A

SAMBHU NATH SARKAR

v.

THE STATE OF WEST BENGAL & ORS.

April 19, 1973

[J. M. SHELAT, ACTING C.J., K. S. HEGDE, A. N. RAY, P. JAGANMOHAN
B REDDY, H.R. KHANNA, A. K. MUKHERJEA AND
Y. V. CHANDRACHUD, JJ.]

The Maintenance of Internal Security Act, (26 *of* 1971), *s.* 17*A—If violates Art.* 14 *and Art.* 22(7) *of the Constitution.*

Constitution of India, 1950, *Art.* 22(4)(*a*) *and* (*b*) *of Art.* 22(7)—*Scope of. Practice—Scope of Supreme Court's Power to review its earlier decisions.*

C The Maintenance of Internal Security Act, 1971, was passed on July 2, 1971. On December 3, 1971, a Proclamation of Emergency was issued and on the next day, the Defence of India Act, 1971, was enacted. Section 6 of the Defence of India Act introduced various amendments and a new section, s. 17A, in the Maintenance of Internal Security Act. Section 17A effectuated 3 main changes: (a) It overrides, by its *non-obstante* clause, the other provisions of the Act; (b) a person may be detained in a class or classes of cases or under the circumstances set out in s. 17A(1) (a) and (b)—namely on the
D ground of prejudicial acts in relation to (i) defence of India, relations with foreign powers and security of India, and (ii) security of the State and maintenance of public order without obtaining the opinion of an Advisory Board for a period longer than 3 months, but not exceeding two years from the date of detention; and (c) the maximum period of detention of such a person can be 3 years or until the expiry of the Defence of India Act, whichever is later. These changes were brought about by Parliament exercising the power contained in Art. 22(4)(b), (7)(a) and (b), in respect of all the heads under Entries 9 and 3 of Lists I and III of the VII Schedule to the Constitution, except the one with respect to main-
E tenance of essential supplies and services.

The petitioner was arrested on January 29, 1972, under s. 3(1) and (2) of the Maintenance of Internal Security Act, and on April 15, 1972, the State Government, after perusing the report of the Advisory Board, confirmed the order of detention under s. 12(1) and directed the detention to continue for 3 years from the date of detention.

In a petition under Art. 32,

F HELD : The petitioner should be released from his detention forthwith.

(1)(a) There is no question of discrimination or violation of Art. 14 as a result of any such discrimination. By the use of the words 'may be detained' in the first part of s. 17A, an unguided discretion has not been conferred on the detaining authority whether to take action under the more drastic provisions of s. 17A or under s. 3(1) read with ss. 10 to 13. [10E]

(i) The opening words in s. 10 'save as otherwise expressly provided in this
G Act', mean that s. 10 would apply only to cases not expressly provided for in the Act, that is it would not apply to cases falling under ss. 17 and 17A. [10B]

(ii) The words 'may be detained' in s. 17A(1) go with the words which follow them, namely, 'without obtaining the opinion of the Advisory Board' and 'in any of the following classes of cases or under any of the following circumstances ....', and hence, are words enabling the authority to detain in certain cases and are not words giving a choice to the authority to apply s. 17A or not. [10C—D]

H (b) Even if the operation of ss. 17A and 10 side by side were to result in any difference in the working of the Act, that difference would not amount to any discrimination, by reason of the provision in s. 17A(2) to the effect that in the case of a person to whom s. 17A(1) applies, s. 10 shall be read subject to the modifications set out therein. [10D—E]

(2) Article 22(4)(a) lays down a rule to which Art. 22(4)(b) read with Art. 22(7)(a) is an exception. In that view, cl. (7)(a) must be construed as a restriction on Parliament's power of making preventive detention laws in the sense that it can depart from the rule laid down in cl. (4)(a) and dispense with reference of cases to an Advisory Board only by a law which prescribes *both* the circumstances under which *and* the class or classes of cases in which, a person may be detained for a period longer than 3 months without obtaining the opinion of an Advisory Board in accordance with cl. (4)(a). Since s. 17A has failed to comply with the requirement of cl. (7)(a), it has to be declared bad as being inconsistent with that clause. [23F—H]

(a) Parliament has no alternative power either to pass a law providing for a longer period of detention than 3 months with the intercession of an Advisory Board, or to enact a law under Art. 22(4)(b) read with Art. 22(7)(a) providing also for a longer detention, but without the intercession of such a Board, for, if such a theory were accepted, it would mean that: (i) Art. 22(4)(a) would be totally nullified by Art. 22(4)(b) read with Art. 22(7)(a), and (ii) whereas State laws providing longer detention would require the intercession of an Advisory Board, such laws passed by Parliament would not. Moreover, the construction, that cl. (4)(b) read with cl. (7)(h) lays down an exception to cl. (4)(a), harmonises the clauses. Therefore, the theory of independent or alternative power of Parliament cannot be accepted. [18E—H; 19C]

(b)(i) An analysis of the 2 clauses, cls. (4) and (7) of Art. 22 shows: (A) that ordinarily, detention provided by a preventive detention law should not be for a period longer than 3 months; (B) that if however such a law does provide for a longer period than 3 months, it must provide for the intercession of an Advisory Board; and (C) that situations may arise when in certain classes of cases Parliament alone should be empowered to enact a law which provides for a longer detention even without the intercession of an Advisory Board. [19A—B]

(ii) The law under cl. 7(a) would be a drastic law, as compared to the one to which cl. (4)(a) would apply, and the presumption would be that such a drastic law would apply to exceptional circumstances and activities expressly and in precise terms described. Circumstances would ordinarily mean situation or events extraneous to the activities of a concerned person or a group of persons, such as riots etc., which might by their pre-existence accentuate the impact of such activities affecting the security of the country or a part of it or the public order. Class or classes of cases, on the other hand, relate to a group or groups of individuals, who, by the nature of their activities fall under one particular group or groups by their common or similar objective or objectives. [21B—C, E]

(iii) The entries 9 in List I and 3 in List III of the VII Schedule lay down the topics in respect of which legislation can be made. They are intended to delineate the bounds within which legislatures can pass detention laws. The purpose of these entries and of Art. 22(7)(a) are distinct. The purpose of Art. 22(7)(a) is to distinguish the ordinary from the exceptional to which only the salutary safeguards provided by cl. (4)(a) would not apply. [21C—E]

(iv) Therefore, mere repetition of the subjects or topics of legislation from the entries would not mean prescribing either the circumstances or the classes of cases to which only, as against the rest of the individuals and their activities, the safeguard of intercession of an independent body would not apply. If enumeration of the heads in the entries were to mean compliance with prescribing of circumstances and classes of cases, Parliament would, in such a law, be dealing with all situations and all classes of cases from the lowest to the most extraordinary or abnormal and not with some only requiring a treatment different from that envisaged by cl. (4)(a); and in such a case, cl. (4)(a) would again be rendered nugatory, for, Parliament can, by enumerating *verbatim* the heads or subjects set out in the entries, do away with the requirement of cl. (4)(a). [20B—F; 21 E—H]

(v) The meaning of the word 'and' in cl. (7)(a) must be held to have its ordinary conjunctive sense, the context in the clause requiring Parliament to prescribe *both* the circumstances *and* the classes of cases in which only consideration by the Board can be dispensed with. Hence, cl. (7)(a) envisages that Parliament should apply its mind and prescribe specific situations *and* types of cases which require a drastic law dispensing with the intervention of an Advisory Board. [22A—B]

A (c) The classification of prejudicial activities set out in Regulation 18B of the British Defence of the Realm Regulations, 1939, in rr. 34(6) and 36(6) of the Defence of India Rules, 1939, and in s. 3(2) of the W. Bengal (Prevention of Violent Activities) Act, 1970, show, that there is no practical difficulty in prescribing specific circumstances under which *and* the classes of cases which need dispensing with the intercession of an Advisory Board. [23F]

(3) This Court would review its earlier decisions if it is satisfied of its
B error or of the baneful effect such a decision would have on the general interest of the public or if it is inconsistent with the legal philosophy of our Constitution and in constitutional matters, this Court would do so more readily than in other branches of law as perpetuation of an error would be harmful to public interest. Nevertheless, this Court will have to bear in mind the accepted rule that earlier decisions are not to be upset except upon a clear compulsion especially when the legislature has acted upon them as perhaps Parliament did, while enacting the impugned s. 17A. [16A—D]

C Majority view on the construction of Art. 22(4)(b) and (7)(a) in *Gopalan* v. *Madras* [1950] S.C.R. 88, over ruled. [23G—H]

The Bengal Immunity Co. Ltd. v. *Bihar*, [1955] 2 S.C.R. 603 and *Legal Remembrancer, State of West Bengal* v. *The Corporation of Calcutta*, [1967] 2 S.C.R. 176, followed.

[The following two questions were left open : ((1) Since the major premise in the majority decision in *Gopalan* that Art. 22 was a self-contained code and
D therefore the provisions of a law made under that Article would not have to be considered in the light of the provisions of Art. 19. was disapproved in *Cooper* v. *Union of India*, [1970] 3 S.C.R. 530, ss. 3 and 8 to 13 of the Maintenance of Internal Security Act, must be declared void as imposing unreasonable restrictions; and (2) the maximum period of detention prescribed by the amended s. 13 and by s. 17A(2)(d) did not satisfy Art. 22(7)(b), since the period fixed by Parliament therein is 3 years or until the expiry of the Defence of India Act whichever is later, which was an uncertain event.] [24A—E]

E ORIGINAL JURISDICTION : Writ Petition No. 266 of 1972.

(Petition under Art. 32 of the Constitution of India for issue of writ in the nature of habeas corpus)

Naranarayan Gooptu, Dilip Sinha, Pulak Ranjan Maulal and *Rathin Das*, for the petitioner.

Niren De, Attorney-General of India, *D. N. Mukherjee* and *G. S.*
F *Chatterjee*, for the respondent.

Niren De, Attorney-General of India, *B. Sen* and *S. P. Nayar*, for Attorney General of India

R. K. Garg and *S. C. Agarwala*, for Intevener Nos. 1 & 4

R. K. Garg and *K. R. Nambiar*, for Intervener No. 2

G *Prodyot Kumar Chakravarthy*, for Intervener No. 3

The Judgment of the Court was delivered by

SHELAT, ACTING C.J., At all material times the petitioner was an employee of the Government of West Bengal in the Collectorate of Hooghly District. He was arrested on January 29, 1972 pursuant to the order of detention dated January 25, 1972 passed by the District
H Magistrate, Hooghly under s. 3(2) read with s. 3(1) of the Maintenance of Internal Security Act, 26 of 1971. The said order was passed "with a view to preventing him from acting in any manner prejudicial to the maintenance of public order". He was served with

the grounds of detention on that very day. The said grounds of detention were in connection with certain incidents alleged to have taken place on April 25, 1971, September 14, 1971, October 12, 1971 and January 19, 1972, as set out therein. A

Before the said order was issued, the petitioner and six others, also Government employees in Hooghly Collectorate, were prosecuted for their alleged parts in the first two incidents on the basis of the first information report dated September 14, 1971 under s. 143/506 of the Penal Code. On March 29, 1972, they were discharged by the Magistrate on a final report of the police dated March 10, 1972. Purusant to the said order of detention, the petitioner was detained and is still in Hooghly jail. B

The mother of the petitioner thereafter filed an application No. 318 of 1972 in the High Court of Calcutta under s. 491 of the Code of Criminal Procedure. In that application the petitioner's detention was challenged only on two grounds, namely, vagueness of the grounds of detention and their irrelevance. On May 29, 1972, the High Court dismissed the said application. The present petition is more comprehensive and for the first time challenges the validity of several provisions of the Act. C D

The record before us shows that all the steps required under the Act have been taken and complied with in the time and manner prescribed by the Act. No objection, therefore, to the petitioner's detention on that ground can be validly taken. The petitioner's case was referred to the Advisory Board constituted under the Act, which reported that there was sufficient cause for his detention. On April 15, 1972, the State Government, on receipt of the said report, confirmed the order of detention under s. 12(1) and directed that detention to continue for three years from the date of detention. The said order of confirmation was duly communicated to the detenu. The petitioner thereafter made his representation to the State Government on August 10, 1972, that is to say, several months after reference of his case to the Board and the said order of confirmation. The said representation was not considered by the State Government as by that time this writ petition had already been filed and was pending before this Court. E F

The order of detention has been challenged in the petition on the following grounds :

(1) that the grounds of detention were vague;

(2) that there was no nexus between the grounds and maintenance of public order; G

(3) that they were mechanically framed without the detaining authority applying his mind;

(4) that the order was *mala fide* and passed for collateral purpose, namely, to victimise the active members of the State Coordination Committee of which the petitioner was one; H

(5) that s. 6(6)(d) and (e) of the Defence of India Act, 42 of 1971 increasing the detention period from 12 months to 3 years by the amendment of s. 13 of the Act has

A treated equally citizens of India and foreigners and has thereby violated Art. 14;

(6) that the said order of confirmation providing three years' detention was *ultra vires* Art. 22.

The District Magistrate by his counter-affidavit denied all the grounds B of challenge to the validity of the said order.

On October 24, 1972, the petitioner applied for urging additional grounds of challenge and on liberty being granted to amend, the petition was amended. Stated briefly, the additional grounds challenged the validity of ss. 3, 5, 8, 11, 12 and 13 of the Act on the grounds of their being unreasonable restrictions and as violating Arts. 14, 19, 21 and 22 by reason of those provisions failing to provide an impartial C authority to consider a detenu's representation, and the means to challenge the materials on which the order is made, the materials placed by the authority before the advisory board and the report of the board based on such materials before government confirmed the detention.

D The hearing of the case started before the Constitution Bench on November 17, 1972 and was heard on that day and again on November 21, 1972 and December 1, 1972. It seems that a contention was then raised as to the validity of s. 17A of the Act which provides for a period of detention for 21 months without consulting an advisory board, which question, the Bench thought, required reconsideration of the decision in *Gopalan* v. *Madras.*(1) The Constitution Bench E thought, therefore, that the case should be referred to a larger bench, and that is how this case has come up before us for disposal.

The Act was passed on July 2, 1971. Its long title shows that it was passed to provide for detention for the purpose of maintenance of internal security and matters connected therewith. Sec. 3(1)(a) empowers the Central and the State Governments to make an order F detaining a person, if satisfied with respect to such person that it is necessary to do so with a view to preventing him from acting in any manner prejudicial to : (i) the defence of India, the relations of India with foreign powers, the security of India, or (ii) the security of the State, or the maintenance of public order, or (iii) the maintenance of supplies and services essential to the community. Sub-s. (2) authorises the exercise of the power of detention under sub-s. (1)(a) by certain G officers named therein, *inter alia,* district magistrates, with respect to matters set out in s. 3(1) (a) (ii) and (iii). Sec. 5 confers power on the appropriate government to remove a person detained under s. 3 from one place of detention to another whether within or outside the State. Sec. 6 provides that such an order shall not be invalid on the ground that the concerned person is detained in a jail outside the jurisdiction of that Government or the officer making the order. Sec. 8 H provides for the communication of grounds for detention to the detenu ordinarily within five days, and in exceptional cases within 15 days

(1) [1950] S.C.R. 88.

from the date of detention. Sec. 9 provides for the constitution of advisory boards. Sec. 10 provides that, save as otherwise provided for in the Act, the appropriate Government shall within 30 days from the date of detention refer every case to the advisory board. Under s. 11, the advisory board has to give its report to the Government within ten weeks from the date of detention. Sub sec. (4) of s. 11 disentities the detenu to appear by any legal practitioner before the board and makes the proceedings before and the opinion of the board confidential. Sec. 12 provides that if the board is of opinion that there is sufficient reason for the detention, the Government may confirm the order and continue such detention for such period as it thinks fit. In case the opinion is that there is no such sufficient cause, the Government has to revoke the detention order. Sec. 13 provides that the maximum period of detention shall be 12 months from the date of detention. Sec. 17 provides that a foreigner, in respect of whom a detention order is passed, may be detained without obtaining the opinion of the advisory board for a longer period than three months, but not exceeding two years in any of the classes of cases, or under any of the circumstances thereinafter set out in sub-cls. (a) to (d) of sub-s. (1), namely, where a foreigner enters or attempts to enter India or is found with arms, ammunition or explosives, or where a foreigner enters or attempts to enter a notified area or is found therein in breach of s. 3 of the Criminal Law Amendment Act, 1961, or where such a foreigner enters or attempts to enter in an area adjoining the borders of India specified under s. 139 of the Border Security Forces, Act, 1968 without a travel document, or where the Central Government has reason to believe that such a foreigner commits or is likely to commit an offence under the Official Secrets Act, 1923. Sec. 17 thus lays down classes of cases in or circumstances under which foreigners can be detained for a period longer than three months without reference to an advisory board.

Art. 19(1) guarantees the rights of freedom of speech and expression, of assembly, to form associations and unions to move freely throughout India, to reside and settle in any part of India and to practise any profession, occupation, trade or business, subject to reasonable restrictions which may be imposed by law as provided by cls. (2) to (6) thereof. Art. 21 guarantees protection of life and liberty, the deprivation of which is not permissible, except in accordance with procedure established by law. Art. 22, by its cls. (1) and (2) guarantees that no person can be detained in custody without his being informed, as soon as may be, of the grounds for his arrest and without being furnished with an opportunity to consult and be defended by a legal practitioner of his choice, and his being produced before the nearest magistrate within 24 hours from his arrest. No such person can be detained for more than that period without the authority of a magistrate. Cl. (3) of Art. 22, however, makes cls. (1) and (2) inapplicable to a person arrested and detained under a law providing for preventive detention. But cl. (4) provides that no law providing for preventive detention shall authorise detention for a period longer than three months unless (a) an advisory board has reported before the expiration of three months that there is sufficient cause for such detention, or (b) such person is detained in accordance with a law made by Parliament under cl. 7(a) and (b).

A Cl. (7) provides that 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-cl. (a) of cl. (4); (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preven-
B tive detention. Parliament under entry 9 of List I of the Seventh Schedule can pass such a law for reasons connected with defence, foreign relations or the security of India, and concurrently with State legislatures under entry 3, List III for reasons connected with the security of the State, the maintenance of public order or the maintenance of supplies and services essential to the community.

C On December 3, 1971, the President issued a proclamation of emergency under Art. 352 of the Constitution. On December 4, 1971, Parliament enacted the Defence of India Act, 42 of 1971. The Act was passed in view of the grave emergency which then existed as proclaimed by the President, and to provide for special measures to ensure public safety and interest, the defence of India and civil defence, for trial of certain offences and for matters connected therewith. Sec.
D 2(3) of the Act provided that it would remain in force during the period of operation of the proclamation of emergency and for six months tthereafter. By sec. 6, the Act introduced amendments in several Acts, one amongst them being the Maintenance of Internal Security Act, 1971. Cl. (d) of sub-s. (6) of s. 6 amended s. 13 of the Act by adding after the words therein "from the date of detention", the words and figures "or until the expiry of the Defence of India Act,
E 1971, whichever is later". By cl. (e) of sub-s. (6) of s. 6, a new section, s. 17A was inserted in the Act. The new section reads as follows :

> "17A. (1) Notwithstanding anything contained in the foregoing provisions of this Act, during the period of operation of the Proclamation of Emergency issued on the 3rd day of December, 1971, any person (including a foreigner) in
> F respect of whom an order of detention has been made under this Act, may be detained without obtaining the opinion of the Advisory Board for a period longer than three months, but not exceeding two years from the date of his detention in any of the following classes of cases or under any of the following circumstances, namely :—
>
> G (a) where such person had been detained with a view to preventing him from acting in any manner prejudicial to the defence of India, relations of India with foreign powers or the security of India; or
>
> (b) where such person had been detained with a view to preventing him from acting in any manner prejudicial to the security of the State or the maintenance of
> H public order.
>
> (2) In the case of any person to whom sub-section (1) applies, sections 10 to 13 shall have effect subject to the following modifications, namely,

(a) in section 10, for the words "shall, within thirty days", the words "may, at any time prior to but in no case later than three months before the expiration of two years" shall be substituted;

(b) in section 11,—

(i) in sub-section (1) for the words "from the date of detention", the words "from the date on which reference is made to it" shall be substituted;

(ii) in sub-section (2), for the words "the detention of the person concerned", the words "the continued detention of the person concerned" shall be substituted;

(c) in section 12, for the words "for the detention", in both the places where they occur, the words "for the continued detention" shall be substituted;

(d) in section 13, for the words "twelve months", the words "three years" shall be substituted."

The new section, s. 17A effectuates three main changes : (1) by its *non-obsante* clause overrides the other provisions of the Act, (2) a person may be detained in a class or classes of cases or under the circumstances set out in sub-cls. (a) and (b) of its sub-s. (1) without obtaining the opinion of an advisory board for a period longer than three months, but not exceeding two years from the date of detention, that is to say, no opinion of an advisory board need now be obtained for 21 months from the date of detention, the first three months of the detention being permissible without such opinion even before the insertion of s. 17A; and (3) the maximum period of detention of such a person can be three years or until the expiry of the Defence of India Act, 1971 whichever is later. These changes have been brought about by Parliament exercising power contained in cl. (4)(b) read with cl. 7(a) and (b) of Art. 22. The power is exercised in respect of classes of cases and circumstances relating to all the heads under entries 9 and 3 of Lists I and III of the Seventh Schedule, except one, *viz.*, maintenance of essential supplies and services, in respect of which Parliament has the power to pass preventive detention laws.

Counsel for the petitioner challenged the validity of the provisions of the Act and the detention order mainly on the following grounds :

(1) that the amendments introduced in the Act by s. 6(6)(d) and (e) are violative of Art. 22(4), (5) and (7);

(2) that s. 10, both prior to and after its amendment, contravenes Art. 22(4);

(3) that sec. 6(6)(d) and (e) of the Defence of India Act contravenes Art. 14;

(4) that the maximum period prescribed by the amendment to s. 13 by s. 6(6)(d) of the Defence of India Act and by the new s. 17A(2)(d) is ultra vires the powers of Parliament since it amounts to punitive and not preventive detention;

A (5) that secs. 3, 5, 8, 11 and 12 of the Act are violative of Arts. 14, 19 and 21, on the ground that they are unreasonable restrictions and are not saved by any of the sub-clauses of Art. 19(1); and

(6) that the amendments brought about in them by s. 6(6)(d) and (e) of the Defence of India Act cannot breathe life B in them as they were *non est,* by reason only of the subsequent proclamation of emergency.

These contentions fall under two parts, (1) relating to the provisions as they stood before the amendments, and (2) relating to the amendments introduced in the Act by the Defence of India Act, s. 6(6)(d) and (e). As regards the first part, the arguments were that :

C

(i) the Act was invalid as the restrictions placed thereby on the fundamental rights guaranteed by Arts. 14, 19(1)(a) to (d) and (g), 21 and 22 were not saved by sub-cls. (2), (3), (4) and (6) of Art. 19(1);

(ii) s. 3 of the Act in so far as it empowers the detention of a person on subjective satisfaction, and not on any objec- D tive assessment of the truth of allegations made against him, imposes an unreasonable restriction on his several rights guaranteed by Art. 19(1);

(iii) s. 8, which obliges the authority to furnish to the detenu the grounds of detention and confers on him the right to make a representation does not provide for its con- E sideration by an independent and impartial body, is bad;

(iv) s. 12 is bad as government can, contrary to principles of natural justice, confirm detention for a period longer than three months on the strength of an advisory board's report without giving any opportunity to the detenu to know the contents of such a report and to controvert it;

F

(v) the provisions of the Act are discriminatory in so far as they drastically curtail the liberty of a detenu without his having safeguards available to a person proceeded against under ss. 107 to 110 of the Code of Criminal Procedure.

G As stated above, s. 17A authorises detention on the ground of prejudicial acts in relation to (a) defence of India, relations with foreign powers and security of India, and (b) security of the State and maintenance of public order only. Counsel argued that by the use of the words "may be detained" in the first part of the section an unguided discretion has been conferred on the detaining authority whether to take action under the more drastic provisions of this section or H under s. 3(1) read with ss. 10 to 13, even though the activities in respect of which action is taken are in both the cases of the kind set out in (a) and (b) above. In support of this argument, counsel relied on the decisions of this Court in *Northern India Caterers Private Ltd.*

v. *Punjab*, (1) *State of M.P.*, v. *Thakur Bharat Singh*, (2) *S. G. Jaisinghani* v. *Union of India*,(3) *Satwant Singh Sawhney* v. *D. Ramarathnam, Assistant Passport Officer, Government of India, New Delhi*.(4) A

The contention, however, is not borne out by the provisions of ss. 10 and 17A(1) and (2). In the first place, s. 10 opens with the words "save as otherwise expressly provided in this Act". These words mean that the section would apply only to cases not expressly provided for in the Act, that is to say, it would not apply to cases falling under ss. 17 and 17A which deal with cases "otherwise expressly provided" in the Act. In the second place, the words "may be detained" in s. 17A(1) go with the words which follow them, namely, "without obtaining the opinion of the advisory board" and in "any of the following classes of cases or under any of the following circumstances—". The words "may be detained", no doubt, enable the authority to detain a person without obtaining the opinion of an advisory board for a period longer than three months, but not exceeding two years in the cases therein set out. The words "may be detained" thus are words enabling the authority to detain without a board's opinion for the period there provided for, but are not words giving a choice to the authority to apply s. 17A(a) or not. Even if the operation of s. 17A and s. 10 side by side were to result in any difference in the working of the Act, that difference would not seem to amount to any discrimination by reason of the provision in s. 17A(2) to the effect that in the case of a person to whom sub-s.(1) applies s. 10 shall be read subject to the modification, namely, that for the words "within thirty days", the words "at any time prior to but in no case later than three months before the expiration of two years" shall be substituted. In this view, there is no question of discrimination or violation of Art. 14 as a result of any such discrimination. This conclusion is clearly borne out by the combined effect of the *non-obstante* clause in the commencement of s. 17A(1) and the qualifying words "save as otherwise provided in this Act" in s. 10. B C D E

But the more important challenge to the validity of s. 17A was as regards its incompatibility with and the non-compliance of the requirements of Art. 22(7). The argument was two fold: (1) that on a proper reading of Art. 22(4), (5) and (7), cl. (7) was an exception to the rule laid down in cl. (4), and (2) that consequent upon such a construction of cl. (7), that is, as an exception to cl. (4), that clause did not generally empower Parliament to enact a law, on the subjects set out in entries 9 and 3 of Lists I and III respectively, without the safeguard provided by cl. (4), namely, of obtaining an opinion of an impartial body, like the advisory board. On the contrary, that clause authorises Parliament to enact a detention law in exceptional class or classes of cases and in exceptional circumstances specifically prescribed by such a law. The contention was that s. 17A did not comply with such a requirement of cl. (7) inasmuch as enumeration of the subjects or heads in s. 17A, except that with respect to maintenance of essential supplies and services, would not mean prescribing class or classes of cases and circumstances as provided by cl. (7). F G

(1) [1967] 3 S. C. R. 399.
(2) [1967] 2 S. C. R. 454.
(3) [1967] 2 S. C. R. 703.
(4) [1967] 3 S. C. R. 525.

A Three questions would emerge from this contention : (1) whether cl. (7) is an exception to the rule laid down in cl. (4); (2) whether Parliament's power to enact a detention law is limited by the requirements laid down in cl. (7); and (3) whether setting out *verbatim* the heads or subjects or some of them upon which Parliament can enact such a law would mean compliance of the requirements of cl. (7).

B These very questions were considered in one form or another in *Gopalan* v. *Madras*(1) in connection with s. 12 of the Preventive Detention Act, 1950. The validity of that section was impugned on the ground of its not having complied with the requirements laid down in cl. (7), firstly, because the section merely enumerated the heads or subjects, except one, namely, maintenance of essential supplies and services upon which under entries 9 and 3 of Lists I and III respectively Parliament could enact a detention law and not the class or classes of C cases and the circumstances in which detention, without the board's opinion, could be ordered, and secondly, because it failed to comply with both the requirements, the word 'and' in that connection being used conjunctively and not disjunctively. Sec. 3(1) of that Act authorised the Central or the State Government to detain a person, (i) if it was satisfied that his detention was necessary to preventing him from acting D prejudicially to (a) to the defence of India, her relations with foreign powers, the security of India; or (b) the security of the State or the maintenance of public order, or (c) the maintenance of supplies and services essential to the community, or (ii) with reference to a foreigner to regulate his continued presence in India, or to make arrangements for his expulsion from India. Sec. 9 required the appropriate Government to place the case of the person detained under s. 3(1) before the E advisory board within six weeks from the date of detention only in cases (1) where the order was made on apprehension that the detenu was likely to act prejudicially to the maintenance of essential supplies and services, and (2) where it was made against a foreigner under the two heads stated above. S. 12 of the Act provided that a person could be detained without obtaining the board's opinion for a period longer than three months, but not exceeding one year F from the date of the detention in the following classes of cases, or in any of the following circumstances, namely, where such a person has been detained with a view to preventing him from acting prejudicially to (a) the defence of India, relations with foreign powers, the security of India, and (b) the security of the State or the maintenance of public order. S. 12(2), however, provided for a review by the appropriate Government in consultation with a person who is or has been or is qualified to be appointed a judge of a High Court. Such a provision for a review and the intercession of an independent and impartial person reduced to a certain extent the rigour of s. 12(1). No such review, which would be of a quasi judicial nature, [(see *Lakhanpal* v. *Union of India*(2)] is provided for in the impugned section 17A.

The majority Court, consisting of Kania, C.J., and Patanjali Sastri, Mukherjea and Das, JJ., (as they all then were) rejected both the contentions, holding, firstly that the word 'and' meant in the context 'or', which meant that it was enough if Parliament, under Art.

(1) [1950] S. C. R. 88. (2) [1967] 1 S. C. R. 433.

22(7)(a), prescribed either the circumstances or the classes of cases in which a person might be detained for a period longer than three months without reference to an advisory board, and secondly, that matters referred to in s. 12 constituted sufficient description of circumstances or classes of cases so as to comply with the requirements of Art. 22(7)(a), and that therefore, the section was not open to any constitutional challenge. A

The minority Court consisting of Fazl Ali and Mahajan, JJ., (as the latter then was) accepted the petitioner's contention in both its aspects and held that the word 'and' meant the conjunctive and not the disjunctive, and that therefore, the impugned provision had to specify both the classes of cases and the circumstances in which detention for a longer period could be directed without a board's opinion. They also held that the expressions "class or classes of cases" and "the circumstances" would not mean merely the heads or the subjects on which a detention law was permissible under cl. (7)(a). B C

Kania, C.J., held that the word 'and' in cl. (7)(a) meant that the power of preventive detention beyond three months may be exercised, either for the circumstances in which or the class or classes of cases in which a person was suspected to be doing the objectional things mentioned in s. 12. According to him, "the use of the word 'which' twice in the first part of the sub-clause read with a comma put after each shows that the legislature wanted these to be read as disjunctive and not conjunctive". (126-127) Patanjali Sastri, J., (as he then was) also construed the word 'and' as meaning that Parliament may prescribe either the circumstances or the classes of cases or both and held that s. 12 provided both, for, to say that persons likely to act prejudicially to the defence of India may be detained beyond three months was at once to prescribe a class of persons who and the circumstances under which persons could be detained for the longer period. (216) Mukherjea, J., (as he then was) thought that cl. (7)(a) laid down an enabling provision and Parliament, if it so chose, could pass a law in terms of the same. "where an optional power is conferred on certain authority to perform two separate acts, ordinarily it would not be obligatory to perform both; it may do either if it so likes". (282) Das, J., (as he then was) also felt that Parliament "was not obliged under cl. (7) to prescribe both circumstances and classes, and in any case has in fact and substance prescribed both, particularly as in some cases circumstances and classes of cases may conceiveably coalesce." (330-331) The approach, on the other hand, of the minority judges was that cl. (4) of Art. 22 laid down a general rule and cl. (7) was an exception thereto. Read in that light, cl. (7) meant that Parliament could dispense with an advisory board, but that if it did, it had to prescribe the circumstances and the classes of cases, and therefore, the word 'and' in that sub-clause could not be read as 'or'. (175-176; and 235) D E F G

As regards the expression "the circumstances under which and the class or classes of cases in which" a person could be detained for a longer period than three months, Kania, C.J., observed that circumstances ordinarily meant events or situations extraneous to the actions of the individual concerned, while a class of cases meant determinable groups based on the actions of the individuals with a common aim or H

A idea. He, however, held that the assumption that entry 9 in List I and entry 3 in List III were incapable of being considered as circumstances or classes of cases was untenable, and therefore, there was no reason why the words of those entries could not be used in s. 12 so as to comply with the requirement of cl. (7)(a). (127-128) Patanjali Sastri, J., thought that cls. (4) and (7) were independent clauses and B could not be correlated so as to characterise cl. (7), as a proviso or exception to cl. (4), and that to read them as a rule and an exception was against their language and structure. He also thought that cl. (7) dealt with preventive detention, a purely protectional measure, which must necessarily proceed in all cases on suspicion or anticipation as distinct from proof, [*Rex* v. *Halliday*(1)] and that in such laws it would be impossible to mention the various circumstances or to enumerate various classes of cases exhaustively for which a person should be C detained for more than three months except in broad outline. (214) According to him, sufficient guidance could be given by broadly indicating the general nature of the prejudicial activities which a person is likely to indulge in. He observed that he failed to see why enumeration of five out of the six subjects on which a detention law was permissible under the two entries could not be said to comply with the requirements of cl. (7)(a). "I fail to see", he said, "why this could D not be regarded as a broad classification of cases or a broad discription of circumstances where Parliament considers longer detention to be justifiable". (215)

'While Kania, C.J., and Patanjali Sastri, J., were thus satisfied that the requirement of cl. (7)(a) would be complied with by the mere enumeration of the subjects in the entries or some of them, Das, J., E and Mukherjea, J, do not appear to express their satisfaction in so forthright a language. This is clear from the following passages :

> "It is true that circumstances ordinarily relate to extraneous things, like riots, commotion, political or communal or some sort of abnormal situation and it is said that the framers of the Constitution had in mind some such situation when the advisory board might be done away with. It is also urged F that they had in mind that the more dangerous types of detenus should be denied the privilege of the advisory board. I am free to confess that prescription of specific circumstances or a more rigid and definite specification of classes would have been better and more desirable. But that is crying for the ideal. The Constitution has not in terms put any such limitation———." (per Das, J., at 331-332)

G "I am extremely doubtful", said Mukherjea, J., "whether the classification of cases made by Parliament in section 12 of the Act really fulfils the object which the Constitution had in view. The basis of classification has been the apprehended acts of the persons detained described with reference to the lists as said above. Five out of the six heads have been taken out and labelled as classes of cases to which the H protection of clause (4) (a) of the article would not be available. It is against common sense that all forms of

(1) [1917] A.C. 260, at 275.

activities connected with these five items are equally dangerous and merit the same drastic treatment. The descriptions are very general and there may be acts of various degrees of intensity and danger under each one of these heads." (281)

Although he thought that s.12 was not framed with due regard to the object which the Constitution had in view, he held that he was unable to say that the section was invalid as being *ultra vires* the Constitution.

Fazl Ali J., on the other hand, held (1) that cl. (4) laid down a general rule and cl. (7) engrafted an exception to it, and that it was never intended that Parliament could treat the normal as the abnormal, or the rule as an exception; (2) that the circumstances to be prescribed must be special and extraordinary and the class or classes of cases must be of the same nature. The Constitution never contemplated that Parliament should mechanically reproduce all or most of the categories in the legislative entries almost *verbatim* and not to apply its mind to decide in what circumstances and in what class or classes of cases the advisory board should be dispensed with; (3) that even if cls. (4) and (7) were treated as alternatives and not as a rule and an exception, a law under cl. (7) (a) would be an exceptionally drastic law and such a law must be intended for an exceptional situation and not for all the situations which would fall under the heads in the entries, under which a detention law is permissible. It followed, therefore, that class or classes of cases and the circumstances must be of a special nature to require legislation which dispenses with the safeguard of an advisory board. (173—176) Mahajan, J., (as he then was) held that if clause (7) were regarded as an independent clause or an alternative to cl. (4), cl. (4) would be rendered nugatory and such a construction would amount to the Constitution saying in one breath that a detention law cannot provide for detention for a period longer than three months without reference to an advisory board and in the same breath saying that Parliament, if it so chose, can do so in respect of or any of the subjects mentioned in the lists. If that was so, it would have been wholly unnecessary to provide such a safeguard in the Constitution on a matter which seriously affected personal liberty. On the construction of cl. (7), he held that the Constitution recognised varying scales of duration of detention with the idea that this would vary with the nature of the apprehended act, detention for a period of three months in ordinary cases, detention for a longer period with intervention of a board in more serious cases, and detention for a longer period than three month without the intercession of a board for still more dangerous class or classes and for acts committed in grave situations." (238—239)

About a month before the Supreme Court delivered its judgment in *Gopalan*(1) the High Court of Calcutta in *Sitendra Narain Ray Choudhury* v. *The Chief Secretary to the Government of West Bengal* (2) (F. B.; Ref. 1 of 1950) had decided by a majority that setting out five out of the six heads in the entries in s. 12 of the 1950 Act was sufficient compliance of the requirements under cl. (4) (b) read with cl. (7) (a) of Art. 22.

(1) [1950] S. C. R. 88. (2) I. L. R. [1954] 1 Cal, 1.

A Counsel for the petitioner canvassed for the reasoning given by Fazl Ali and Mahajan, JJ., while the learned Attorney General contended that the reasoning in the judgments of the majority judges was in consonance with clauses (4) and (7) of Art. 22. He commended the following propositions for our acceptance:

(1) The Constitution authorises preventive detention and makes
B specific provisions for it in Art. 22(4) to (7);

(2) The heads in respect of which preventive detention can be ordered are carefully and deliberately made in entries 9 and 3 of Lists I and III;

(3) The Constitution provides two separate and independent situations where preventive detention can be directed, namely, the substantive part of cl. (4)(a) and cl. (4)(b) read with
C cl. (7)(a) and (b);

(4) Except for the enabling power in cl. (7)(a) both Parliament and State legislatures are competent to make preventive detention laws under entry 3 of List III;

(5) So far as cl. (7) of Art. 22 is concerned, it is an enabling clause and provides for two situations in which a law under
D that clause can be made by Parliament alone. In other words, these two situations are independent of each other and are not conditions-precedent.

The learned Attorney General argued that what cl. (7)(a) provides is that Parliament may prescribe the circumstances or prescribe class or classes of cases for which a person can be detained for more than
E three months without reference to an advisory board. In other words, the clause is an enabling clause authorising Parliament (1) to prescribe the circumstances under which a person may be detained for a period longer than three months *de hors* the advisory board; and (2) to prescribe the class or classes of cases etc. In this sense Parliament can do either of the two, and therefore, though cl. (7)(a) uses the word 'and', that word is used in the disjunctive and not in conjunctive sense.
F 'Circumstances', according to him, mean the heads or subjects set out in the two legislative entries, and the expression "class or classes of cases" mean incidents or activities but is not related to individuals or group or groups of individuals.

The learned Attorney-General finally urged the fact, which all of us are too well conscious of, that the majority decision in *Gopalan*(1) has stood for such a long time that it should not be disturbed unless
G there are strong and manifest reasons to do so. Counsel for the petitioner, on the other hand, argued that the majority decision was contrary to the scheme and the terms of Art. 22. Since the matter involves the right of personal liberty, the fact that the decision has held the field should not by itself be a deterrent against its reconsideration. The principles upon which such reconsideration would be resorted to have been explained by this Court in a number of decisions, of which
H we need remind ourselves of two only. *The Bengal Immunity Co. Ltd.* v. *Bihar*(2) and *the Legal Remembrancer, State of West Bengal*

(1) [1950] S. C. R. 88. (2) [1955] 2 S.C.R. 603.

v. *The Corporation of Calcutta.*(1) These decisions have laid down that this Court would review its earlier decisions if it is satisfied of its error or of the baneful effect such a decision would have on the general interest of the public or if it "is inconsistent with the legal philosophy of our Constitution," and that in constitutional matters this Court would do so more readily than in other branches of law as prepetuation of an error would be harmful to public interests. Indeed, the inhibition of the doctrine of *Stare decisis* is in this case partly reduced by the fact that despite the majority decision in *Gopalan* (supra) upholding the validity of the impugned s. 12 of the Act of 1950, and presumably in deference to the minority views, that section was removed from the Act the very next year by the Preventive Detention (Amendment) Act, 1951. Further, the major premise in the majority decision that Art. 22 was a self-contained code and that therefore the provisions of a law permitted by that Article would not have to be considered in the light of the provisions of Art. 19 was disapproved in *R. C. Cooper* v. *The Union of India.*(2) Nevertheless, we have to bear in mind the accepted rule that earlier decisions are not to be upset except upon a clear compulsion especially when the legislature has acted upon, as perhaps Parliament did, while enacting the impugned s. 17A.

Art. 19(1) in the first instance, guarantees the several freedoms, well accepted in all democratic systems, subject of course to the power of the State to impose reasonable restrictions in public interest and public good. Art. 21 then guarantees the equally well accepted safeguard against arbitrary deprivation of life and personal liberty save in accordance with procedure established by law, thereby ensuring government by law and not by men. Cls. (1) and (2) of Art. 22 again lay down the well-accepted rule that a person detained in custody shall be expeditiously informed of the grounds of his arrest and guarantee his right to the assistance of a legal practitioner of his choice and the necessity of his having to be produced before a magistrate thus securing a judicial as against a legislative or an executive sanction for his arrest.

The non-applicability of cls. (1) and (2) provided by cl. (3) of Art. 22 in the case of an enemy-alien and a person detained under a preventive detention law was provided for, as is notorious, as a sequel to the tragic incidents and the danger to both the internal and external security of the country following the partition. Cl. (3) consequently was inserted as an exception to the rule laid down in cls. (1) and (2) of Art. 22. There can be no doubt whatsoever that the Constitution-makers accepted preventive detention as a necessary evil, to be tolerated in a constitutional scheme which, otherwise, guaranteed personal liberty in its well-accepted form. Having thus recognised the necessity of preventive detention laws, the constitution-makers first delineated in clear and precise terms certain heads or subjects in respect of which only Parliament by itself and concurrently with State legislatures was empowered to enact detention laws under entries 9 and 3 of Lists I and III respectively. Secondly, they provided in cl. (4) that no such law shall authorise detention of a person for a period longer than three months unless (a) an advisory board with persons

(1) [1967] 2 S.C.R. 176. (2) [1970] 3 S.C.R. 530.

A of judicial training has reported that there is sufficient cause for detention; or (b) a person is detained in accordance with a Parliamentary statute passed under cl. (4)(b) read with cl. (7)(a) and (b). These provisions clearly indicate that ordinarily preventive detention can only be for a period of three months only. If a law, however, provides for detention for longer period, it can only do so with the intercession of an impartial, independent body, *viz.*, an advisory board.
B Sub-cl. (b) of cl. (4), however, provides that a detention for a longer period than three months can be had, if a person is detained under a law made by Parliament under cl. (7)(a) and (b). Cl. (4) thus lays down two situations in which the rule of three months detention can be relaxed; (1) where the intercession of an advisory board is provided, and (2) where Parliament has enacted a law under cl. (7)(a) and (b). The proviso to sub-cl. (a) of cl. (4) lays down that even where
C there is intercession of the board, detention cannot be in any event for more than the maximum period prescribed in the law in question under cl. (7). Reading cl. (4) thus in its entirety, the plain meaning of the language used there is clear. It first lays down the ordinary rule of detention being only for three months and then provides two exceptions to it, *viz.*, (a) detention for longer period of intercession of an advisory board is provided for, and (b) where Parliament acts
D under cl. (7)(a) and (b), subject in both the cases to the maximum period provided in the law under consideration. It will be seen that sub-cl. (a) of cl. (4) is not restricted to Parliamentary Statutes, while sub-cl. (b) is and applies to an Act passed by Parliament alone.

We next go to cl. (7). That clause by its sub-cl. (a) provides: "Parliament may by law prescribe—

E (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 without the opinion of an Advisory Board in accordance with the provisions of sub-cl. (b) of cl. (4)."

Two alternative constructions of cl. (7)(a) were suggested before us. The learned Attorney-General submitted that cls. (4) and (7) should
F be read together, and if so read, they mean two independent powers; (1) to make a law providing for longer detention with the provision for an advisory board, and (2) to make a law providing for a longer detention without an advisory board. He argued that, therefore, the powers were independent or alternative and there was no question of cl. (7)(a) being an exception to cl. (4)(a). Secondly, he argued that the words "may by law prescribe" in cl. (7)(a) meant that that sub-cl.
G was an enabling provision which authorised Parliament (i) to prescribe the circumstances under which, and (ii) the class or classes of cases in which a person can be detained for a longer period without the intervention of an advisory board. Since the Constitution enables Parliament to perform two things, it has the power to do either of them and therefore the word 'and' there used has to be read in the context as having been used in the disjunctive sense. (Maxwell on Interpretation
H of Statutes (11th ed.) 229) On the other hand, the contention on behalf of the petitioner was that cl. (4)(a) laid down a safeguard that there has to be the intervention of a board in all cases where the law provides for detention for a period longer than three months except

in the case when Parliament choose to exercise its power under cl. (7)(a). A

In determining which of these constructions is correct, it is necessary to consider first the nature and scope of cl. (4)(a). Under that clause, no law, whether passed by Parliament under entry 9 of List I and or by Parliament and the State Legislature under entry 3 of List III can authorise longer detention than three months unless it provides for the intercession of an advisory board. Cl. (4)(a) thus lays down a limitation on the legislative power conferred on both the Central and State legislatures while exercising their power under the said entries. The position then is that although Parliament and the State Legislatures have the power to make detention laws under any of the six topics or subjects enumerated in the two entries, cl. (4)(a) first provides that a law passed by either of them cannot provide detention for a period longer than three months. It next lays down that if such a law provides detention for a period longer than three months, it can do so only if it includes the safeguard of the intercession of an advisory board, which the Constitution was anxious enough to see that it contained persons who were or would be qualified to hold the position of a High Court judge. B C D

Whereas sub-cl. (a) of cl. (4) applies to legislation enacted by both Parliament and the State Legislatures, sub-cl. (b) applies to laws made by Parliament. Sub-cl. (b) provides that the limitation placed on the power of Parliament under sub-cl. (a) is not to apply to a law made by Parliament under cl. (7)(a) and (b). If the theory of alternative power of Parliament either to enable a law providing for a longer period but with the intercession of a Board or to enact a law under cl. (4)(b) read with cl. (7)(b) providing also for a longer detention but without the intercession of a board, were accepted cl. (4)(a) would be totally nullified by cl. (4)(b) read with cl. (7)(a). In other words, such a construction would mean that though the constitution-makers laid down a safeguard against a law providing for a longer duration, they, in the very same breath, nullified that safeguard by generally empowering Parliament under cls. (4)(b) read with cl. (7)(a) to enact laws with longer period of detention without the intercession of an advisory board. Surely, such an interpretation which nullifies one part of the same clause while interpreting its another part has to be avoided. Further, if cl. (4)(b) read with cl. (7)(a) was intended to override cl. (4)(a) and the safeguard required in a law providing for detention for a longer period, the constitution-makers would have confined cl. (4)(a) only to laws made by the State Legislatures and would not have applied it to Parliament as well. The constitution-makers in that case would have simply used in cl. (4)(b) and cl. (7)(a) language such as "Nothing contained in cl. (4)(a) shall apply to a law of preventive detention made by Parliament". The acceptance of the theory of alternative power of Parliament means that whereas State laws providing longer detention would require the intercession of an advisory board, laws passed by Parliament, though providing for longer detention, would not. It is impossible to conceive that such a result could have been intended by the constitution-makers, who were careful enough to provide for the intervention of an impar- E F G H

A tial and an independent body in laws whether made by Parliament or State Legislatures providing for detention for longer period than three months. On an analysis of the two clauses (4) and (7), the conclusion is inescapable that what they provide is (a) that ordinarily, detention provided by a preventive detention law should not be for a period longer than three months; (b) that if, however, such a law does provide for a longer period than three months, it must provide for the inter-
B cession of an advisory body; and (c) that situations may arise when in certain classes of cases Parliament alone should be empowered to enact a law which provides for a longer detention even without the intercession of an advisory board. On a careful consideration of the language of cls. (4) and (7), the theory of independent or alternative power of Parliament breaks down and cannot be accepted, firstly, because the language of the two clauses does not bear out such a cons-
C truction, and secondly, because the construction under which cl. (4)(b) read with cl. (7)(a) lays down an exception to cl. (4)(a) harmonises both the clauses and brings out the true intention in enacting the two clauses.

The next question is what kind of a law which can provide for a longer duration of detention and at the same time can dispense with
D the advisory board is permissible under cl. (7)(a). Such a law has to be one passed by Parliament and has to be one which prescribes "the circumstances under which, and the class or classes of cases in which", a person may be detained for a longer period than the one contemplated by cl. (4), *i.e.*, three months and without the requirement of an advisory board. The expression "the circumstances under which and the class or classes of cases" evoked a controversy in *Gopalan*(1)
E which resulted in difference of opinion between the majority and the minority judges. That controversy practically in the same terms was repeated before us, one side contending that enumeration of the heads or subjects in the two entries on which a law of detention can be made would sufficiently comply with the requirement of cl. (7)(a), and the other side contending against such a meaning being given to the aforesaid expression. In deciding that controversy, one broad consideration
F at once arises and that is that the circumstances and the classes of cases mentioned in cl. (7)(a) are not limited to any one or more of the subjects set out in the two entries in respect of which a detention law can be made. If the contention that enumeration of these subjects would satisfy the requirement of cl. (7)(a) were to be right, a Parliamentary law can enumerate all the six subjects in the two entries and provide detention for a longer period for reasons connected with all
G of them. Both the Preventive Detention Act, 1950 and the impugned Act excepted the subject of maintenance of essential supplies and services, but in the absence of any restrictive language in that respect in cl. (7)(a), they need not have done so. That means that Parliament can pass a law dispensing with the advisory board by merely stating therein all the heads or subjects in the two entries. If that were done, the safeguard provided in cl. (4)(a) can be rendered total-
H ly infructuous. If that was the intention, cl. (7)(a) need not have been framed in an elaborate language as has been done and it would

(1) [1950]SCR 88

have been sufficient to provide that nothing in cl. (4)(a) shall apply to a law passed by Parliament which sets out the subjects in the entries or any one or more of them. Why did the constitution-makers consider it necessary to provide in cl. (7)(a) that the law must prescribe the circumstances and the classes of cases? The insertion of such an expression coupled with Parliament being the only body which can enact such a law seems to suggest that cl. (7)(a) is an exception to cl. (4)(a) and it being such an exception, Parliament alone is empowered to pass a law dealing with exceptional circumstances and exceptional classes of cases. If enumeration of the heads in the entries were to mean compliance of prescribing circumstances and classes of cases, Parliament would in such a law be dealing with all situations and all classes of cases from the lowest to the most extraordinary or abnormal and not with some only requiring a treatment different from that envisaged by cl. (4)(a). In such a case, cl. (4)(a) would again be renedered nugatory, for Parliament can, by enumerating *verbatim* the heads or subjects set out in the entries, do away with the requirement of cl. (4)(a). Could that have been the intention in enacting cl.(7)(a)? It clearly could not have been so intended for the simple reason that deprivation of personal liberty even for a period longer than three months, ordinarily considered to be sufficient, required, according to cl. (4)(a), at least the safeguard of an impartial body against executive action of a drastic kind.

The difficulty in equating enumeration in *verbatim* of the heads of legislation permissible under the two entries in Lists I and III with both the circumstances and the classes of cases is that though the activities of persons thought necessary for detention may vary in degrees of their impact depending upon the situations existing at the time, all of them, irrespective of their degree of intensity and impact, would be clubbed together so as to treat them equally in a law under cl. (7)(a). In such a case even activities, which would not justify the dispensation of the safeguard of an advisory board as against those which need such dispensation, would be treated equally, with the result that in respect of all activities and all situations Parliament would be enabled to dispense with the safeguard of the intervention of an advisory board. What use would then be of having cl. (4)(a) if its requirement can be avoided by a law which simply sets out the subjects or some of them from the two entries? As Mahajan, J., pointed out in *Gopalan,*(1) the language of cls. (4) and (7) show that they deal with three distinct situations; (1) where the activities and the persons likely to perpetrate them, though connected with the subjects in the entries, are of such a nature and consequence that three months' detention would meet the situation; (2) where the activities and the persons likely to perpetrate them are of such nature and consequence that they need a longer period of detention but with the intercession of an advisory board, and (3) where the activities and the persons likely to resort to them are of such a nature and consequence that the situations they create are such as require not only a longer period of detention, but also the dispensation of intercession by an advisory body. In times of severe emergency when the security of the country or a part of it is threatened

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A for instance, not only detention for a longer period might become necessary but the intervention of an advisory body to which information of a vital nature would have to be disclosed might be regarded both as inconsistent with the safety of the country or the community as well as cumbersome. Such situations may arise not merely in cases involving the security of the nation or part or parts of it but may arise in connection with the rest of the subjects in the entries. Sabotage
B of essential supplies and services would in given circumstances be as dangerous as activities involving danger to the security of the State and/or public order.

Circumstances would ordinarily mean situations or events extraneous to the activities of a concerned person or a group of persons, such as riots, disorders, tensions, religious, racial, regional or linguistic or other such commotions, which might by their pre-existence
C accentuate the impact of such activities affecting the security of the country or a part of it or the public order. Class or classes of cases, on the other hand, relate to group or groups of individuals, who by the nature of their activities fall under one particular group or groups by their common or similar objective or objectives. The subjects or heads set out in the legislative entries were intended to delineate the
D bounds within which the legislatures can pass detention laws. The purposes of these entries and of cl. (7) (a) are distinct; that of the entries to lay down the topics in respect of which legislation can be made and that of cl. (7) (a) to distinguish the ordinary from the exceptional to which only the salutary safeguard provided by cl. (4) (a) would not apply. Mere repetition of the subjects or topics of legislation from the entries would not mean prescribing either the cir-
E cumstances or the classes of cases to which only, as against the rest of the individuals and their activities, the safeguard of intercession of an independent body would not apply. The law under cl. (7)(a) would, as compared to the one to which cl.(4)(a) would apply, be a drastic law and the presumption would be that such a drastic law would apply to exceptional circumstances and exceptional activities expressly and in precise terms prescribed.

F If cl. (7) (a) were construed to permit mere enumeration of the subjects in respect of which there is power to enact preventive detention laws, all those subjects can be set out *verbatim,* in which event cl. (4)(a) would be rendered *otiose.* An act prejudicial to the maintenance of essential supplies and services, *e.g.* possession of controlled or rational food articles in excess of statutory limits, would be equated for treatment with an act prejudicial to the security of India or of a
G State. On the other hand, an act sabotaging, for instance, lines of supplies and communication in times of an emergency, prejudicial to the maintenance of essential supplies and services would be equated with an act prejudicial to maintenance of public order in one locality or affecting a section of the community. Cl. (7)(a), thus, envisages Parliament to apply its mind and prescribe specific situations and types of cases which require a drastic law dispensing with the intervention
H of an advisory board on the ground that such intervention would in such exceptional circumstances and in cases of dangerous individuals would be cumbersome or unsafe. Reading cls. (4)(a) and (7)(a) together, it is quite clear that intercession of an independent body like

the advisory board was regarded by the constitution-makers as an essential safeguard against a jurisdiction primarily based on suspicion and apprehension, which could be dispensed with in extraordinary circumstances and with regard to dangerous persons and their apprehended activities specifically prescribed in the law made under cl. (7)(a). In this view, the meaning of the word 'and' in that clause must be held to have its ordinary conjunctive sense, the context in that clause also requiring not the opposite but its commonly understood sense, requiring Parliament to prescribe both the circumstances and the classes of cases in which only consideration by the board can be dispensed with.

In *Gopalan*(1) Patanjali Sastri, J., (as he then was) expressed the view that in such a matter as preventive detention which by its nature depended on the likelihood of certain apprehended acts, it would be impossible for Parliament to exhaustively set out the circumstances or the classes of cases which a law under cl. (7)(a) would be made. The difficulty felt by Patanjali Sastri, J., was sought to be answered by Fazl Ali, J. (p. 178) by referring to Regulation 18B of the British Defence of the Realm Regulations, 1939 as and by way of a concrete illustration where activities and circumstances of a more dangerous type could be classified from the rest. Regulation 18B laid down the following classes of cases where the Secretary of State could direct preventive detention :—

(1) If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations;

(2) If the Secretary of State has reasonable cause to believe any person to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts;

(3) If he has reasonable cause to believe any person to have been or to be a member of, or to have been or to be active in the furtherance of the objects of any such organisation mentioned; and

(4) If he has reasonable cause to believe that the recent conduct of any person for the time being in an area or any words recently written or spoken by such a person expressing sympathy with the enemy, indicates or indicate that that person is likely to assist the enemy.

Mahajan, J., (as he then was), likewise, referred to the classification of the prejudicial activities set out in R. 34(6) of the Defence of India Rules, 1939. Such a classification of acts is also to be found in R. 36(6) of the Defence of India Rules, 1971. S. 3(2) of the West Bengal (Prevention of Violent Activities) Act, 19 of 1970, similarly, classifies certain activities as falling within the expression "acting in any manner prejudicial to the security of the State or the maintenance

(1) [1950] SCR 88.

A of public order." That provision runs as follows :

"(2) For the purposes of sub-section (1), the expression 'acting in any manner prejudicial to the security of the State or the maintenance of public order' means—

(a) using, or instigating any person by words, either spoken or written, or by signs or by visible representations or otherwise, to use, any lethal weapon—

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(i) to promote or propagate any cause or ideology, the promotion or propagation of which affects, or is likely to affect, adversely the security of the State or the maintenance of public order; or

(ii) to overthrow or to overawe the Government established by law in India.

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(b) committing mischief, within the meaning of section 425 of the Indian Penal Code, by fire or any explosive substance on any property of Government or any local authority or any corporation owned or controlled by Government or any University or other educational institution or on any public building, where the commission of such mischief disturbs, or is likely to disturb, public order; or

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(c) causing insult to the Indian National Flag or to any other object of public veneration, whether by mutilating, damaging, burning, defiling, destroying or otherwise, or instigating any person to do so.

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x x x x x

(d) committing, or instigating any person to commit, any offence punishable with death or imprisonment for life or imprisonment for a term extending to seven years or more or any offence under the Arms Act, 1959 or the Explosive Substances Act, 1908, where the commission of such offence disturbs, or is likely to disturb, public order; or

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(e) in the case of a person referred to in clauses (a) to (f) of Section 110 of the Code of Criminal Procedure, 1898, committing any offence punishable with imprisonment where the commission of such offence disturbs, or is likely to disturb, public order."

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These examples are sufficient to dispel fear of any practical difficulty in prescribing specific circumstances under which and the classes of cases which need dispensing with the intercession of an advisory board.

In our opinion, cl. (4)(a) of Art. 22 lays down a rule to which cl. (4)(b) read with cl. (7)(a) is an exception. Upon that view cl. (7)(a) must be construed as a restriction on Parliament's power of making preventive detention laws in the sense that it can depart from the rule laid down in cl. (4)(a) and dispense with reference of cases

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to an advisory board only by a law which prescribes both the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months without obtaining the opinion of an advisory board in accordance with the provisions of sub-cl. (a) of cl. (4). With great respect to the distinguished judges who formed the majority in *Gopalan*,(1) we are not able to concur in their views on the construction of cl. (4) (b) and cl. (7)(a) of Art. 22. Sec. 17A of the Act, in our opinion, has failed to comply with the requirement of cl. (7)(a), and has therefore, to be declared bad as being inconsistent with that clause.

In *Gopalan*(1) the majority court had held that Art. 22 was a self-contained Code and therefore a law of preventive detention did not have to satisfy the requirements of Arts. 19, 14 and 21. The view of Fazl Ali, J., on the other hand, was that preventive detention was a direct breach of the right under Art. 19(a) to (d) and that law providing for preventive detention had to be subject to such judicial review as is obtainable under cl. (5) of that Article. In *R. C. Cooper* v. *Union of India*(2) the aforesaid premise of the majority in *Gopalan*(1) was disapproved and therefore it no longer holds the field. Though *Cooper's* case(2) dealt with the inter-relationship of Art. 19 and Art. 31, the basic approach to construing the fundamental rights guaranteed in the different provisions of the Constitution adopted in this case held the major premise of the majority in *Gopalan*(1) to be incorrect. In view of this constructional position, counsel for the petitioner and for the intervener made submissions on s. 13 of the Act as amended by s. 6(6)(d) of the Defence of India Act as being in violation of Art. 14 and also on ss. 3, 8, 9, 10, 11 and 12 of the Act even as they stood before the enactment of s. 6(6)(d) of the Defence of India Act on the ground that those provisions were not reasonable restrictions and were therefore void and the subsequent declaration of emergency and the enactment of s. 6(6)(d) could not breathe life into those provisions which were already void. Counsel also contended that the maximum period of detention prescribed by the amended s. 13 and by s. 17A(2)(d) did not satisfy Art. 22(7)(b) since the period fixed by Parliament therein is three years or until the expiry of the Defence of India Act, whichever is later, an event uncertain as no one can anticipate when the emergency would be terminated. However, in the view we have taken of s. 17A of the Act we need not go into them as in accordance with the practice followed by this Court we need not decide more than what is necessary. We, therefore, do not express any views on the aforesaid contentions raised by counsel. It is, therefore, enough for us to declare s. 17A as not having satisfied the requirements laid down in cl. (7)(a) of Art. 22 and therefore bad.

The consequence is that the petition succeeds and we direct that the petitioner be released forthwith from his detention.

V.P.S. Petition allowed.

(1) [1950] 3 S. C. R. 88. (2) [1970]3 S. C. R 530