferred upon a Board to create offences and annex penalties. The American authorities on the question of the validity of delegated powers need not detain us because, the theory that a legislature is a delegate of the people and therefore, it cannot delegate its power to another does not hold true under our Constitution. The executive, under our Constitution, is responsible to the legislature and is not independent of it as in the United States. The three Privy Council decisions to which we have referred above were considered by this Court in Re Delhi Laws Act case, which is considered as a leading authority on the question of delegated legislation. The Reference made in that case by the President under Article 143(1) of the Constitution to the Supreme Court, in regard to the validity of certain laws, was necessitated by the decision of the Federal Court in Jatindra Nath Gupta v. State of Bihar in which it was held by the majority that the power to extend the operation of an Act for a further period of one year with such modification as May be specified was a legislative power and that the provisions of section 1(3) of that Act which delegated that power to an outside agency was bad. One of the questions which was referred to this Court in Delhi Laws Act case was whether section 7 of the Delhi Laws Act, 1912 was ultra vires the Legislature which passed that Act. That section provided that the Provincial Government may by a notification extend with such restrictions and modifications as it thinks fit to the Province of Delhi or any part thereof any enactment which is in force in any part of British India at the date of such notification. The difficulty of discovering the ratio of the seven judgments delivered in the Delhi Laws Act case is well-known. There is, however, no difference amongst the learned Judges in their perception and understanding of what was actually decided in the three Privy Council cases to which we have referred and which were discussed by them. They read the Privy Council decisions as laying down that conditional legislation is permissible whereby the legislature entrusts to an outside agency the discretionary power to select the time or place to enforce the law. As stated by Shri H.M. Seervai in his "Constitutional Law of India" (2nd ed. at p. 1203: "The making of laws is not an end in itself, but is a means to an end, which the legislature desires to secure. That end may be secured directly by the law itself. But there

are many subjects of legislation in which the end is better secured by extensive delegation of legislative power". There are practical difficulties in the enforcement of laws contemporaneously with their enactment as also in their uniform extension to different areas. Those difficulties cannot be foreseen at the time when the laws are made. It, therefore, becomes necessary to leave to the judgment of an outside agency the question as to when the law should be brought into force and to which areas it should be extended from time to time. What is permissible to the Legislature by way of conditional legislation cannot be considered impermissible to the Parliament when, in the exercise of its constituent power, it takes the view that the question as regards the time of enforcement of a Constitutional amendment should be left to the judgement of the executive. We are, therefore, of the opinion that section 1 (2) of the 44th Amendment Act is not ultra vires the power of amendment conferred upon the Parliament by Article 368 (1) of the Constitution.

We may now take up for consideration the question which was put in the forefront by Dr. Ghatate, namely, that since the Central Government has failed to exercise its power within a reasonable time, we should issue a mandamus calling upon it to discharge its duty without any further delay. Our decision on this question should not be construed as putting a seal of approval on the delay caused by the Central Government in bringing the provisions of section 3 of the 44th Amendment Act into force. That Amendment received the assent of the President on April 30, 1979 and more than two and half years have already gone by without the Central Government issuing a notification for bringing section 3 of the Act into force. But we find ourselves unable to intervene in a matter of this nature by issuing a mandamus to the Central Government obligating it to bring the provisions of section 3 into force. The Parliament having left to the unfettered judgment of the Central Government the question as regards the time for bringing the provisions of the 44th Amendment into force, it is not for the Court to compel the Government to do that which, according to the mandate of the Parliament, lies in its discretion to do when it considers it opportune to do it. The executive is responsible to the Parliament and if the Parliament considers that the executive has betrayed its trust by not bringing any provision of the Amendment into force, it can censure the executive. It would be quite anomalous that the inaction of the executive should have the approval of the Parliament and yet we should show our disapproval of it by issuing a mandamus. The Court's power of judicial review in such cases has to be capable of being exercised both positively and negatively, if indeed it has that power; positively, by issuing a mandamus calling upon the Government to act and negatively by inhibiting it from acting. If it were permissible to the Court to compel the Government by a mandamus to bring a Constitutional amendment into force on the ground that the Government has failed to do what it ought to have done, it would be equally permissible to the Court to prevent the Government from acting, on some such ground as that, the time was not yet ripe for issuing the notification for bringing the Amendment into force. We quite see that it is difficult to appreciate what practical difficulty can possibly prevent the Government from bringing into force the provisions of section 3 of the 44th Amendment, after the passage of two and half year. But the remedy, according to us, is not the writ of mandamus. If the Parliament had laid down an objective standard or test governing the decision of the Central Government in the matter of enforcement of the Amendment, it may have been possible to assess the situation judicially by examining the causes of the inaction of the Government in order to see how far they bear upon the standard or test prescribed by the Parliament. But, the Parliament has left the matter to the judgment of the Central Government without prescribing any objective norms. That makes it

difficult for us to substitute our own judgement for that of the Government on the question whether section 3 of the Amendment Act should be brought into force. This is particularly so when, the failure of the Central Government to bring that section into force so far, can be no impediment in the way of the Parliament in enacting a provision in the National Security Act on the lines of that section. In fact. the Ordinance rightly adopted that section as a model and it is the Act which has wrongly discarded it. It is for these reasons that we are unable to accept the submission that by issuing a mandamus, the Central Government must be compelled to bring the provisions of section 3 of the 44th Amendment into force. The question as to the impact of that section which, though a part of the 44th Amendment Act, is not yet a part of the Constitution, will be considered later when we will take up for examination the argument as regards the reasonableness of the procedure prescribed by the Act.

We have said at the very outset of the discussion of this point that our decision on the question as to whether a mandamus should be issued as prayed for by the petitioners, should not be construed as any approval on our part of the long and unexplained failure on the part of the Central Government to bring section 3 of the 44th Amendment Act into force. We have no doubt that in leaving it to the judgment of the Central Government to decide as to when the various provisions of the 44th Amendment should be brought into force, the Parliament could not have intended that the Central Government may exercise a kind of veto over its constituent will by not ever bringing the Amendment or some of its provisions into force. The Parliament having seen the necessity of introducing into the Constitution a provision like section 3 of the 44th Amendment, it is not open to the Central Government to sit in judgment over the wisdom of the policy of that section. If only the Parliament were to lay down an objective standard to guide and control the discretion of the Central Government in the matter of bringing the various provisions of the Act into force, it would have been possible to compel the Central Government by an appropriate writ to discharge the function assigned to it by the Parliament. In the past, many amendments have been made by the Parliament to the Constitution. some of which were given retrospective effect, some were given immediate effect, while in regard to some others, the discretion was given to the Central Government to bring the Amendments into force. For example, sections 3 (1) (a) and (4) of the Constitution (First Amendment) Act, 1951 gave retrospective effect to the amendments introduced in Articles 19 and 31 by those sections. The 7th Amendment. 1956, fixed a specific date on which it was to come into force. The 13th Amendment, 1962, provided by section 1 (2) that it shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint. That amendment was brought into force by the Central Government on December 1, 1963. The 27th Amendment, 1971 brought section 3 thereof into force at once, while the remaining provisions were to come into force on a date appointed by the Central Government, which was not to be earlier than a certain date mentioned in section 1(2) of the Amending Act. Those remaining provisions were brought into force by the Central Government on February 15, 1972. The 32nd Amendment, 1973, also provided by section 1 (2) that it 11 shall come into force on a date appointed by the Central Government. That amendment was brought into force on July 1, 1974. The 42nd Amendment, 1976. by which the Constitution was recast extensively, gave power to the Central Government to bring it into force. By a notification dated January 1, 1977 parts of that Amendment were brought into force in three stages (see Basu's Commentary on the Indian Constitution, Ed. 1977, Volume C, Part III, page 134). Certain sections of that Amendment, which were not brought into force, were repealed by

section 45 of the 44th Amendment.

It is in this background that the Parliament conferred upon the Central Government the power to bring the provisions of the 44th Amendment Act into force. The Parliament could not have visualised that, without any acceptable reason, the Central Government may fail to implement its constituent will. We hope that the Central Government will, without further delay, bring section 3 of the 44th Amendment Act into force. That section, be it remembered, affords to the detenu an assurance that his case will be considered fairly and objectively by an impartial tribunal.

As regards the argument that section 1(2) of the 44th Amendment Act is bad because it vests an uncontrolled power in the executive, we may point out, briefly, how similar and even more extensive delegation of powers to the executive has been upheld by this Court over the years. In Sardar Inder Singh v. State of Rajasthan, section 3 of the Rajasthan (Protection of Tenants) Ordinance provided that it shall remain in force for a period of two years unless that period is further extended by the Rajpramukh. It was held by this Court that section 3, in so far as it authorised the Rajpramukh to extend the life of the ordinance, fell within the category of conditional legislation and was ultra vires. The Court dissented from the view expressed in Jetindra Nath Gupta v. The State of Bihar, (supra) that the power to extend the life of an enactment cannot validly be conferred on an outside authority. In Sita Ram Bisaambhar Dayal and Ors. v. State of U.P. and others, section 3D (1) of the U.P. Sales Tax Act, 1948, which was challenged on the ground of excessive delegation, provided for levying taxes at such rates as may be prescribed by the State Government not exceeding the maximum prescribed. While rejecting the challenge, Hegde, J. speaking for the Court observed:

> "However much one might deplore the "New Despotism" of the executive, the very complexity of the modern society and the demand it makes on its Government have set in motion force which have made it absolutely necessary for the legislatures to entrust more and more powers to the executive. Text book doctrines evolved in the 19th Century have become out of date".

In Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. v. The Assistant Commissioner of Sales Tax, the question which arose for determination was whether the provisions of section 8 (2) (b) of the Central Sales Tax Act, 1956 suffered from the vice of excessive delegation because the Parliament, in not fixing the rate itself and in adopting the rate applicable to the sale or purchase of good inside the appropriate State, had not laid down any legislative policy, abdicating thereby its legislative function. Rejecting this contention Khanna, J., who spoke for himself and two other learned Judges observed that the growth of the legislative power of the executive is a significant development of the twentieth century and that provision was therefore made for delegated legislation to obtain flexibility, elasticity, expedition and opportunity for experimentation. Mathew, J. speaking on behalf of himself and Ray, C.J. agreed with the conclusion that section 8 (2)

(b) did not suffer from the vice of excessive delegation of legislative power. The decisions bearing on the subject of excessive delegation have been surveyed both by Khanna, J. and Mathew, J. in their respective judgments. In M.K. Pasiah and Sons v, The Excise Commissioner, it was contended for the appellants that the power to fix the rate of Excise Duty conferred by section 22 of the Mysore

Excise Act of 1965 on the Government was bad for the reason that it was an abdication by the State legislature of its essential legislative function. The Court, speaking through Mathew, J. upheld the validity of section 22. We are unable to appreciate that the constituent body can be restrained from doing what a legislature is free to do. We are therefore unable to accept the argument that section 1 (2) confers an uncontrolled power on the executive and is, by its unreasonableness, violative of Articles 14 and 19 of the Constitution.

We are also unable to accept Shri Tarkunde's argument that the Central Government's failure to bring section 3 of the 44th Amendment into force is mala fide. The Parliament has chosen to leave to the discretion of the Central Government the determination of the question as to the time when the various provisions of the 44th Amendment should be brought into force. Delay in implementing the will of the Parliament can justifiably raise many an eye-brow, but it is not possible to say on the basis of such data, as has been laid before us, that the Central Government is actuated by any ulterior motive in not bringing section 3 into force. The other limb of Shri Tarkunde's argument that there is an obligation upon the Central Government to bring the provisions of the 44th Amendment into force within a reasonable time has already been dealt with by us while considering the argument that, since the Government has not brought section 3 into force within a reasonable time, it should be compelled by a writ of mandamus to perform its obligation.

That disposes of all the contentions bearing on the 44th Amendment Act except one, which we will consider later, as indicated already.

The next question arises out of the provisions of section 3(1) and 3 (2) of the National Security Act which, according to the petitioners, are so vague in their content and wide in their extent that, by their application, it is easy for the Central Government or the State Government to deprive a person of his liberty for any fanciful reason which may commend itself to them. Sub-section (1) and (2) of section 3 of the Act read thus:

> "3 (1) The Central Government or the State Government may:- F
>
> (a) if satisfied with respect to any person that 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, or
>
> (b) if satisfied with respect to any foreigner 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) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to

do, make an order directing that such person be detained.

Explanation:-For the purposes of this sub-section, "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" does not include "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as defined in the Explanation to sub-section (1) of section 3 of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980, and accordingly no order of detention shall be made under this Act on any ground on which an order of detention may be made under that Act."

It is contended by Shri Jethmalani that the expressions 'defence of India' 'relations of India with foreign powers', security of India' and 'security of the State' which occur in sub-sections (1) (a) and (2) of section 3 are so vague, general and elastic that even conduct which is otherwise lawful can easily be comprehended within those expressions, depending upon the whim and caprice of the detaining authority. The learned counsel argues: These expressions are transposed from the legislative entries into the aforesaid two sub-sections without any attempt at precision or definition. In so for as 'Defence of India' is concerned, the legislature could have easily indicated the broad content of that expression by including within it acts like inciting armed forces to rebellion, damaging or destroying defence installations or disclosing defence secrets. In the absence of such definition, a statement that corrupt officials are responsible for the purchase of defence equipment from a foreign power, may be considered as falling within the mischief of that expression. The expression 'acting in any manner prejudicial to the relations of India with foreign powers', is particularly open to grave objection because, it can take in any and every piece of conduct. In the absence of a precise definition it is impossible for any person to know with reasonable certainty as to what in this behalf are the limits of lawful conduct which he must not transgress. Even if a person were to say, in the exercise of the right of his free speech and expression, that a foreign power, which is not friendly with India, is adopting ruthless measures to suppress human liberties, it would be open to the detaining authority to detain a person for making that statement. The vice, therefore, of section 3 consists in the fact that the governing factor for the application of that section is the passing and personal opinion of the detaining authority in regard to the security and defence of the country and its external affairs. A cardinal requirement of the rule of law is that citizens must know with certainty where lawful conduct ends and unlawful conduct begins; but more than that, the bureaucrats must know the limits of their power. The vagueness of the expressions used in section 3 confers uncontrolled discretion on the detaining, authority to expand the horizon of their power, to the detriment of the liberty of the subject. Even the right to peaceful demonstration which has been upheld by this Court, may be treated by the detaining authority as falling within the mischief of section 3. The circumstance that, if a habeas corpus petition is filed, the Court may release the detenu is hardly any answer to the vice of the section because, the fundamental principle is that a person cannot be deprived of his liberty on the basis of a vague and uncertain law. The provisions of the Northern Ireland (Emergency Provisions) Act 1973 (Halsbury's Statutes of England, 3rd edition, Volume 43, page 1235) is an instance of a statute which defines with precision the reasons for which a person can be detained. That Act was passed inter alia for the detention of terrorists in Northern Ireland. Section 10 (1) provides that any constable may arrest without warrant any person whom the suspects of being a terrorist. Section 20 of that Act defines the terms 'terrorist' and 'terrorism' with

great care and precision in order that the power of detention may not be abused.

In support of these propositions Shri Jethmalani relies on the decisions of the American Supreme Court in United States of America v. L. Cohen Grocery Company, Champlin Refining Company v. Corporation Commission of the State of Okalahoma, Ignatius Lanzetta v, State of New Jersey and David H. Scull v. Commonwealth of Virginia Ex Rel., Committee on Law Reform and Racial Activities, The ratio of these cases may be Summed up by reproducing the third head note of the case last mentioned:

> "Fundamental fairness requires that a person cannot be sent to jail for a crime he could not with reasonable certainty know he was committing: reasonable certainty in that respect is all the more essential when vagueness might induce individuals to forgo their rights of speech, press, and association for fear of violating an unclear law."

Counsel has also drawn our attention to the decision of this Court in the State of Madhya Pradesh & Anr. v. Baldeo Prasad where a law was struck down on the ground, inter alia that the word 'goonda' is of uncertain import, which rendered unconstitutional a law which permitted goondas to be externed.

In this behalf Dr. Singhvi, intervening on behalf of the Supreme Court Bar Association, has drawn our attention to section 8(3) of the Jammu & Kashmir Public Safety Act, 6 of 1968, which defines the expressions "acting in any manner prejudicial to the security of State 'and' acting in any manner prejudicial to the maintenance of public order.' Where there is a will there is a way, and counsel contends that the way shown with admirable precision by the Jammu & Kashmir Legislature is there for the Parliament to follow, provided its intention is, as it ought to be, that before the people are deprived of their liberty, they must have the opportunity to regulate their conduct in order to ensure that it may conform to the requirements of law.

In making these submissions counsel seem to us to have overstated their case by adopting an unrealistic attitude. It is true that the vagueness and the consequent uncertainty of a law of preventive detention bears upon the unreasonableness of that law as much as the uncertainty of a punitive law like the Penal Code does. A person cannot be deprived of his liberty by a law which is nebulous and uncertain in its definition and application. But in considering the question whether the expressions aforesaid which are used in section 3 of the Act are of that character, we must have regard to the consideration whether concepts embodied in those expressions are at all capable of a precise definition. The fact that some definition or the other can be formulated of an expression does not mean that the definition can necessarily give certainty to that expression. The British Parliament has defined the term "terrorism" in section 28 of the Act of 1973 to mean "the use of violence for political ends", which, by definition, includes 'any use of violence for the purpose of putting the public or any section of the public in fear." The phrases "political ends" itself of an uncertain character and comprehends within its scope a variety of nebulous situations. Similarly, the definitions contained in section 8 (3) of the Jammu and Kashmir Act of 1978 themselves depend upon the meaning of concepts like 'overawe the Government.' The formulation of definitions cannot

be a panacea to the evil of vagueness and uncertainty. We do not, of course suggest that the legislature should not attempt to define or at least to indicate the contours of expressions, by the use, of which people are sought to be deprived of their liberty. The impossibility of framing a definition with mathematical precision cannot either justify the use of vague expressions or the total failure to frame any definition at all which can furnish, by its inclusiveness at least, a safe guideline for understanding the meaning of the expressions used by the legislature. But the point to note is that there are expressions which inherently comprehend such an infinite variety of situations that definitions, instead of lending them a definite meaning, can only succeed either in robbing them of their intended amplitude or in making it necessary to frame further definitions of the terms defined. Acts prejudicial to the 'defence of India', 'security of India', 'security of the State', and 'relations of India with foreign powers' are concepts of that nature which are difficult to encase within the strait-jacket of a definition. If it is permissible to the legislature to enact laws of preventive detention, a certain amount of minimal latitude has to be conceded to it in order to make those laws effective. That we consider to be a realistic approach to the situation. An administrator acting bona fide, or a court faced with the question as to whether certain Acts fall within the mischief of the aforesaid expressions used in section 3, will be able to find an acceptable answer either way. In other words though an expression may appear in cold print to be vague and uncertain, it may not be difficult to apply it to life's practical realities. This process undoubtedly involves the possibility of error but then, there is hardly any area of adjudicative process which does not involve that possibility.

The requirement that crimes must be defined with appropriate definiteness is regarded as a fundamental concept in criminal law and must now be regarded as a pervading theme of our Constitution since the decision in Maneka Gandhi. The underlying principle is that every person is entitled to be informed as to what the State commands or forbids and that the life and liberty of a person cannot be put in peril on an ambiguity. However, even in the domain of criminal law, the processes of which can result in the taking away of life itself, no more than a reasonable degree of certainty has to be accepted as a fact. Neither the criminal law nor the Constitution requires the application of impossible standards and therefore, what is expected is that the language of the law must contain an adequate warning of the conduct which may fall within the prescribed area, when measured by common understanding. In criminal law, the legislature frequently uses vague expressions like 'bring into hatred or contempt', 'maintenance of harmony between different religious groups' or 'likely to cause disharmony or hatred or ill-will', or 'annoyance to the public'. (see sections 124A, 153A(1) (b), 153B (1)(c), and 268 of the Penal Code). These expressions, though they are difficult to define, do not elude a just application to practical situations. The use of language carries with it the inconvenience of the imperfections of language.

We see that the concepts aforesaid, namely, 'defence of India', 'security of India', 'security of the State' and 'relations of India with foreign powers' which are mentioned in section 3 of the Act, are not of any great certainty or definiteness. But in the very nature of things they are difficult to define. We cannot therefore strike down these provisions of section 3 of the Act on the ground of their vagueness and uncertainty. We must, however, utter a word of caution that since the concepts are not defined, undoubtedly because they are not capable of a precise definition, courts must strive to give to those concept a narrower construction than what the literal words suggest. While construing

laws of preventive detention like the National Security Act, care must be taken to restrict their application to as few situations as possible. Indeed, that can well be the unstated premise for upholding the constitutionality of clauses like those in section 3, which are fraught with grave consequences to personal liberty, if construed liberally.

What we have said above in regard to the expressions 'defence of India', 'security of India', 'security of the State' and 'relations of India with foreign powers' cannot apply to the expression "acting in any manner prejudicial to the maintenance of supplies and services essential to the community which occurs in section 3(2) of the Act. Which supplies and services are essential to the community can easily be defined by the Legislature and indeed, legislations which regulate the prices and possession of essential commodities either enumerate those commodities or confer upon the appropriate Government the power to do so. In the absence of a definition of 'supplies and services essential to the community', the detaining authority will be free to extend the application of this clause of subsection (2) to any commodities or services the maintenance of supply of which, according to him, is essential to the community.

But that is not all. The explanation to sub-section (2) gives to the particular phrase in that sub-section a meaning which is not only uncertain but which, at any given point of time, will be difficult to ascertain or fasten upon. According to the Explanation, no order of detention can be made under the National Security Act on any ground on which an order of detention may be made under the Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980. The reason for this, which is stated in the Explanation itself, is that for the purposes of sub- section (2) "acting in any manner prejudicial to the maintenance of supplies essential to the community" does not include "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as defined in the Explanation to subsection (1) of section 3 of the Act of 1980 Clauses (a) and (b) of the Explanation to section 3 of the Act of 1980 exhaust almost the entire range of essential commodities. Clause (a) relates to committing or instigating any person to commit any offence punishable under the Essential Commodities Act, 10 of 1955, or under any other law for the time being in force relating to the control of the production, supply or distribution of, or trade and commerce in, any commodity essential to the community. Clause (b) of the Explanation to section 3 of the Act of 1980 relates to dealing in any commodity which is an essential commodity as defined in the Essential Commodities Act, 1955, or with respect to which provisions have been made in any such other law as is referred to in clause (a). We find it quite difficult to understand as to which are the remaining commodities outside the scope of the Act of 1980, in respect of which it can be said that the maintenance of their supplies is essential to the community. The particular clause in sub-section (2) of section 3 of the National Security Act is, therefore, capable of wanton abuse in that, the detaining authority can place under detention any person for possession of any commodity on the basis that the authority is of the opinion that the maintenance of supply of that commodity is essential to the community. We consider the particular clause not only vague and uncertain but, in the context or the Explanation, capable of being extended cavalierly to supplies, the maintenance of which is not essential to the community. To allow the personal liberty of the people to be taken away by the application of that clause would be flagrant violation of the fairness and justness of procedure which is implicit in the provisions of Article 21.

In so far as "services essential to the community" are concerned, they are not covered by the Explanation to section 3 (2) of the Act. But in regards to them also, in the absence of a proper definition or a fuller description of that or a prior enumeration of such services, it will be difficult for any person to know with reasonable certitude as to which services are considered by the detaining authority as essential to the community. The essentiality of services varies from time to time depending upon the circumstances existing at any given time. There are, undoubtedly, some services like water, electricity, post and telegraph, hospitals, railways, ports, roads and air transport which are essential to the community at all times but, people have to be forewarned if new categories are to be added to the list of services which are commonly accepted as being essential to the community.

We do not, however, prose to strike down the power given to detain persons under section 3 (2) on the ground that they are acting in any manner prejudicial to the maintenance of supplies and services essential to the community. The reason for this is that it is vitally necessary to ensure a steady flow of supplies and services which are essential to the community, and it the State has the power to detain persons on the grounds mentioned in section 3 (1) and the other grounds mentioned in section 3 (2), it must also have the power to pass orders of detention on this particular ground. What we propose to do is to hold that no person can be detained with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies and services essential to the community unless, by a law, order or notification made or published fairly in advance, the supplies and services, the maintenance of which is regarded as essential to the community and in respect of which the order of detention is proposed to be passed, are made known appropriately, to the public.

That disposes of the question as to the vagueness of the provisions of the National Security Act. We will now proceed to the consideration of a very important topic, namely, the reasonableness of the procedure prescribed by the Act. The arguments advanced on this question fall under three sub-heads: (1) the reasonableness of the procedure which is generally prescribed by the Act; (2) the fairness and reasonableness of the substantive provisions in regard to the constitution of Advisory Boards; and (3) the justness and reasonableness of the procedure in the proceedings before the Advisory Boards. The discussion of these questions will conclude this judgment.

Shri Jethmalani attacked the constitutionality of the very National Security Act itself on the ground that it is a draconian piece of legislation which deprives people of their personal liberty excessively and unreasonably, confers vast and arbitrary powers of detention upon the executive and sanctions the use of those powers by following a procedure which is unfair and unjust. The Act, according to the counsel, thereby violates Articles 14, 19 and 21 and is therefore wholly unconstitutional. This argument, it must be stated, is not to be confused with the fundamental premise of the petitioners that, under our Constitution, no law of preventive detention can at all be passed, whatever be the safeguards it provides for the protection of personal liberty. We have already dealt with that argument.

The argument of Shri Jethmalani against the validity of the National Security Act can be disposed of briefly. We need not enter into the controversy which is reflected in the dissenting judgment of Kailasam, J. in Maneka Gandhi as to whether the major premise of Gopalan's case really was that

Article 22 is a complete code in itself and whether because of that premise, the decision in that case that Article 21 excluded the personal freedom conferred by Article 19 (1) is incorrect. We have the authority of the decisions in the Bank Nationalization case, Haradhan Saha, Khudiram, Sambhu Nath Sarkar and Maneka Gandhi for saying that the fundamental rights conferred by the different Articles of Part III of the Constitution are not mutually exclusive and that therefore a law of preventive detention which falls within Article 22 must also meet the requirements of Articles 14, 19 and 21. Speaking for the Court in Khudiram, one of us, Bhagwati, J. said:

> "This question, thus, stands concluded and a final seal is put on this controversy and in view of these decisions, it is not open to any one now to contend that a law of preventive detention, which falls within article 22, does not have to meet the requirement of article 14 or article 19." (page 847) But just as the question as to whether the rights conferred by the different articles of Part III are mutually exclusive is concluded by the aforesaid decisions, the question whether a law of preventive detention is unconstitutional for the reason that it violates the freedoms conferred by Articles 14, 19, 21 and 22 of the Constitution is also concluded by the decision in Haradhan Saha. In that case the validity of the Maintenance of Internal Security Act, 1971 was challenged on the ground that it violates these articles since its pro visions were discriminatory, they constituted an unreasonable infringement of the rights conferred by Article 19, they infringed the guarantee of fair procedure and they did not provide for an impartial machinery for the consideration of the representation made by the detenu to the Government. The Constitution Bench which heard the case considered these contentions and rejected them by holding that the MISA did not suffer from any constitutional infirmity. The MISA was once again challenged in Khudiram, but the Court refused to entertain that challenge on the ground that the question was concluded by the decision in Haradhan Saha and that it was not open to the petitioner to challenge that Act on the ground that some argument directed against the constitutional validity of the Act under Article 19 was not advanced or considered in Haradhan Saha. The Court took the view that the decision in Haradhan Saha must be regarded as having finally decided all questions as to the constitutional validity of MISA on the ground of challenge under Article 19. We would like to add that in Haradhan Saha the challenge to MlSA on the ground of violation of Articles 14, 21 and 22 was also considered and rejected. The question therefore as to whether MISA violated the provisions of these four articles, namely, Articles 14, 19, 21 and 22, must be considered as having been finally decided in Haradhan Saha. Accordingly, we find it impossible to accept the argument that the National Security Act, which is in pari materia with the Maintenance of Internal Security Act, 1971, is unconstitutional on the ground that, by its very nature, it is generally violative of Articles 14, 19, 21 and 22.
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> Though the Act, as a measure of preventive detention, cannot be challenged on the broad and general ground that such Acts are calculated to interfere unduly with the liberty of the people, we shall have to consider the challenge made by the petitioners' counsel, particularly by Shri Jethmalani and Dr. Ghatate, to certain specific

provisions of the Act on the ground that they cause excessive and unreasonable interference with the liberty of the detenus and that the procedure prescribed by those provisions is not fair, just and reasonable. Dr. Ghatate has, with particular emphasis, challenged on these grounds the provisions of sections 3(2), 3(3), 5, 8, 9, 10, 11, 13 and 16 of the Act. Shri Tarkunde challenged the provisions of section 8 and 11(4) of the Act.

We have already dealt with the argument arising out of the provisions of section 3(2) read with the Explanation, by which power is conferred to detain persons in order to prevent them from acting in any manner prejudicial to the maintenance of supplies and services essential to the community. In so far as sub-section (3) of section 3 is concerned, the argument is that it is wholly unreasonable to confer upon the District Magistrate or the Commissioner of Police the power to issue orders of detention for the reasons mentioned in sub-section (2) of section 3. The answer to this contention is that the said power is conferred upon these officers only if the State Government is satisfied that having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of these officers, it is necessary to empower them to take action under sub-section (2). The District Magistrate or the Commissioner of Police can take action under sub-section (2) during the period specified in the order of the State Government only. Another safeguard provided is, that the period so specified in the Order made by the State Government during which these officers can exercise the powers under sub-section (2) cannot, in the first instance, exceed three months and can be extended only from time to time not exceeding three months at any one time. By sub-section (4) of section 3, the District Magistrate or the Commissioner of Police has to report forthwith the fact of detention to the State Govern-

ment and no such order of detention can remain in force for more than 12 days after the making thereof unless, in the meantime, it has been approved by the State Government. In view of these in built safeguards, it cannot be said that excessive or unreasonable power is conferred upon the District Magistrate or the Commissioner of Police to pass orders under sub-section (2).

By section 5, every person in respect of whom a detention order has been made is liable-

(a) to be detained in such place and under such conditions, including conditions as to maintenance, discipline and punishment for breaches of discipline, as the appropriate Government may, by general or special order, specify, and

(b) to be removed from one place of detention to another place of detention, whether hl the same State, or in another State, by order of the appropriate Government.

The objection of the petitioners to these provisions on the ground of their unreasonableness is not wholly without substance. Laws of preventive detention cannot, by the back- door, introduce procedural measures of a punitive kind. Detention without trial is an evil to be suffered, but to no

greater extent and in no greater measure than is minimally necessary in the interest of the country and the community. It is neither fair nor just that a detenu should have to suffer detention in "such place" as the Government may specify. The normal rule has to be that the detenu will be kept in detention in a place which is within the environs of his or her ordinary place of residence. If a person ordinarily resides in Delhi to keep him in detention in a far of place like Madras or Calcutta is a punitive measure by itself which, in matters of preventive detention at any rate, is not to be encouraged. Besides, keeping a person in detention in a place other than the one where he habitually resides makes it impossible for his friends and relatives to meet him or for the detenu to claim the advantage of facilities like having his own food. The requirements of administrative convenience, safety and security may justify in a given case the transfer of a detenu to a place other than that where he ordinarily resides, but that can only be by way of an exception and not as a matter of general rule. Even when a detenu is required to be kept in or transferred to a place which is other than his usual place of residence, he ought not to be sent to any far off place which, by the very reason of its distance, is likely to deprive him of the facilities to which he is entitled. Whatever smacks of punishment must be scruplously avoided in matters of preventive detention.

Since section 5 of the Act provides for, as shown by its marginal note, the power to regulate the place and conditions of detention there is one more observation which we would like to make and which we consider as of great importance in matters of preventive detention. In order that the procedure attendant upon detentions should conform to the mandate of Article 21 in the matter of fairness, justness and reasonableness, we consider it imperative that immediately after a person is taken in custody in pursuance of an order of detention, the members of his household, preferably the parent, the child or the spouse, must be informed in writing of the passing of the order of detention and of the fact that the detenu has been taken in custody. Intimation must also be given as to the place of detention, including the place where the detenu is transferred from time to time. This Court has stated time and again that the person who is taken in custody does not forfeit, by reason of his arrest, all and every one of his fundamental rights. It is therefore, necessary to treat the detenu consistently with human dignity and civilized norms of behavior.

The objection of the petitioners against the provision contained in section 8(1) is that it unreasonably allows the detaining authority to furnish the grounds of detention to the detenu as late as five days and in exceptional cases 10 days after the date of detention. This argument overlooks that the primary requirement of section 8(1) is that the authority making the order of detention shall communicate the grounds of detention to the detenu "as soon as may be". The normal rule therefore is that the grounds of detention must be communicated to the detenu without avoidable delay. It is only in order to meet the practical exigencies of administrative affairs that detaining authority is permitted to communicate the grounds of detention not later than five days ordinarily, and not later than 10 days if there are exceptional circumstances. If there are any such circumstances, the detaining authority is required by section 8(1) to record its reasons in writing. We do not think that this provision is open to any objection.

Sections 9, 10 and 11 deal respectively with the constitution of Advisory Boards? reference to Advisory Boards and procedure of Advisory Boards. We will deal with these three sections a little later while considering the elaborate submissions made by Shri Jethmalani in regard thereto.

Dr. Ghatate's objection against section 13 is that it provides for a uniform period of detention of 12 months in all cases, regard less of the nature and seriousness of the grounds on the basis of which the order of detention is passed. There is no substance in this grievance because, any law of preventive detention has to provide for the maximum period of detention, just as any punitive law like the Penal Code has to provide for the maximum sentence which can be imposed for any offence. We should have thought that it would have been wrong to fix a minimum period of detention, regardless of the nature and seriousness of the grounds of detention. The fact that a person can be detained for the maximum period of 12 months does not place upon the detaining authority the obligation to direct that he shall be detained for the maximum period. The detaining authority can always exercise its discretion regarding the length of the period of detention. It must also be mentioned that, under the proviso to section 13, the appropriate Government has the power to revoke or modify the order of detention at any earlier point of time.

Section 16 is assailed on behalf of the petitioners on the ground that it confers a wholly unwarranted protection upon officers who may have passed orders of detention mala fide. That section provides that no suit or other legal proceeding shall lie against the Central Government or a State Government and no suit, prosecution or other legal proceeding shall lie against a person, for anything in good faith done or intended to he done in pursuance of the Act. The grievance of Dr. Ghatate is that even if an officer has in fact passed an order of detention mala fide, but intended to pass in good faith, he will receive the protection of this provision. We see a contra diction in this argument because, if an officer intends to pass an order in good faith and if he intends to pass the order mala fide he will pass it likewise Moreover, an act which is not done in good faith will not receive the protection of section 16 merely because it was intended to be done in good faith. It is also necessary that the act complained of must have been in pursuance of the Act.

Shri Jethmalani also challenged the provisions of section 16 on the ground of their unreasonableness. He contends that the expression "good faith", which occurs in section 16, has to be construed in the sense in which it is defined in section 3(22) of the General Clauses Act, 10 of 1897, according to which, a thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not. On the contrary, section 52 of the Indian Penal Code provides that nothing is said to be done or believed in "good faith" which is done or believed without due care and attention. If the definition contained in section 52 of the Penal Code were made applicable, a suit or other proceeding could have lain against the detaining authority on the ground that the order was passed carelessly or without a proper application of mind. Counsel contends that since the General Clauses Act would apply, the detaining authority can defend the order and defeat the suit or other proceeding brought against it by showing merely that the order was passed honestly. We do not see any force in this grievance. If the policy of a law is to protect honest acts, whether they are done with care or not, it cannot be said that the law is unreasonable. In fact, honest acts deserve the highest protection. T hen again, the line which divides a dishonest act from a negligent act is often thin and, speaking generally, it is not easy for a defendant to justify his conduct as honest, if it is accompanied by a degree of negligence. The fact, therefore, that the definition contained in section 3(22) of the General Clauses Act includes negligent acts in the category of the acts done in good faith will not always make material difference to the proof of matters arising in proceedings under section 16 of the Act.

That takes us to the last of the many points urged in this case, which relates to the constitution of Advisory Boards and the procedure before them. Three section of the National Security Act are relevant in this context, namely, section 9, 10 and 11. It may he recalled that section 3 of the 44th Constitution Amendment Act, 1978 made an important amendment to Article 22(4) of the Constitution by providing that-

(i) No law of preventive detention shall authorise the detention of any person for more than two months unless an Advisory Board has reported before the expiry of that period that there is in its opinion sufficient cause for such detention;

(ii) the Advisory Board must be constituted in accordance with the recommendation of the Chief Justice of the appropriate High Court; and

(iii) the Advisory Board must consist of a Chairman and not less than two other members, the Chairman being a serving Judge of the appropriate High Court and the other members being serving or retired judges of any High Court.

The main points of distinction between the amended provisions and the existing provisions of Article 22(4) are that whereas, under the amended provisions, (i) the constitution of the Advisory Boards has to be in accordance with the recommendation of the Chief Justice of the appropriate High Court, (ii) the Chairman of the Advisory Board has to be a serving Judge of the appropriate High Court, and (iii) the other members of the Advisory Board have to be serving or retired Judges of any High Court, under the existing procedure, (i) it is unnecessary to obtain the recommendation of the Chief Justice of any High Court for constituting the Advisory Board and (ii) the members of the Advisory Board need not be serving or retired Judges of a High Court: it is sufficient if they are "qualified to be appointed as Judges of a High Court". By Article 217(2) of the Constitution. a citizen of India is qualified for appointment as a Judge of a High Court if he has been advocate of a High Court for ten years.

The distinction between the provisions of the amended and the unamended provisions of Article 22(4) in regard to the constitution of Advisory Boards is of great practical importance from the point of view of the detenu. The safeguards against unfounded accusation and the opportunity for establishing innocence which constitute the hallmark of an ordinary criminal trial are not available to the detenu. He is detained on the basis of ex parte reports in regard to his past conduct, with a view to preventing him from persisting in that course of conduct in future. It is therefore of the utmost importance from the detenu's point of view that the Advisory Board should consist of persons who are independent, unbiased and competent and who possess a trained judicial mind. But the question for our consideration is whether, as urged by Shri Jethmalani, section 9 of the National Security Act is bad for the reason that its provisions do not accord with the requirements of section 3 of the 44th Amendment Act.

We find considerable difficulty in accepting this submission. Earlier in this judgment, we have upheld the validity of section 1(2) of the 44th Amendment Act, by which the Parliament has given to the Central Government the power to bring into force all or any of the provisions of that Act, with

option to appoint different dates for the commencement of different provisions of the Act. The Central Government has brought all the provisions of the 44th Amendment Act into force except one, namely, section 3, which contains the provision for the constitution of Advisory Boards. We have taken the view that we cannot compel the Central Government by a writ of mandamus to bring the provisions of section 3 into force. We have further held that, on a true interpretation of Article 368(2) of the Constitution, it is in accordance with the terms of the 44th Constitution Amendment Act that, upon the President giving his assent to that Act, the Constitution stood amended. Since section 3 has not been brought into force by the Central Government in the exercise of its powers under section 1(2) of the 44th Amendment Act, that section is still not a part of the Constitution. The question as to whether section 9 of the National Security Act is bad for the reason that it is inconsistent with the provisions of section 3 of the 44th Amendment Act, has therefore to be decided on the basis that section 3, though a part of the 44th Amendment Act, it is not a part of the Constitution. If section 3 is not a part of the Constitution, it is difficult to appreciate how the validity of section 9 of the National Security Act can be tested by applying the standard laid down in that section. lt cannot possibly be that both the unamended and the amended provisions of Article 22(4) of the Constitution are parts of the Constitution at one and the same time So long as section 3 of the 44th Amendment Act has not been brought into force, Article 22(4) in its unamended form will continue to be a part of the Constitution and so long as that provision is part of the Constitution, the amendment introduced by section 3 of the 44th Amendment Act cannot become a part of the Constitution. Section 3 of 44th Amendment substitute a new Article 22(4) for the old Article 22(4). The validity of the constitution of Advisory Boards has therefore to be tested in the light of the provisions contained in Article 22(4) as it stands now and not according to the amended Article 22(4). According to that Article as it stands now, an Advisory Board may consist of persons, inter alia, who are qualified to be appointed as Judges of a High Court. Section 9 of the National Security Act provides for the constitution of the Advisory Boards in conformity with that provision. We find it impossible to hold, that the provision of a statute, which conforms strictly with the existing provisions of the Constitution, can be declared bad either on the ground that it does not accord with the provisions of a constitutional amendment which has not yet come into force, or on the ground that the provision of the section is harsh or unjust The standard which the Constitution, as originally enacted, has itself laid down for constituting Advisory Boards, cannot be characterised as harsh or unjust. The argument, therefore, that section 9 of the National Security Act is bad for either of these reasons must fail.

We must hasten to add that the fact that section 3 of the 44th Amendment has not yet been brought into force does not mean that the Parliament cannot provide for the constitution of Advisory Boards in accordance with its requirements the Parliament is free to amend section 9 of the National Security Act so as to bring it in line with section 3 of the 44th Amendment. Similarly, the fact that section 9 provides for the constitution of Advisory Boards consisting of persons "who are, or have been, or are qualified to be appointed as Judges of a High Court" does not mean that the Central Government or the State Governments cannot constitute Advisory Boards consisting of serving or retired Judges of the High Court. The minimal standard laid down in Article 22(4)(a), which is adopted by section 9 of the Act, is binding on the Parliament while making a law of preventive detention and on the executive while constituting an Advisory Board That standard cannot be derogated from. But, it can certainly be improved upon. We do hope that the Parliament will take

the earliest opportunity to amend section 9 of the Act by bringing it in line with section 3 of the 44th Amendment as the ordinance did and that, the Central Government and the State Governments will constitute Advisory Boards in their respective jurisdictions in accordance with section 3, whether or not section 9 of the Act is so amended. We are informed that some enlightened State Governments have already given that lead. We hope that the other Governments will follow suit. After all, the executive must strive to reach the highest standards of justice and fairness in all its actions, whether or not it is compellable by law to adopt those standards. Advisory Boards consisting of serving or retired Judges of High Courts, preferably serving, and drawn from a panel recommended by the Chief Justice of the concerned High Court will give credibility to their proceedings. There will then be a reasonable assurance that Advisory Boards will express their opinion on the sufficiency of the cause for detention, with objectivity, fairness and competence. That way, the implicit promise of the Constitution shall have been fulfilled.

Now, as to the procedure of Advisory Boards. Shri Jethmalani laid great stress on this aspect of the matter and, in our opinion, rightly. Consideration by the Advisory Board of the matters and material used against the detenu is the only opportunity available to him for a fair and objective appraisal of his case. Shri Jethmalani argues that the Advisory Boards must therefore adopt a procedure which is akin to the procedure which is generally adopted by judicial and quasi-judicial tribunals for resolving the issues which arise before them. He assails the procedure prescribed by sections 10 and C 11 of the National Security Act on the ground that it is not in consonance with the principles of natural justice, that it does not provide the detenu with an effective means of establishing that what is alleged against him is not true and that it militates against the requirements of Article 2 l . Learned counsel enumerated twelve requirements of natural justice which, according to him, must be observed by the Advisory Boards. Those requirements may be summed up, we hope without injustice to the argument, by saying that (i) the detenu must have the right to be represented by a lawyer of his choice; (ii) he must have the right to cross-examine persons on whose statements the order of detention is founded; and

(iii) he must have the right to present evidence in rebuttal of the allegations made against him. Counsel also submitted that the Advisory Board must give reasons in support of its opinion which must be furnished to the detenu, that the entire material which is available to the Advisory Board must be disclosed to the detenu and that the proceedings of the Advisory Board must be open to the public. According to Shri Jethmalani, the Advisory Board must not only consider whether the order of detention was justified but it must also consider whether it would have itself passed that order on the basis of the material placed before it, Counsel says that the Advisory Board must further examine whether all the procedural steps which are obligatory under the Constitution were taken until the time of its report, the impact of loss of time and altered circumstances on the necessity to continue the detention and last but not the least, whether there is factual justification for continuing the order of detention beyond the period of three months. Counsel made an impassioned plea that 25 years of the Gopalan jurisprudence have desensitised the community to the perils of preventive detention and that, it is imperative to provide for the maximum safeguards to the detenu in order to preserve and protect his liberty, which can be achieved by making at least the rudiments of due process available to him. How much process is due must depend, according to Shri Jethmalani, on the extent of grievous loss involved in the case. The loss in preventive detention is of the precious

right of persona' liberty and therefore, it is urged, all such procedural facilities must be afforded to the detenu as will enable him to meet the accusations made against him and to disprove them.

First and foremost, we must consider whether and to what extent the detenu is entitled to exercise the trinity of rights before the Advisory Board: (i) the right of legal representation; (ii) the right of cross examination and

(iii) the right to present his evidence in rebuttal. These rights undoubtedly constitute the core of just process because without them, it would be difficult for any person to disprove the allegations made against him and to establish the truth. But there are two considerations of primary importance which must be borne in mind in this regard. There is no prescribed standard of reasonableness and therefore, what kind of processual rights should be made available to a person in any proceeding depends upon the nature of the proceeding in relation to which the rights are claimed. The kind of issues involved in the proceeding determine the kind of rights available to the persons who are parties to that proceeding. Secondly, the question as to the availability of rights has to be decided not generally but on the basis of the statutory provisions which govern the proceeding, provided of course that those provisions are valid. In the instant case, the question as to what kind of rights are available to the detenu in the proceeding before the Advisory Board has to be decided in the light of the provisions of the Constitution, and on the basis of the provisions of the National Security Act to the extent to which they do not of lend against the Constitution.

Turning first to the right of legal representation which is claimed by the petitioners, the relevant article of the Constitution to consider is Article 22 which bears the marginal note "protection against arrest and detention in certain cases." That article provides by clause (l) that 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. Clause (2) requires that every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of 24 hours Of such arrest and that no person shall be detained in custody A beyond the said period without the authority of a magistrate. Clause (3) provides that 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. It may be recalled that clause 4(a) of Article 22 provides that no law of preventive detention shall authorise the detention of a person for a period longer than three months unless the Advisory Board has reported before the expiry of the said period of three months that there is in its opinion sufficient cause for such detention. By clause 7(c) of Article 22, the Parliament is given the power to prescribe by law the procedure to be followed by the Advisory Board in an inquiry under clause 4(a).

On a combined reading of clauses (1) and (3) (b) of Article 22, it is clear that the right to consult and to be defended by a legal practitioner of one's choice, which is conferred by clause (1), is denied by clause 3(b) to a person who is detained under any law providing for preventive detention. Thus, according to the express intendment of the Constitution itself, no person who is detained under any law, which provides for preventive detention, can claim the right to consult a legal practitioner of his choice or to be defended by him. In view of this, it seems to us difficult to hold, by the application of

abstract, general principles or on a priori considerations that the detenu has the right of being represented by a legal practitioner in the proceedings before the Advisory Board, Since the Constitution, as originally enacted, itself contemplates that such a right should not be made available to a detenu, it cannot be said that the denial of the said right is unfair, unjust or unreasonable. It is indeed true to say, after the decision in the Bank Nationalisation case, that though the subject of preventive detention is specifically dealt with in Article 22, the requirements of Article 21 have nevertheless to be satisfied. It is therefore necessary that the procedure prescribed by law for the proceedings before the Advisory Boards must be fair, just and reasonable. But then, the Constitution itself has provided a yardstick for the application of that standard, through the medium of the provisions contained in Article 22(3)(b). Howsoever much we would have liked to hold otherwise, we experience serious difficulty in taking the view that the procedure of the Advisory Boards in which the detenu is denied the right of legal representation is unfair unjust or unreasonable. If Article 22 were silent on the question of the right of legal representation, it would have been possible, indeed right and proper, to hold that the detenu cannot be denied the right of legal representation in the proceedings before the Advisory Boards. It is unfortunate that courts have been deprived of that choice by the express language of Article 22(3)(b) read with Article 22(1).

It is contended by Shri Jethmalani that the provision contained hl clause 3(b) of Article 22 is limited to the right which is specifically conferred by clause (1) of that article and therefore, if the right to legal representation is available to the detenu apart from the provisions of Article 22(1), that right cannot of denied to him by reason of the exclusionary provision contained in Article 22(3)(b). Counsel says that the right of legal representation arises out of the provisions of Articles 19 and 21 and 22(5) and therefore, nothing said in Article 22(3)(b) can affect that right. In a sense we have already answered this contention because, what that contention implies is that the denial of the right of legal representation to the detenu in the proceedings before the Advisory Board is an unreasonable restriction, within the meaning of Article 19(1), on the rights conferred by that article. If the yardstick of reasonableness is provided by Article 22(3), which is as much a part of the Constitution as originally enacted, as Articles 19, 21 and 22(S), it would be difficult to hold that the denial of the particular right introduces an element of unfairness, unjustness or unreasonableness in the procedure of the Advisory Boards. It would be stretching the language of Articles 19 and 21 a little too far to hold that what is regarded as reasonable by Article 22(3)(b) must be regarded as unreasonable within the meaning of those articles. For illustrating this point, we may take the example of law which provides that an enemy alien need not be produced before a magistrate within twenty-four hours of his arrest or detention in custody. If the right of production before the magistrate within 24 hours of the arrest is expressly denied to the enemy alien by Article 22(3)(a), it would be impossible to hold that the said right is nevertheless available to him by reason of the provisions contained in Article 21. The reason is, that the answer to the question whether the procedure established by law for depriving an enemy alien of his personal liberty is fair or just is provided by the Constitution itself through the provisions of Article 22(3)(a). What that provision considers fair, just and reasonable cannot, for the purposes of Article 21, be regarded as unfair unjust or unreasonable.

To read the right of legal representation in Article 22(5) is straining the language of that article. Clause (5) confers upon the detenu the right to be informed of the grounds of detention and the

right to be afforded the earliest opportunity of making a representation against the order of detention. That right has undoubtedly to be effective, but it does not carry with it the right to be represented by a legal practitioner before the Advisory Board merely because, by section 10 of the National Security Act, the representation made by the detenu is required to be forwarded to the Advisory Board for its consideration. If anything, the effect of section 11(4) of the Act, which conforms to Article 22(3)(b), is that the detenu cannot appear before the Advisory Board through a legal practitioner. The written representation of the detenu does not have to be expatiated upon by a legal practitioner.

Great reliance was placed by Shri Jethmalani on the decision of the American Supreme Court in ozie Powell v. State of Alabama(1), in which it was held that the right of hearing includes the right to the aid of counsel because, the right Lo be heard will in many cases be of little help if it did not comprehend the right to be heard by a counsel. Delivering the opinion of the court, Sutherland. J. said:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." (page 170) The aforesaid decision in Powell is unique in more than one way and has to be distinguished. The petitioners therein were charged with the crime of rape committed upon two white girls. At the trial, no counsel was employed on behalf (If petitioners but the trial Judge had stated that "he had appointed all the members of the Bar for the purpose of arranging the defendants and then of course anticipated that the members of the bar would continue to help the defendants if no counsel appeared". The trial of the petitioners was completed within a single day, at the conclusion of which the petitioners were sentenced to death. That verdict was assailed on the ground, inter alia, that the petitioners were denied the right of counsel. It must be stated that the Constitution of Alaboma provided that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel; and a state statute required that the court must appoint a counsel for the accused in all capital cases where the accused was unable to employ one. It is in the light of these provisions and as a requirement of the due process clause of the American Constitution that it was held that the right to hearing, which is a basic

element of due process, includes the right to the aid of counsel. The patent distinction between that case and the matter before us is that our Constitution, at its very inception, regarded it reasonable to deny to the detenu the right to consult and be defended by a legal practitioner of his choice. Secondly, a criminal trial- involves issues of a different kind from those which the Advisory Board has to consider. The rights available to an accused can, therefore, be of a different character than those available to the detenu, consistently with reason and fairplay.

Shri Jethmalani also relied upon another decision of the Supreme Court which is reported in John J. Morrissey v. Lou B. Brewer.(l) In that case, two convicts whose paroles were revoked by the Iowa Board of Parole, alleged that they were denied due process because their paroles were revoked without a hearing. Burger C.J., expressing the view of six members of the court, expressly left upon the question whether a prolee is entitled, in a parole revocation proceeding, to the assistance of counsel. The three other learned Judges held that due process requires that the parolee be allowed the assistance of counsel in the parole revocation proceeding. It must be appreciated that the American decisions on the right to counsel turn largely on the due process clause in the American Constitution. We cannot invoke that clause for spelling out a right as part of a reasonable procedure, in matters wherein our Constitution expressly denies that right.

In support of his submission that for detenu is entitled to appear through a legal practitioner before the Advisory Board, Shri Jethmalani relies on the decisions of this Court in Madhav Haywadanroo Hoskot v. State of Maharashtrara(1) Hussainara Khatoon v. Home Secretary, State of Bihar(2) and Francis Coralie Mullin v. The Administrator, Union Territory of Delhi(3). Speaking for the Court, Krishna Iyer, J. said in Hoskot:

"The other ingredient of fair procedure to a prisoner, who has to seek his liberation through the court process is lawyer's services. Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the carde where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law," Page (204) In Hussainara Khatoon, one of us, Bhagwati, J. voiced the concern by saying:

"It is an essential ingredient reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services avail to him." (Page 103).

These observations were made in the context of rights available to an accused in a criminal trial and cannot be extended to the proceedings of Advisory Boards in order

to determine the rights of detenus in relation to those proceedings The question as regards the kind and nature of rights available in those proceedings has to be decided on the basis of the provisions contained in Article 22 of the constitution and sections 10 and 11 of the National Security Act.

In Francis Caralie Mullin, the petitioner, while in detention, wanted to have an interview with her lawyer, which was rendered almost impossible by reason of the stringent provisions of clause 3(b)(i) of the Conditions of Detention' formulated by the Delhi Administration. In a petition filed in this Court to challenge the aforesaid clause, inter alia, it was held by this Court that the clause was void, since it violated Articles 14 and 21 by its discriminatory nature and unreasonableness. The Court directed that the detenu should be permitted to have an interview with her legal adviser at any reasonable hour during the day after taking an appointment from the Superintendent of the jail and that the interview need not necessarily take place in the presence of an officer of the Customs or Central excise Department. The Court also directed that the officer concerned may watch the interview but not so as to be within the hearing distance of the detenu and the legal adviser. This decision has no bearing on the point which arises before us, since the limited question which was involved in that case was whether the procedure prescribed by clause (3), governing the interviews which a detenu may have with his legal adviser was reasonable. The Court was not called upon to consider the question as regards the right of a detenu to be represented by a legal practitioner before the Advisory Board.

We must therefore, held, regretfully though, that the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board. It is, however, necessary to add an important caveat. The reason behind the provisions contained in Article 22(4) (b) of the Constitution slate is that a legal practitioner should not be permitted So appear before the Advisory Board for any party. The Constitution does not contemplate that the detaining authority or the Government should have the facility of appearing before the Advisory Board with the aid of a legal practitioner but that the said facility should be denied to the detenu. In any case, that is not what the Constitution says and it would be wholly inappropriate to read any such meaning into the provisions of Article 22. Permitting the detaining authority or the Government to appear before the Advisory Board with the aid of a legal practitioner or a legal adviser would be in breach of Article 14, if a similar facility is denied to the detenu. We must therefore make it clear that if the detaining authority or the Government takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner. We are informed that officers of the Government in the concerned departments often appear before the Board and assist it with a view to justifying the detention orders. If that be so, we must clarify that the Boards should not permit the authorities to do indirectly what they cannot do directly; and no one should be enabled to take shelter behind the excuse that such officers are not "legal practitioner" or legal advisers, Regard must be had to the substance and not the form

since, especially, in matters like the proceedings of Advisory Boards, whosoever assist or advises on facts or law must be deemed to be in the position of a legal adviser. We do hope that Advisory Boards will take care to ensure that the provisions of Article 14 are not violated in any manner in the proceedings before them. Serving or retired Judges of the High Court will have no difficulty in under standing this position. Those who are merely "qualified to be appointed" as High Court Judges may have to do a little homework in order to appreciate.

Another aspect of this matter which needs to be mentioned is that the embargo on the appearance of legal practitioner should not be extended so as to prevent the detenu from being aided or assisted by a friend who, in truth and substance, is not a legal practitioner. Every person whose interests are adversely affected as a result of the proceedings which have a serious import, is entitled to be heard in those proceedings and be assisted by a friend. A detenu, taken straight from his cell to the Board's room, may lack the ease and composure to present his point of view. He may be "tongue-tied, nervous, confused or wanting in intelligence", (see Pett v.

Greyhound Racing Association Ltd.)(1), and if justice to be done, he must at least have the help of a friend who can assist him to give coherence to his stray and wandering ideas. Incarceration makes a man and his thoughts dishevelled. Just as a person who is domb is entitled, as he must, to be represented by a person who has speech, even so, a person who finds himself unable to present his own case is entitled to take the aid and advice of a person who is better situated to appreciate the facts of the case and the language of the law. It may be that denial of legal representation is not denial of natural justice per se, and therefore, if a statute excludes that facility expressly, it would not be open to the tribunal to allow it. Fairness, as said by Lord Denning M.R., in Maynard v. Osmond(2) can be obtained without legal representation. But, it is not fair, and the statute does not exclude that right, that the detenu should not even be allowed to take the aid of a friend. Whenever demanded, the Advisory Boards must grant that facility.

Shri Jethmalani laid equally great stress on the need to give the detenu the right of cross-examination and in support of his sub mission in that behalf, he relied on the decisions of the American Supreme Court in Jack R. Goldberg v. John Belly(3), Morrissey, Norvai Goss v. Eileen Lopez(4) and Powell. In Goldberg, Brennan, J., expressing the view of five members of the court said that in almost every setting where important decisions turn on questions of fact, due process requires opportunity to confront and cross-examine adverse witnesses. The learned Judge reiterated the court's observations in Greeny v. McElore(5) to the following effect:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where govern mental action seriously injures an individual, and toe reasonableness of the action depends on fact findings. the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity

> to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment.. This Court has been zealous to protect these right from erosion. It has spoken out not only in criminal cases, ... but also in all types of cases where administrative..... actions were under scrutiny".

Welfare recipients whose aid was terminated or was about to be terminated were held entitled to be given an opportunity to confront and cross-examine the witnesses relied on by the department. The right to confront and cross-examine adverse witnesses was upheld in the other American cases also which counsel has cited.

For reasons which we have stated more than once during the course of this judgment, the decisions of the U.S. Supreme Court which turn peculiarly on the due process clause in the American Constitution cannot be applied wholesale for resolving questions which arise under our Constitution, especially when, after a full discussion of that clause in the Constituent Assembly, the proposal to incorporate it in Article 21 was rejected. In U.S A. itself, Judges have expressed views on the scope of the clause, which are not only divergent but diametrically opposite. For example, in Goldberg on which Shri Jethmalani has placed considerable reliance, Black, J., said in his dissenting opinion that the majority was using the judicial power for legislative purposes and that "they wander out of their filed of vested powers and transgress into the area constitutionally assigned to the Congress and the people". The dissenting opinion of Chief Justice Burger in that case is reported in Mue Wheeler v. John Montgomery(l), in the some volume. Describing the majority opinion as 'unwise and precipitous" the learned Chief Justice said:

"The Court's action today seems another manifestation of the now familiar conventionalizing syndrome: once some presumed flaw is observed, the Court then eagerly accepts the inviation to find a constitutionally "rooted"

remedy. If no provision is explicit on the point it is then seen as implicit" or commanded by the vague and nebulous concept of "fairness".

It is only proper that we must evolve our own solution to problems arising under our Constitution without, of course, spurning the learning and wisdom of our counterparts in comparable jurisdictions.

The principal question which arises is whether the right of cross-examination is an integral and inseparable part of the principles of natural justice. Two fundamental principles of natural justice are commonly recognised, namely, that an adjudicator should be disinterested and unbiased (nemo judex in cause sua) and that, the parties must be given adequate notice and opportunity to be heard (audi alterm partem). There is no fixed or certain standard of natural justice, substantive or

procedural, and in two English cases the expression 'natural justice' was described as one 'sadly lacking in precision'(l) and as 'vacuous'(2). The principles of natural justice are, in fact, mostly evolved from case to case, according to the broad requirements of Justice in the given case.

We do not suggest that the principles of natural justice, vague and variable as they may be, are not worthy of preservation. As observed by Lord Reid in Ridge v. Baldwin(3), the view that natural justice is so vague as to be practically meaningless" is tainted by "the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist". But the importance of the realisation that the rules of natural justice are not rigid norms of unchanging content, consists in the fact that the ambit of those rules must vary according to the context, and they have to be tailored to suit the nature of the proceeding in relation to which the particular right is claimed as a component of natural justice. Judged by this test, it seems to us difficult to hold that a detenu can claim the right of cross-examination in the proceeding before the Advisory Board. First and foremost, cross examination of whom ? The principle that witnesses must be con fronted and offered for cross- examination applies generally to proceedings in which witnesses are examined or documents are adduced in evidence in order to prove a point. Cross-examination then becomes a powerful weapon for showing the untruthfulness of that evidence. In proceedings before the Advisory Board. the question for consideration of the Board is not whether the detenu is guilty of any charge but whether there is sufficient cause for the detention of the person concerned. The detention, it must be remembered, is based not on fact proved either by applying the test of preponderance of probabilities or of reasonable doubt. 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 proceeding of the Advisory Board has therefore to be structured differently from the proceeding of judicial or quasi-judicial tribunals, before which there is a lis to adjudicate upon, Apart from this consideration, 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 identity 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 have in order to disprove the charges against him That is the importance of the statement that the concept of what is just and reasonable is flexible in its scope and calls for such procedural protections as the particular situation demands. Just as there can be an effective hearing without legal E; 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.

In this connection, we would like to draw attention to certain decisions of our Court. In New Prakash Transport Co. Ltd. v. New Suwarna Transport Co. Ltd(1), it was observed that "the question whether the rules of natural justice have been observed in a particular case must itself be judged in the light of the constitution of the statutory body which has to function in accordance with the rules laid down by the legislature and in that sense the rules themselves must vary". In Nagendra Nath

Bora v. Commissioner of Hills Division and Appeals, Assam(1), the aforesaid statement was cited with approval by another Constitution Bench. In State of Jammu Kashmir v. Bakshi Ghulam Mohammed(2), it was argued that the right to hearing included the right to cross-examine witnesses. That argument was rejected by the Court by observing that the right of cross-examination depends upon the circumstances of each case and on the terms of the statute under which the matter is being enquired into. Citing with approval the passage in Nagendra Nath Bora, the Court held that the question as to whether the right to cross-examine was available had to be decided in the light of the fact that it was dealing with a statute under which a Commission of Inquiry was set up for fact-finding purposes and that the report of the Commission had no force proprio vigore.

In support of his submission that the right of cross- examination is a necessary part of natural justice, Shri Jethmalani relies upon the decisions of this Court which are reported in Union of India v. T. R. Varma(3) and Khem Chand v. Chand Union of India(4). It was observed in the first of these two cases that the rules of natural justice require that the party concerned should have the opportunity of adducing the relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, that "he should be given the opportunity of cross-examining the witnesses examined by" the other side and that no materials should be relied on against him without his being given an opportunity of explaining them. In Khem Chand it was held that if the purpose of Article 311(2) was to give the Government servant an opportunity to exonerate himself from the charge and if this opportunity is to be a reasonable one, he should be allowed to show that the evidence against him is not worthy of credence or consideration and, "that he can only do if he is given a chance to cross-examine the witnesses called against him "and to examine himself or any other witnesses in support of his defence. These observations must be understood in the context of the proceedings in which they are made and cannot be taken as laying down a general rule that the right of cross-examination is available as a part of natural justice in each and every proceeding. In both of these cases, the question which arose for consideration of the Court was whether a Government servant, who was dismissed from service, was given "a reasonable opportunity" of showing cause against the action proposed to be taken against him, within the meaning of Article 311(2) of the Constitution. It shall have been noticed that the emphasis in these cases is on the right to cross-examine the witnesses who are examined by the opposite party. In T. R. Varma the right of cross-examination is described as the right in regard to the witnesses examined by the other party while in Khem Chand, the right is described as an opportunity to defend oneself by cross- examining the witnesses produced by the other side. No witnesses are examined in the proceedings before the Advisory Board on behalf of the detaining authority and therefore, the rule laid down in the two decisions on which Shri Jethmalani relies can have no application to those proceedings.

If the debates of the Constituent Assembly are any indication, it would appear that Dr. R. Ambedkar, at any rate, was of the opinion that the detenu should be given the right to cross-examine witnesses before the Advisory Board. In his reply to the debate on the procedure of the Advisory Board, he said on September 16, 1949 that a "pointed question has been asked whether the accused person would be entitled to appear before the Board, cross-examine the witnesses, and make his own statement'. Dr. Ambedkar's answer was that the Parliament should be given the power to prescribe the procedure to be followed by the Advisory Board. That is how clause 7(c) came to be incorporated in Article 22 of the Constitution, giving that power to the Parliament. Pandit Thakur Dass Bhargava

thereafter asked as to what was the position regarding the safeguard of cross- examination. The reply of Dr. Ambedkar, significantly, was:

> "The right of cross-examination is already there in the Criminal Procedure Code and in the Evidence Act. Unless a provincial Government goes absolutely stark mad and takes away these provisions it is unnecessary to make any provision of that sort. Defending includes cross examination."
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> x x x x x x "If you can give a single instance in India where the right of cross-examination has been taken away, I can understand it. I have not seen any such case." (see Constituent Assembly Debates, Vol. 9, pages 1561, 1562, 1563).

Dr. Ambedkar, unfortunately, was not prophetic and the authors of the various Preventive Detention Acts did not evidently share his view. In fact, the right of cross- examination under the Criminal Procedure Code and the Evidence Act, by which Dr. Ambedkar laid great store, has nothing to do with the detenu's right of cross-examination before the Advisory Board. With great respect, Dry Ambedkar seems to have nodded slightly in referring to the pro vision for cross examination under those Acts. Whatever it is, Parliament has not made any provision in the National Security Act, under which the detenu could claim the right of cross-examination and the matter must rest there.

We are therefore of the opinion that, in the proceedings before the Advisory Board, the detenu has no right to cross-examine either the persons on the basis of whose statement the order of detention is made or the detaining authority.

The last of the three rights for which Shri Jethmalani contends is the right of the detenu to lead evidence in rebuttal before the Advisory Board. We do not see any objection to this right being granted to the detenu. Neither the Constitution nor the National Security Act contains any provision denying to the detenu the right to present his own evidence in rebuttal of the allegations made against him. The detenu may therefore offer oral and documentary evidence before the Advisory Board in order to rebut the allegations which are made against him. We would only like to add that if the detenu desires to examine any witnesses, he shall have to keep them present at the appointed time and no obligation can be cast on the Advisory Board to summon them. The Advisory Board, like any other tribunal, is free to regulate its own procedure within the constraints of the Constitution and the statute. It would be open to it, in the exercise of that power, to limit the time within which the detenu must complete his evidence. We consider it necessary to make this observation particulary in view of the fact that the Advisory Board is under an obligation under section 11(1) of the Act to submit its report to the appropriate Government within seven weeks from the date of detention of the person concerned. The proceedings before the Advisory Board have therefore to be completed with the utmost expedition.

It is urged by Shri Jethmalani that the Advisory Board must decide two questions which are of primary importance to the detenu: one, whether there was sufficient cause for the detention of the person concerned and two, whether it is necessary to keep the person in detention any longer after

the date of its report. We are unable to accept this contention. Section 11(2) of the Act provides specifically that the report of the Advisory Board shall specify its opinion "as to whether or not there is sufficient cause for the detention of the person concerned". This implies that the question to which the Advisory Board has to apply its mind is whether on the date of its report there is sufficient cause for the detention of the person. That inquiry necessarily involves the consideration of the question as to whether there was sufficient cause for the detention of the person when the order of detention was passed, but we see no justification for extending the jurisdiction of the Advisory Board to the consideration of the question as to whether it is necessary to continue the detention of the person beyond the date on which it submits its report or beyond the period of three months after the date of detention. The question as to whether there are any circumstances on the basis of which the detenu should be kept in detention after the Advisory Board submits its report, and how long, is for the detaining authority to decide and not for the Board. The question as regards the power of the Advisory Board in this behalf had come up for consideration before this Court in Puranlal Lakhanpal v. Union of India. While rejecting the argument that the words "such detention" which occur in Article 22(4)(a) of the Constitution mean detention for a period longer than three months, the majority held that the Advisory Board is not called upon to consider whether the detention should continue beyond the period of three months. In coming to that conclusion the majority relied upon the decision in Dattatraya Moreshwar Pangarkar v. State of Bombay in which Mukherjea, J., while dealing with a similar question, observed:

> "The Advisory Board again has got to express its opinion only on the point as to whether there is sufficient cause for detention of the person concerned. It is neither called upon nor is 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 under s. 11(1) of the Act confirm the detention order and continue detention of the person concerned for such period as it thinks fit."

The contention that the Board must determine the question as to whether the detention should continue after the date of its report must therefore fail. The duty and function of the Advisory Board is to determine whether there was sufficient cause for detention of the person concerned on the date on which the order of detention was passed and whether or not there is sufficient cause for the detention of that person on the date of its report.

We are not inclined to accept the plea made by the learned counsel that the proceedings of the Advisory Board should be thrown open to the 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 the inquiry which the Advisory Board has to undertake, we do not think that the interests of justice will be served better by giving access to the public to the proceedings of the Advisory Board.

This leaves for consideration the argument advanced by Shri Jethmalani relating to the post-detention conditions applicable to detenus in the matter of their detention. The learned counsel made a grievance that the letters of detenus are censored, that they are not provided with reading or writing material according to their requirements and that the ordinary amenities of life are denied to them. It is difficult for us to frame a code for the treatment of detenus while they are held in detention. That will involve an exercise which . calls for examination of minute details, which we cannot undertake. We shall have to examine each case as it comes before us, in order to determine whether the restraints imposed upon the detenu in any particular case are excessive and unrelated to the object of detention. If so, they shall have to be struck down. We would, however, like to say that the basic commitment of our Constitution is to foster human dignity and the well-being of our people. In recent times, we have had many an occasion to alert the authorities to the need to treat even the convicts in a manner consistent with human dignity. The judgment of Krishna Iyer, J. in Sunil Batra v. Delhi Administration is an instance in point. It highlights that places of incarceration are "part of the Indian earth"

> and that, "the Indian Constitution cannot be held at bay by jail officials 'dressed in a little, brief authority". We must impress upon the Government that the detenus must be afforded all reasonable facilities for an existence consistent with human dignity. We see no reason why they should not be permitted to wear their own clothes, eat their own food, have interview with the members of their families at least once a week and, last but not the least, have reading and writing material according to their reasonable requirement. Books are the best friends of man whether inside or outside the jail.
>
> There is one direction which we feel called upon to give specifically and that is that persons who are detained under the National Security Act must be segregated from the convicts and kept in a separate part of the place of detention. It is hardly fair that those who are suspected of being engaged in prejudicial conduct should be lodged in the same ward or cell were the convicts whose crimes are established are lodged. The evils of "custodial perversity"

are well-known and have even found a place in our law reports. As observed by Krishna Iyer, J. in Sunil Batra, the most important right of the person who is imprisoned is to the integrity of his physical person and mental personality. Even within the prison, no person can be deprived of his guaranteed rights save by methods which are fair, just and reasonable. "In a democracy, a wrong to some one is a wrong to every one" and care has to be taken to ensure that the detenu is not subjected to any indignity. While closing this judgment, we would like to draw attention to what Shah, J. said for the Court in Sampat Prakash v. State of Jammu & Kashmir(2):

> "The petitioner who was present in the Court at the time of hearing of his petition complained that he is subjected to solitary confinement while in detention. It must be emphasised that a detenu is not a convict. Our Constitution, notwithstanding the broad principles of the rule of law, equality and liberty of the individual enshrined therein, tolerates, on account of peculiar conditions pre-

> vailing legislation which is a negation of the rule of law, equality and liberty. But it is implicit in the Constitutional scheme that the power to detain is not a power to punish for offences which an executive authority in his subjective satisfaction believes a citizen to have committed. Power to detain is primarily intended to be exercised in those rare cases when the large interest of the State demand that restrictions shall be placed upon the liberty of a citizen curbing his future activities. The restrictions so placed must consistently with the effectiveness of detention, be minimal."

If any of the persons detained under the National Security Act are at present housed in the same ward or cell where the convicts are housed, immediate steps must be taken to segregate them appropriately. "The Indian human", whenever necessary, has of course "a constant companion-the Court armed with the Constitution" and informed by it.

In the result, the Writ Petitions shall stand disposed of in accordance with the view expressed herein and the orders and directions given above.

GUPTA, J. I find myself unable to agree with the views expressed in the judgment of the learned Chief Justice on two of the points that arise for decision in this batch of writ petitions, one of them relates to the failure of the Central Government to bring into operation the provisions of section 3 of the Constitution (Forty Fourth Amendment) Act, 1978 and the other concerns the question whether an ordinance is 'law' within the meaning of article 21 of the Constitution.

The Constitution (Forty-Fourth Amendment) Act, 1978 received assent of the President on April 30, 1979. Article 368(2) says, inter alia, that after a Bill for the amendment of the Constitution is passed in each House of Parliament by the prescribed majority "it shall be presented to the President who shall give his assent to the Bill and there upon the Constitution shall stand amended in accordance with the terms of the Bill". Section 1(2) of the Constitution (Forty-Fourth Amendment) Act states that the Act "shall come into force on such date as the Central Government, may, by notification in the official Gazette, appoint," and that "different dates may be appointed for different provisions of this Act". Section 3 of the Amendment Act substitutes a new clause A for the existing clause (4) of article 22 of the Constitution which provides inter alia for the constitution of Advisory Boards. The relevant part of section 3 reads as follows;

> "Amendment of article 22.-In article 22 of the Constitution,
>
> (a) for clause (4), the following clause shall be substituted, namely:
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> (4) No law providing for preventive detention shall authorise the detention of a person for a longer period than two months unless an Advisory Board constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court has reported before the expiration of the said period of two months that there is in its opinion sufficient cause for such detention:

Provided that an Advisory Board shall 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 a serving or retired Judges of any High Court."

The provision requiring the Advisory Board to be constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court and that the Chairman of the Advisory Board shall be a serving Judge of the High Court and the other members of the Board shall be serving or retired Judges of any High Court is absent in the existing clause (4) under which persons who are only qualified to be appointed as Judges of a High Court are eligible to be members of the Advisory Board. Many of the provisions of the Act were brought into force on different dates in the year 1979 but the provisions of section 3 were not given effect to for more than one year and seven months when the hearing of these writ petitions commenced on December 9, 1980. Now though more than two and a half years have passed the provisions of section 3 have not yet been brought into force. The question is whether under section 1(2) the Central Government had the freedom to bring into force any of the provisions of the Amendment Act at any time it liked. I do not think that section 1(2) can be construed to mean that Parliament left is to the unfettered discretion or judgment of the Central Government when to bring into force any provision of the Amendment Act. After the Amendment Act received the President's assent, the Central Government was under an obligation to bring into operation the provisions of the Act within a reasonable time; the power to appoint dates for bringing into force the provisions of the Act was given to the Central Government obviously because it was not considered feasible to give effect to all the provisions immediately. After the Amendment Act had received the President's assent the Central Government could not in it discretion keep it in a state of suspended animation for any length of time it pleased. That Parliament wanted the provisions of the Constitution (Forty-Fourth Amendment) Act, 1978 to be made effective as early as possible would appear from its objects and Reasons. The following extract from the objects and Reasons clearly discloses a sense of urgency:

"Recent experience has shown that the fundamental rights, including those of life and liberty, granted to citizens by the Constitution are capable of being taken away by a transient majority. It is, therefore, necessary to provide adequate safeguards against the recurrence of such a contingency in the future and to ensure to the people themselves an effective voice in determining the form of government under which they are to live. This is one of the primary objects of this Bill.

x x x x x x As a further check against the misuse of the Emergency provisions and to put the right to life and liberty on a secure footing, it would be provided that the power to suspend the right to move the court for the enforcement of a fundamental right cannot be exercised in respect of the fundamental right to life and liberty. The right to liberty is further strengthened by the provision that a law for preventive detention cannot authorise, in any case, detention for a longer period than two

> months, unless an Advisory Board has reported that there is sufficient cause for such detention. An additional safeguard would be provided by the requirement that the Chairman of an Advisory Board shall be a serving Judge of the appropriate High Court and that the Board shall be constituted in accordance with the recommendations of the Chief Justice of that High Court."

I have already said that Parliament must have taken into consideration the practical difficulties in the way of the executive in bringing into operation all the provisions of the Act immediately, and by enacting section 1(2) it relied on the Central Government to give effect to them. Now when more than two and a half years have passed since the Constitution (Forty-Forth Amendment) Act, 1978 received the assent of the President, it seems impossible that any such difficulty should still persist preventing the Government from giving effect to section 3 of the Amendment Act. It is interesting to note that clause 9 of the National Security ordinance, 1980 provided for the constitution of Advisory Boards in conformity with article 22 of the Constitution as amended by section 3 of the Constitution (Forty-Fourth Amendment) Act, 1978. This makes it clear that non- implementation of the provisions of section 3 was not due to any practical or administrative difficulty. However, the National Security Act, 1980 which replaced the ordinance does not retain the provision of clause 9 of the ordinance and prescribes the constitution of the Advisory Boards in section 9 in accordance with unamended article 22(4). I do not think it can the seriously suggested that a provision like section 1(2) of the Constitution (Forty-Fourth Amendment) Act empowered the executive to scotch an amendment of the Constitution passed by Parliament and assented to by the President. The Parliament is competent to take appropriate steps if it considered that the executive had betrayed its trust does not make the default lawful or relieve this Court of its duty. I would therefore issue a writ of mandamus directing the Central Government to issue a notification under section 1(2) of the Constitution (Forty- Fourth Amendment) Act, 1978 bringing into force the provisions of section 3 of the Act within two months from this date.

On the other point, I find it difficult to agree that an ordinance is 'law' within the meaning of article 21 of the Constitution. Article 21 reads:

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

The National Security ordinance, 1980 has been challenged on a number of grounds, one of which is that the life and liberty of person cannot be taken away by an ordinance because it is not 'law' within the meaning of article 21. Normally it is the legislature that has the power to make laws. Article 123 of the Constitution deals with the President's power to promulgate ordinances and the nature and effect of an ordinance promulgated under this article, Article 123 is as follows:

> "(1) It at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require.

(2) An ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance-

(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions: and

(b) may be withdrawn at any time by the President.

Explanation-Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purpose of this clause.

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void"

To show that there is no difference between a law passed by Parliament and an ordinance promulgated by the President under article 123 reliance was placed on behalf of the Union of India on clause (2) of the article which says that an ordinance shall have the same force and effect as an Act of Parliament. It was further pointed out that chapter III of part V of the Constitution which includes article 123 is headed "Legislative Powers of the President." Reference was made to article 213 which concerns the power of the Governor to promulgate ordinances: article 213 is in chapter IV of part VI of the Constitution which hears a similar description: Legislative Power of the Governor". From these provisions it was contended that the President in promulgating an ordinance under article 123 exercises his legislative power and therefore an ordinance must be regarded as 'law' within the meaning of article 21. But the nature of the power has to be gathered from the provisions of article 123 and not merely from the heading of the chapter. It is obvious that when something is said to have the force and effect of an Act of Parliament, that is because it is not really an Act of Parliament. Article 123 (2) does say that an Act of Parliament to make the two even fictionally identical. The significance of the distinction will be clear by a reference to articles 356 and 357 which are in part XVIII of the Constitution that contains the emergency provisions. The relevant part of article 356 reads:

"(1) If the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation-

(a) assume to himself all or any of the functions of the Government of the State and all or any or the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;"

Article 357 provides:

(1) Where by a Proclamation issued under clause (1) of article 356, it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent-

(a) for Parliament to confer on the President the power of the Legislature of the State to make laws, and to authorise the President to delegate, subject to such conditions as he may think fit to impose, the power so conferred to any other authority to be specified by him in that behalf;

(b) for Parliament, or for the President or other authority in whom such power to make laws is vested under sub-clause (a), to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities thereof;

(c) x x x x x (2) Any law made in exercise of the power of the Legislature of the State by Parliament or the President or other authority referred to in sub-

clause (a) of clause (1) which Parliament or the President or such other authority would not, but for the issue of a proclamation under article 356, have been competent to make shall, after the Proclamation has ceased to operate, continue in force until altered or repealed or amended by a competent Legislature or other authority." It will appear that whereas an ordinance issued under article 123 has the same force and effect as an Act of Parliament, under article 357(1) (a) Parliament can confer on the President the power of the legislature of the State to make laws. Thus, where the President is required to make laws, the Constitution has provided for it. The difference in the nature of the power exercised by the President under article 123 and under article 357 is clear and cannot be ignored. Under article 21 no person can be deprived of life and liberty except according to procedure established by law. Patanjali Sastri J. in A. K Gopalan v. State observed that the word "established" in article 21 "implies some degree of firmness, permanence and general acceptance". An ordinance which has to be laid before both Houses of Parliament and ceases to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses can hardly be said to have that 'firmness' and 'permanence' that the word 'established' implies. It is not the temporary duration of an ordinance that is relevant in the present context, an Act of Parliament may also be temporary; what is relevant is its provisional and tentative character which is apparent from clause 2 (a) of article 123. On this aspect also the difference between a law made by the President under article 357 and an ordinance promulgated by him under article 123 should be noted. A law made under article 357 continues in force until altered, repealed or amended by a competent legislature or authority; an ordinance promulgated under article 123 ceases to operate at the expiration of six weeks from the reassembly of Parliament at the latest. On behalf of the Union of India learned Attorney General referred to

article 367 (2) to argue that the Constitution itself equates an ordinance with an Act of Parliament. Article 367 (2) reads:

> "Any reference in this Constitution to Acts or laws of, or made by, Parliament, or to Acts or laws of, or made by, the Legislature of a State, shall be construed as including a reference to an ordinance made by the President or, to an ordinance made by a Governor, as the case may be."

Any reference in the Constitution to Acts of Parliament has to be construed as including a reference to an ordinance made by the President as article 367 (2) provides because an ordinance has been given the force and effect of an Act, But clearly an ordinance has this force and effect only over an area where it can validity operate. An invalid ordinance can have no force or effect and if it is not 'law' in the sense the word has been used in article 21, article 367 (2) cannot make it so.

There is also another aspect of the matter. Article 21 not only speaks of a situation in normal times which left no time for the to think of a situation in normal times which left no time for the President to summon Parliament and required him to promulgate ordinances to take away the life or liberty of persons, unless one considered life and liberty as matters of no great importance. However, in view of the opinion of the majority upholding the validity of the ordinance, it is unnecessary to dilate on this aspect.

On all the other points I agree with conclusions reached by the learned Chief Justice.

TULZAPURKAR, J. On the question of bringing into force, section 3 read with section 1(2) of the Constitution (Forty- Fourth Amendment) Act, 1978 I am in agreement with the view expressed by my learned brother A. C. Gupta in his judgment. Barring this aspect, I am in agreement with the rest of the judgment delivered by my Lord the Chief Justice. P.B.R.