FAGU SHAW, ETC., ETC. A

*v.*

THE STATE OF WEST BENGAL

*December* 20, 1973

[A. N. RAY, C.J., K. K. MATHEW, Y. V. CHANDRACHUD, A. ALAGIRISWAMI AND P. N. BHAGWATI, JJ.] B

*Constitution of India,* 1950— *Art.* 22(4)(*a*)(*b*); (7)(*a*) *and* (*b*)—*Whether Parliament was bound to prescribe the maximum period of detention.*

*Maintenance of Internal Security Act,* 1971—*S.* 13—*Whether period fixed in s.* 13 *is maximum period.*

Art. 22(4)(a) of the Constitution says that no law providing for preventive detention shall authorise the detention of a person for a period longer than three C months unless an Advisory Board has reported before the expiry of three months that there is in its opinion sufficient cause for such detention. The proviso to the Article provides that nothing in sub-clause (a) shall authorise the detention of any person "beyond the maximum period prescribed by any law made by Parliament under sub-cl. (b) of cl. (7)" of Art. 22. By reason of Art. 22(4)(b) a person can be detained for a longer period than three months without the necessity of consulting an Advisory Board if "such person is detained in accordance with the provisions of any law made by Parliament under sub-cls. (a) and (b) of cl. (7)" of Art. 22. And Art. 22(7) says : D

"(7) Parliament may by law prescribe :—

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

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

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

Section 13 of the Maintenance of Internal Security Act, 1971 as amended by s. 6(d) of the Defence of India Act, 1971 enacts that the "maximum period for which any person may be detained in pursuance of any detention order which has been confirmed under s. 12 shall be twelve months from the date of detention or F until the expiry of the Defence of India Act, 1971, whichever is later." Pursuant to an order of detention passed by the Government of West Bengal the petitioners were detained under s. 13 of the Maintenance of Internal Security Act, 1971. In a petition under Art. 32 of the Constitution it was contended (i) that the Parliament was bound to prescribe the maximum period of detention under Art. 22(7)(b) of the Constitution in order that the provision of Art. 22(4)(a) might operate and as s. 13 of the Act, as amended, did not prescribe the maximum period of detention, the confirmation of detention orders in terms of sec. 13 of the Act G was bad; (ii) that since the determination of the period of detention, namely, the expiry of the Defence of India Act, 1971 is depending upon the requirement of the proclamation of emergency, the period fixed in Sec. 13 is not "the maximum period" as visualised by Art. 22(7)(b); and (iii) that the Parliament has abdicated its power and duty to fix the maximum period to the executive as the determination of the operation of the proclamation of emergency is a matter within the discretion of the President and he is, therefore, the authority to determine the retirement age of the Defence of India Act.

H

HELD : (*Per* Ray C. J., Mathew and Chandrachud, JJ :) (1) There is no provision in the Constitution which either expressly or by necessary implication compels Parliament to prescribe the maximum period of detention under Art. 22(7)(b). The proviso does not *proprio vigore* compel the Parliament to fix the

A maximum period. Nor does Art. 22(7)(b). On the other hand it expressly says otherwise. [841 B]

The language of Art. 22(4)(b) is in marked contrast with that of Art. 22(4)-(a) read with the proviso. Art. 22(4)(b) makes it obligatory upon Parliament, if it wants to pass a law for detaining a person for a period of more than three months, without making a provision in that law for obtaining the opinion of an Advisory Board. [841 DE]

B Under entry 3 of List III of the Seventh Schedule, both Parliament and State Legislatures have plenary power to pass laws for preventive detention as respects the subjects mentioned therein. A power to pass a law for detention carries with it the incidental power to provide for the period of such detention. Therefore, both Parliament and State Legislatures have power under the entry to provide for detention of a person for a specified period without fixing a specified period. The purpose of Art. 22(4)(a) is to put a curb on that power. What the proviso means is that even if the Advisory Board has reported before the expiration of three C months that there is sufficient cause for detention, the period of detention beyond three months shall not exceed the maximum period that might be fixed by any law made by Parliament under Art. 22(7)(b). The proviso cannot mean that even if Parliament does not pass a law fixing the maximum period under Art. 22(7)(b), the State legislatures cannot pass a law which provides for detention of a person beyond three months. The period of such detention, *viz.*, detention beyond the period of three months, would then be a matter within the plenary power of Parliament or State legislatures, as the case may be, as such a power is incidental to the power to pass a law with respect to the topics covered by entry 3 of D List III. [839 H; 840 A—D]

Therefore, but, for the proviso to cl. (4)(a) of Art. 22, the Act as it provides for the opinion of the Advisory Board, can authorise detention of a person for any period, by virtue of the plenary character of the legislative power conferred by the entry. The proviso says in effect that if Parliament fixed the maximum period under Art. 22(7)(b), the power of Parliament and State legislatures to fix the period of detention in a law passed under the entry would be curtailed to that extent. [840 E—F]

E

*Gopalan* v. *The State of Madras*, [1950] S.C.R. 88, *Krishnan* v. *The State of Madras*, [1951]S.C.R. 621 and *State of West Bengal* v. *Ashok Dey and Others*, [1972] 1 S.C.C. 199, referred to.

(2) (a) The meaning of the word 'maximum' is "the highest attainable magnitude or quantity (of something); a superior limit," The meaning of the word 'period' is "a course or extent of time; time of duration." Therefore the words 'maximum period' mean the highest or the greatest course or extent or stretch of F time, which may be measured in terms of years, months or days as well as in terms of the occurrence of an event or the continuance of the state of affairs. [842 G]

(b) It is not necessary that the Parliament should have fixed a period in terms of years, months or days in order that it might be the "maximum period" for the purpose of Art. 22(7)(b). As the object of preventive detention is to prevent persons from acting in a manner prejudicial to the maintenance of internal security or public order or supplies or services essential to the community or other G objects specified by Entry 9 List I, the power to detain must be adequate in point of duration to achieve the object. If the maximum period can be fixed only in terms of years, months or days, certainly it would have been open to Parliament to fix a long period in s. 13 and justify it as "the maximum period". [843 D—E]

(3) It is not correct to say that the Parliament in fixing the duration of the maximum period of detention with reference to an event like the cessation of the period of emergency, has in any way, abdicated its power or function to fix the maximum period or delegated it to the President. There can be no doubt that H it is Parliament that has fixed the maximum period in s. 13 of the Act. It cannot be presumed that the President will act unreasonably and continue the Proclamation of Emergency even after the Emergency has ceased to exist. Seeing that the maximum period of detention has been fixed by s. 13 and that the discretion to fix the period of detention in a particular case has to be exercised after taking

into account a number of imponderable circumstances three is no substance in the argument that the power of Government to determine the period of detention is discretionary or arbitrary. [844 DE; F] A

*Suna Ullah* v. *State of J. & K.* A.I.R. 1972 S.C. 2431, refererd to

*Per* Alagiriswami, J: (a) An analysis of the provisions of cls. 4 and 7 of Art. 22 clearly shows that a maximum period of detention should be laid down by Parliament whether it is a case of detention after obtaining the opinion of an Advisory Board or without obtaining the opinion of an Advisory Board. It is clear from the provisions of cls. (4) and (7) that a law providing for preventive detention can authorise the detention of a person for a longer period than three months only if an Advisory Board has reported that there is sufficient cause for such detention, that even with the advice of an Advisory Board the detention cannot exceed the maximum period prescribed by law made by Parliament under sub-cl. (b) of cl. (7) and that if a person is detained in accordance with the provisions of any law made by Parliament under sub-cls. (a) and (b) of cl. (7) the detention can be for a period longer than three months. Therefore, the parliamentary statute can provide for preventive detention without obtaining the opinion of an Advisory Board by laying down the circumstances under which, the class or classes of cases in which it can be done. In that case the maximum period for which a person can be detained should also be specified by the parliamentary law, that is, a person cannot be detained for a period exceeding three months without obtaining the opinion of an Advisory Board unless the concerned provision of law also provides for the maximum period for which such a person is to be detained. [851 E; 849FG] B C D

(b) The word "may" in Art. 22(7) amounts to "shall". The power to dispense with the opinion of an Advisory Board is given only to Parliament. When it makes a law under cls. (7)(a) and (b) of Art. 22 that also would bind the State Legislatures in so far as they enact any legislation with regard to preventive detention. Though the State Legislatures have the power with regard to preventive detention, they do not have the power to prescribe the circumstances under which and the class or classes of cases in which a person may be detained for a period longer than three months without obtaining the opinion of an Advisory Board. That power is completely that of Parliament and any State legislation will also be subject to the maximum period prescribed by Parliament under a legislation made under Art. 22(7)(a) and (b). [849 H; 850 AB] E

*A. K. Gopalan* v. *The State of Madras*, [1950] S.C.R. 88, *S. Krishnan* v. *The State of Madras*, [1951] S.C.R. 621, and *State of West Bengal* v. *Ashok Dey*, [1972] 1 S.C.C. 199, distinguished.

(2)(a) The power to prescribe a maximum period given to Parliament (referred to in this proviso) is to prevent the State Legislatures making laws with regard to preventive detention without any maximum limit. The Constitution makers apparently did not want the State Legislatures to have an unfettered power with regard to preventive detention even in the field allotted to them under Entry 3 of List III of Seventh Schedule. [850 D—E] F

(b) An harmonious construction of the whole of Arts. 22(4) and (7) would thus necessitate that Parliament should provide a maximum period of detention not merely in respect of laws relating to preventive detention made by State Legislatures but also its own laws regarding preventive detention. If the proviso to sub-cl. (a) contemplates Parliament making a law providing for the maximum period of detention which cannot be exceeded by any State law reagarding preventive detention the reasonable construction would be to hold that it is obligatory on Parliament to legislate under sub-cl. (b) fettering the hands in the matter of legislating with regard to the maximum period of detention. If the Parliament can fix the maximum period it can also alter it. If legislation with regard to the provisions of a maximum period is merely optional there was no need for the proviso at all. The concept of a maximum period of detention runs through the whole of Art. 22(4) and (7). This is because while Parliament and State Legislatures make laws it is the executive that makes orders of detention and if no maximum period of detention is specified by law it would be open to the executive to keep persons in detention indefinitely. [850 H; 851 A—C] G H

A *Per* Bhagwati, J : (1)(a) Parliament is under no obligation to make a law under sub-cl. (a) of cl. (7). It is only if the requirement of obtaining the opinion of the Advisory Board is intended to be dispensed with that the Parliament must make a law under sub-cl. (a) of cl. (7). If the Parliament does not make such a law, cl. (4)(b) will not come into operation and detention for a period longer than three months whether under Parliamentary law or under State law, would be impermissible without obtaining the opinion of the Advisory Board. The language of cl. (4)(b) posits clearly and in no uncertain terms that there must be law both under sub-cls. (a) and (b) of cl. (7) in order that cl. (4)(b) may
B operate. If there is a law only under sub-cl. (a) of cl. (7) and no law under sub-cl. (b) of cl. (7), a person cannot be detained longer than three months without obtaining the opinion of the Advisory Board as contemplated under cl. (4)(b). The making of a law by the Parliament under sub-cl. (a) of cl. (7) is, therefore, obligatory if the detention is to be for a longer period than three months without the intercession of the Advisory Board.-[824 E—H]

(b) It is clear on a combined reading of the proviso and the main provision in
C cl. (4)(a) that the proviso is an integral part of the main provision. It is intended to cut down the large amplitude of the power of detention conferred under the main provision. The scope and boundary of the power of detention under cl. (4)(a) can, therefore, be defined only by reading the proviso and the main provision as *one single enactment*. If the proviso does not operate he main provision also would not, for the main provision is intended to operate only with the limitation imposed by the proviso. The proviso is not used in its traditional orthodox sense. It is intended to enact a substantive provision laying down as outside limit to the period of detention. If there is no outside limit by reason of Parlia-
D ment not having prescribed the maximum period under cl. (7)(b), the provision enacted in cl. (4)(a) cannot operate and in that event detention cannot be continued beyond three months, even though the opinion of the Advisory Board may be obtained. The proviso clearly posits the existence of a law made by Parliament under cl. (7)(b) and makes it an essential element in the operation of cl. (4)(a). [859 B—E]

*A. K. Gopalan* v. *State of Madras*, [1950] S.C.R. 88, *S. Krishnan* v. *The State of Madras*, [1951] S.C.R. 621 and *State of West Bengal* v. *Ashok Dey*, [1972] 1
E S.C.C., 199, distinguished.

(c) Parliament is free to prescribe or not to prescribe the maximum period under cl. (7)(b). But if no maximum period is prescribed neither Parliament nor the State Legislature can authorise detention for a long period than three months either under sub-cl. (a) or sub-cl. (b) of cl. (4). If the Parliament or the State Legislature wishes to authorise detention for a period longer than three months it must conform to the provisions of either sub-cl. (a) or (b) of cl. (4) and that requires that the maximum period must be prescribed by Parliament by law
F made under cl. (7)(b). [860 H]

(2) The highest or the greatest extent or stretch of time may be determined by means of a fixed date or in terms of years, months or days or by reference to the occurrence of an event. But whatever be the mode of determination the maximum period must be a definite period. What is necessary is that the point of time at which the event would happen must be definite. [863 E]

G In the instant case since it cannot be predicated with any definiteness as to when the emergency would come to an end the period prescribed by s. 13 of the Act cannot be said to be the "maximum period" within the meaning of cl. (7)(b). Parliament has not prescribed the maximum period of detention as contemplated under cl. (7)(b) and so no person can be detained under the provisions of the Act for a period longer than three months. [866 C]

ORIGINAL JURISDICTION : Writ Petition Nos. 41, 106 etc. etc. of 1973.

H Under Art. 32 of the Constitution for issue of a writ in the nature of *habeas corpus*.

*R. K. Maheshwari*, for the petitioner (in W.P. 41).

*A. K. Gupta*, for the petitioner (in W.P. Nos. 106 & 113). A

*M. S. Gupta*, for the petitioner (in W.P. Nos. 441 & 214).

*T. S. Arora*, for the petitioner (in W.P. 621).

*Niren De, Attorney General of India* and *D. N. Mukherjee*, for the respondent (in W.P. 106).

*Dilip Sinha*, for the respondents (in W.P. Nos. 113, & 441). B

*M. M. Kshatriya*, for the respondents (in W.P. 214).

*P. K. Chatterjee* and *G. S. Chatterjee*, for the respondent (in W.P. 41).

*Niren De, Attorney General of India* and *R. N. Sachthey*, for *Attorney General of India.* C

*Ramamurthy*, for intervener No. 1 and for intervener No. 2.

The Judgment of Ray CJ, Mathew & Chandrachud JJ. was delivered by Mathew J. Alagiriswami, J. and Bhagwati, J. gave partly dissenting Opinions.

MATHEW, J. In these writ petitions filed under article 32 of the Constitution, the petitioners question the legality of their detention and D pray for issue of writs in the nature of *habeas corpus*. These petitions raise a common constitutional question, namely, whether Parliament is bound to prescribe the maximum period of detention under article 22(7)(b) of the Constitution in order that the proviso to article 22(4)(e) might operate, and, whether, by s. 13 of the Maintenance of Internal Security Act, 1971 (Act 26 of 1971), hereinafter referred to as the Act, after it was amended by s. 6(d) of the Defence of India Act, 1971, the Parliament has prescribed the "maximum period". E

The orders passed by the Government of West Bengal under s.12 (1) of the Act in these cases provide that the Governor is pleased to confirm the orders of detention and to continue the detention of the F detenues till the expiration of 12 months from the dates of their detention or until the expiry of the Defence of India Act, 1971, whichever is later.

The material part of s. 13 of the Act as it originally stood ran as follows :

> "The maximum period for which any person may be G detained in pursuance of any detention order which has been confirmed under s. 12 shall be twelve months from the date of detention."

After it was amended by s. 6(d) of the Defence of India Act, 1971, the material part of s. 13 of the Act reads :

> "The maximum period for which any person may be H detained in pursuance of any detention order which has been confirmed under s. 12 shall be twelve months from the date

A of detention or until the expiry of the Defence of India Act, 1971, whichever is later."

The Defence of India Act, 1971, came into force on December 4, 1971. Section 1(3) of that Act provides that the Act shall come into force at once and shall remain in force during the period of operation of the Proclamation of Emergency and for a period of six months B thereafter. Section 2(g) of that Act defines "Proclamation of Emergency" as the proclamation issued under clause (1) of article 352 of the Constitution on the 3rd day of December, 1971. The President issued the Proclamation of Emergency under article 352 of the Constitution on December 3, 1971.

C Article 22(4)(a) of the Constitution says that no law providing for preventive detention shall authorize the detention of a person for a period longer then three months unless an Advisory Board has reported before the expiry of three months that there is in its opinion sufficient cause for such detention. The proviso to the article provides that nothing in sub-clause (a) shall authorize the detention of any person "beyond the maximum period prescribed by any law made by D Parliament under sub-clause (b) of clause (7)" of article 22. By reason of article 22(4)(b), a person can be detained for a longer period than three months without the necessity of consulting an Advisory Board if "such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7)" of article 22. And, article 22(7) says :

E "(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-F clause (a) of clause (4);

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

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

G

The contentions of the petitioners were that the Parliament was bound to prescribe the maximum period of detention under article 22(7)(b) of the Constitution in order that the proviso to article 22(4) (a) might operate and, as s. 13 of the Act as amended did not prescribe "the maximum period" of detention, the confirmation of the detention orders in terms of s. 13 of the Act was bad.

H

The learned Attorney General, who appeared for the respondent in these petitions, submitted that in s. 13 of the Act the Parliament has prescribed "the maximum period" of detention. And in the alter-

native, he said that the Parliament was not bound to prescribe the maximum period of detention for the proviso to article 22(4)(a) to operate. A

In *A. K. Gopalan* v. *The State of Madras*(1) Kania, C. J. said that article 22(7)(b) is permissive, it being not obligatory on Parliament to prescribe the maximum period and that if this construction resulted in a Parliamentary law enabling the detention of a person for an indefinite period without trial, that unfortunate consequence is the result of the words of article 22(7) itself and that the Court could do nothing about it. B

In *Krishnan* v. *The State of Madras*(2), s.11 of the Preventive Detention (Amendment) Act, 1951, was impugned as violative of article 22(4)(a) on the ground that s. 11 did not fix a maximum period of detention but on the contrary, empowered the Government in express terms to order that the detenu was to continue in detention for such period as it thought fit. The Court, by a majority, held that s.11 was not invalid on the ground that it did not fix the maximum period of detention inasmuch as the Act was to be in force only for a period of one year and no detention under that Act could be continued after the expiry of the Act. Mahajan, J. pointed out that the point was concluded by the decision in *Gopalan's* case(1) where Kania, C.J. had observed that it was not obligatory on Parliament to prescribe any maximum period. On the other hand, Bose, J. who wrote a dissenting judgment, held that though it was not obligatory on Parliament to fix the maximum period of detention under article 22(7)(b), if it wanted to detain a person for a period longer than three months, it could only do so by providing in the Act the maximum period of detention. C D E

In the *State of West Bengal* v. *Ashok Dey and Others*(3) the central issue was whether a State Legislature has power to pass a law providing for preventive detention of a person for a period longer than three months even after obtaining the opinion of an Advisory Board that there was sufficient cause for detention, unless the Parliament has prescribed the maximum period of detention under article 22(7)(b). The contention was that there was no such power. The Court negatived the contention and said that article 22(7) is couched in a permissive way, that there is nothing mandatory about it and that the majority decision in *Krishnan's* case(2) following the observation of Kania, C.J. in *Gopalan's* case(1) was binding on the Court. The Court also said that under entry 3 of list III of the Seventh Schedule, both Parliament and State legislatures have concurrent power to make laws in respect of "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 subject to such detention", and that as the State legislatures have plenary power to make law providing for preventive detention within the limitations imposed by the Constitution, the power must necessarily extend to all F G H

(1) [1950] S.C.R. 88. (2) [1951] S.C.R. 621

(3) [1972] 1 S.C.C. 199.

matters incidental to preventive detention as contemplated by this entry subject only to the condition that the law made by the State should not come into conflict with a law made by Parliament with respect to the same matter. The Court came to the conclusion that there was no limitation on the power of a State legislature to make a law providing for detention for a period beyond three months for the reason that Parliament has not made a law prescribing the maximum period of detention under article 22(7)(b).

Great reliance was placed by the petitioners on the reasoning contained in the dissenting judgment of Bose, J. in *Krishnan's* case(supra) for the proposition that the fixation by law of the maximum period of detention is obligatory upon Parliament in order that the proviso to article 22(4)(a) may operate.

According to Bose, J., a law providing for detention of a person beyond a period of three months must satisfy either clause (4)(a) or clause (4)(b) of article 22. The learned judge was not, however, prepared to read the word 'may' in clause (7) of article 22 as meaning 'must' as that would change the usual meaning of the word. He was of the view that Parliament is free to prescribe or not to prescribe the maximum period of detention under article 22(7)(b) and that neither Parliament nor State legislature can be compelled to pass a law authorising preventive detention beyond three months but, if, however, either wishes to do so, then it is bound to conform to the provisions of either sub-clause (a) or (b) of article 22(4) or both, and that, in the case of sub-clause (a), the proviso is as much a part of the sub-clause as its main provision. The learned judge then said that if no maximum limit is prescribed under sub-clause (b) of article 22(7), the proviso to article 22(4)(a) cannot operate, and, if it cannot operate, no legislative action can be taken under clause (4)(a), and resorted to reasoning from analogies to fortify his conclusion. He observed : "If A is told by B that he may go to a bank and withdraw a sum of money not exceeding such limit as may be fixed by C, it is evident that until C fixes the limit no money can be withdrawn. Equally, if A is told that he may withdraw money not exceeding a limit which he himself may fix, there can, in my opinion, be no right of withdrawal until he fixes the limit". He concluded his judgment by saying that the majority judgment abounted to the Constitution telling all persons resident in the land that "though we authorise Parliament to prescribe a maximum limit of detention if it so chooses, we place no compulsion on it to do so and we authorise it to pass legislation which will empower any person or authority Parliament chooses to name, right down to a police constable, to arrest you and detain you as long as he pleases, for the duration of your life if he wants, so that you may linger and rot in jail till you die, as did men in the Bastille".

We think the analogies which the learned judge referred to are, in fact, misleading and his reasonings from them not convincing.

Under entry 3 of List III of the Seventh Schedule, both Parliament and State legislatures have plenary power to pass laws for preventive detention as respects the subjects mentioned therein. As ancillary to

that power, or, as an inseparable part of it. Parliament and State legislatures have power to fix the period of detention also. One cannot imagine a power to pass a law for detention unless that power carries with it the incidental power to provide for the period of such detention. Therefore, both Parliament and State legislatures have power under the entry to provide for detention of a person for a specified period. The purpose of article 22(4)(a) is to put a curb on that power by providing that no law shall authorize the detention of a person for a period exceeding three months unless an Advisory Board has reported within the period of three months that there is sufficient cause for detention. And, what the proviso means is that even if the Advisory Board has reported before the expiration of three months that there is sufficient cause for detention, the period of detention beyond three months shall not exceed the maximum period that might be fixed by any law made by Parliament under article 22(7)(b). The proviso cannot mean that even if Parliament does not pass a law fixing the maximum period under article 22(7)(b), the State legislatures, for example, cannot pass a law which provides for detention of a person beyond three months. The period of such detention, *viz.*, detention beyond the period of three months, would then be a matter within the plenary power of Parliament or State legislatures, as the case may be, as such a power is incidental to the power to pass a law with respect to the topics covered by entry 3 of List III.

It is therefore clear that, but for the proviso to clause (4)(a) of article 22, the Act, as it provides for the opinion of the Advisory Board, can authorize detention of a person for any period, by virtue of the plenary character of the legislative power conferred by the entry. Whether such a law is liable to be struck down on the ground that it imposes unreasonable restrictions upon the fundamental rights under article 19 is an altogether different question. The proviso says in effect that if Parliament fixes the maximum period under article 22(7)(b), the power of Parliament and State legislatures to fix the period of detention in a law passed under the entry would be curtailed to that extent.

Seeing, therefore, that the power to pass a law providing for detention of a person after obtaining the opinion of the Advisory Board includes the power to fix any reasonable period beyond three months by virtue of the plenary character of the legislative power conferred by the entry, the proper analogy would be : A has authority from B to draw any amount from a bank but he is told that if C fixes a limit upon that authority, then he can only draw the amount as fixed by C: in such a case, if C does not fix the amount, the power of A to draw is plenary. Or, if A is told that he may withdraw money not exceeding a limit which he himself may fix, A has power to draw any amount, nay, the whole amount in the Bank, if only he fixes the limit at that amount. The condition-precedent, namely, the fixation of the amount by A in such a case, would be wholly illusory, for whatever he chooses to draw would be the limit of his authority. To put it differently, as Parliament and State legislatures have power under the entry to pass a law enabling the detention of a person for a period longer than three

A months in case the law provides for the opinion of the Advisory Board, there could be no limit to that period, except in the context of its reasonableness, as the power to fix the period of detention is incidental to the plenary power to legislate on the topic of preventive detention. The proviso merely enables Parliament to put a curb on that power by prescribing the maximum period of detention under
B article 22(7)(b). The proviso does not, *proprio vigore*, compel the Parliament to fix the maximum period. Nor does article 22(7). On the other hand, it expressly says otherwise. Whence then arises the obligation of Parliament to fix the maximum period under article 22(7)(b)? We see no provision which either expressly or by necessary implication compels Parliament to do so. Personal liberty is a cherished freedom, more cherished perhaps than all other freedoms,
C and we are deeply concerned that no man may linger and rot in detention. As judges and citizens, personal liberty is as dear to us as to anyone else and we may respectfully venture to make the same assumption in regard to those judges who were parties to the decisions in *Gopalan's case*(1), *Krishnan's case*(2) *and Ashok Dey's case*(3). But the problem here is one of dispassionate interpretation of the article in question and we cannot import an obligation that Parlia-
D ment "shall" by law prescribe the maximum period of detention. Such an obligation could only arise from an invisible radiation proceeding from a vague and speculative concept of personal liberty. The language of article 22(4(b) is in marked contrast with that of article 22(4)(a) read with the proviso. Article 22(4)(b) makes it obligatory upon Parliament, if it wants to pass a law for detaining a person for a period of more than three months without making a
E provision in that law for obtaining the opinion of an Advisory Board within three months, to comply with sub-clauses (a) and (b) of article 22(7). We, therefore, see no sufficient reason for departing from the view taken in the decisions of this Court referred to earlier as regards the power of Parliament under article 22(7)(b).

The question whether, when Parliament passes a law under artic[illegible] 22(7)(b) fixing the maximum period of detention in any class of cases,
F it is exercising an independent power of fixing the maximum period of detention derived from clause (7) of article 22 or a power traceable to the entries on the subject of preventive detention, does not arise for consideration here. If the exercise of the power under article 22(7) is independent of the power conferred by the entries relating to preventive detention, the question whether
G a law passed by virtue of any of the entries fixing a period of detention in excess of the maximum period fixed by a law passed under article 22(7)(b) would, *sub-silentio* repeal the provision in regard to the maximum period in the law passed under article 22(7), and make that period "the maximum period" for the purpose of article 22(7)(b) does not also strictly arise for consideration. But this much we think is certain, namely, that the prescription of a 'maximum period' by a
H law made under article 22(7)(b) has no particular sanctity so far as Parliament is concerned, as it could pass a law for detention the

(1) [1950] S.C.R. 88. (2) [1951] S.C.R. 621.
(3) [1972] 1 S.C.C. 199.

next day providing for a higher 'maximum period' and justify that law as a law passed both under the relevant entry relating to preventive detention and under article 22(7)(b). To put it differently, the view that the prescription of the maximum period under article 22(7)(b) is a guarantee that the Parliament cannot pass a law providing for longer period of detention than the maximum period fixed under article 22(7)(b) has no solid foundation, as the law of detention fixing the longer period would *sub silentio* repeal the law under article 22(7)(b) fixing the 'maximum period'. As Parliament has power to repeal a law fixing the maximum period under article 22(7)(b), the longer period fixed under the later law of detention would become the maximum period.

Detention without trial is a serious matter. It is only natural that it should conjure up lurid pictures of men pining in Bastille. But malignant diseases call for drastic remedies. And it was this realization that made the Constitution-makers—all lovers of liberty—to reconcile themselves to the idea of detention without trial.

Even if it is granted that Parliament is bound to fix the maximum period of detention, as we said, such a fixation cannot be immutable. what then is the great guarantee of personal liberty in the fixation of the maximum period of detention by Parliament, if that fixation can fluctuate with the mood of Parliament?

The learned Attorney General contended in the alternative that if s. 13 as amended is regarded as fixing the maximum period of detention under article 22(7)(b), it does not suffer from any infirmity on the score that the period fixed is indefinite as contended by the petitioners.

The petitioners had contended that the expression "the maximum period" occurring in article 22(7)(b) connotes a definite period reckoned in terms of years, months or days and that no period can be said to be a maximum period unless it is possible to predicate its beginning and end in terms of years, months or days. In other words, the argument was that since the determination of the period of detention, namely, the expiry of the Defence of India Act, 1971, is dependent upon the revocation of the Proclamation of Emergency, the period fixed in s. 13 is not "the maximum period" as visualized by article 22(7)(b).

The meaning of the word 'maximum' is, "the highest attainable magnitude or quantity (of some thing), a superior limit" (Shorter Oxford Dictionary, p. 1221, (1953), 3rd ed.). The meaning of the word 'period' is " A course or extent of time; Time of duration" (Shorter Oxford Dictionary, p. 1474). Therefore, the words "maximum period" mean the highest or greatest course or extent or stretch of time. The highest or greatest course or extent or stretch of time may be measured in terms of years, months or days, as well as in terms of the occurrence of an event or the continuous of a state of affairs.

In *Juggilal Kamlapat* v. *Collector, Bombay*(1), the High Court of Bombay was concerned with the question whether a requisition

(1) A.I.R. 1946 Bombay 280.

order which stated that the requisition of the immovable property in question was to continue during the period of "the present war and six months thereafter" was vague and indefinite. Bhagwati, J. said :

> "The period of the present war through indefinite in duration was definite in itself in so far as the petitioners were given in as clear terms as it could be an indication of the period for which their property was sought to be requisitioned by respondent 1 *viz.*, the duration of the present war. The user of this term was as definite as the user of the expression "the life time of A" which is used when settling or bequeathing a remainder in favour of B. B could not be heard to say that the life time of A which was the period prescribed as the one which was to come to an end before the remainder would vest in possession in his favour was a term which was vague or indefinite. It was as clear and definite as it could be, having regard to the fact that the period of the life time of an individual is indeterminate, though that life is of necessity going to come to an end some time or other".

We do not think it necessary that Parliament should have fixed a period in terms of years, months or days in order that it might be "the maximum period" for the purpose of article 22(7)(b). Seeing that the object of the law of preventive detention is to prevent persons from acting in a manner prejudicial to the maintenance of internal security, or of public order, or of supplies and services essential to the community or other objects specified in entry 9 of List I of the Seventh Schedule, we see great force in the contention of the learned Attorney General that "the maximum period" in article 22(7)(b) can be fixed with reference to the duration of an emergency. In other words, as the object of preventive detention is to prevent persons from acting in a manner prejudicial to the maintenance of internal security, public order or supplies or services essential to the community or other objects specified in entry 9 of List I, the power to detain must be adequate in point of duration to achieve the object. And, how can the power be adequate in point of duration, if it is insufficient to cope with an emergency created by war or public disorder or shortage of supplies essential to the community, the duration of which might be incapable of being predicted in terms of years, months or days even by those gifted with great prophetic vision ? If 'the maximum period" can be fixed only in terms of years, months or days, certainly it would have been open to Parliament to fix a long period in s. 13 and justify it as "the maximum period". It would be straining the gnat and swallowing the camel if anybody is shocked by the fixation of the maximum period of detention with reference to the duration of an emergency but could stomach with complacency the fixation of maximum period, say, at fifteen or twenty years. Whether the fixation of a "maximum period" in terms of years or in terms of events is reasonable in a particular circumstance is a totally different matter.

It was argued on behalf of one of the interveners on the basis of the decision of this Court in *B. Shama Rao* v. *The Union Territory*

*of Pondicherry*(1) that the Parliament has abdicated its power and duty to fix maximum period to the executive as the determination of the duration of the Proclamation of the Emergency is a matter within the discretion of the President and he is, therefore, the authority to determine the retirement age of the Defence of India Act.

We do not think that the Parliament, in fixing the duration of the maximum period of detention with reference to an event like the cessation of the period of emergency, has, in any way, abdicated its power or function to fix the maximum period or delegated it to the President. There can be no doubt that it is Parliament that has fixed the maximum period in s. 13 of the Act. The only question is whether, because the duration of the period is dependent upon the volition of the President, it ceases to be "the maximum period". We cannot presume that the President will act unreasonably and continue the Proclamation of Emergency even after the emergency has ceased to exist.

The petitioners argued that s. 13 of the Act is bad for the reason that it is violative of their fundamental right under article 19 of the Constitution. This challenge is not open to them as it is precluded by the Proclamation of Emergency. Although it was argued that s. 13 of the Act is violative of article 14 of the Constitution for the reason that it has conferred unlimited discretion on the detaining authority to fix the period of detention, we do not think that there is any substance in that contention. The authority which passes the initial order of detention is not expected to fix the period of detention [see *Krishnan's* case(supra)], nay, it may be illegal if it were to do so. Nor is the Government bound, when confirming the order of detention, under s. 12(1) of the Act, to fix the period of detention [see *Suna Ullah* v. *State of J* N *K*(2). Even if a period is fixed in confirming the detention order under s. 12(1), the period can be revoked or modified (see s. 13). The maximum period of detention has been fixed by s. 13 and the discretion to fix the duration within the maximum has been given to the Government after considering all the relevant circumstances. Seeing that the maximum period of detention has been fixed by s. 13 and that the discretion to fix the period of detention in a particular case has to be exercised after taking into account a number of imponderable circumstances, we do not think that there is any substance in the argument that the power of Government to determine the period of detention is discriminatory or arbitrary.

In the result, we overrule the contention of the petitioners and direct the writ petitions to be listed for disposal.

ALAGIRISWAMI, J. I have read the judgment of our learned brother Mathew, J. and with respect I differ from him on the question whether it is obligatory on Parliament to fix the maximum period of detention. I shall analyse the relevant provisions later but I shall first deal with three decisions which have dealt with this question.

(1) [1967] 2 S.C.R. 650. (2) A.I.R. 1972 S.C. 2431.

A In *A. K. Gopalan* v. *The State of Madras*(1) the six learned Judges comprising the Bench delivered separate judgments. Kania C. J. was the only Judge who dealt with this point in these words :

> "It was argued that this gives the Parliament a right to allow a person to be detained indefinitely. If that construction is correct, it springs out of the words of sub-clause (7) B itself and the Court cannot help in the matter."

It would be noticed that there is no discussion at all here as to whether the learned Chief Justice came to the conclusion that the contention was correct or not or how it springs out of the words of sub-clause (7) that it was not obligatory on Parliament to prescribe any maximum period.

C In the next case of *S. Krishnan* v. *The State of Madras*(2) Patanjali Sastri, J. with whom Kania, C.J. agreed, did not deal with this question at all. Mahajan, J., with whom S. R. Das, J. agreed substantially on the grounds stated by Mahajan, J. did, of course, deal with this question in these words :

> "The next point canvassed before us was that the Constitution D does not envisage detention for an indefinite period and that it is obligatory on Parliament to provide a maximum period for detention of a person under a law of preventive detention. In my opinion, this argument again is not sound. Emphasis was laid on the proviso to article 22(4)(a) which enacts that nothing in the sub-clause shall authorize the detention of any person beyond the maximum period prescribed E by any law made by Parliament under sub-clause(b)of clause (7),and it was urged that the word "may" in article 22(7) must be read in the sense of "must" and as having a compulsory force inasmuch as the enactment authorizes Parliament to prescribe by law a maximum period for detention, for the advancement of justice and for public good, or for the benefit of persons subjected to preventive detention. F Reference was made to Maxwell on "Interpretation of the Statutes" (9th End., page 246) and to the well-known case of *Julius* v. *Bishop of Oxford*(3) Lord Cairns in that case observed as follows :—
>
> > "Where a power is deposited with a public officer for the purpose of being used for the benefit of persons G that power ought to be exercised."
>
> In my opinion, clause (7) of article 22, as already pointed out, in its true concept to a certain degree restricts the measure of the fundamental right contained in clause (4)(a) and in this context the rule referred to by Maxwell has no application whatever. Moreover, the provision in the H Constitution is merely an enabling one and it is well settled

(1) [1950] S.C.R. 88. (2) [1951] S.C.R. 621.

(3) 5 App. cas. 214.

that in an enabling Act words of a permissive nature cannot be given a compulsory meaning. (Vide Craies on Statute Law, p. 254). Be that as it may, the point is no longer open as it has been concluded by the majority decision in *Gopalan's case*. The learned Chief Justice at p. 119 of the report observed as follows :—

> "Sub-clause (b) is permissive. It is not obligatory on the Parliament to prescribe any maximum period. It was argued that this gives the Parliament a right to allow a person to be detained indefinitely. If that construction is correct, it springs out of the words of sub-clause (7) itself and the court cannot help in the matter."

*Nothing said by Mr. Nambiar is sufficient to persuade me to take a different view of the matter than was taken in Gopalan's case.* It may be pointed out that Parliament may well have thought that it was unnecessary to fix any maximum period of detention in the statute which was of a temporary nature and whose own tenure of life was limited to one year. Such temporary statutes cease to have any effect after they expire, they automatically come to an end at the expiry of the period for which they have been enacted and nothing further can be done under them. The detention of the petitioners therefore is bound to come to an end automatically with the life of the statute and in these circumstances *Parliament may well have thought that it would be wholly unnecessary to legislate and provide a maximum period of detention for those detained under this law."*

It would be noticed that while he did discuss this question he thought that the point was concluded by the decision in *Gopalan's case*. As I have pointed out earlier that was not a majority decision but only a passing observation by Kania, C.J. Both these cases mainly proceed on the basis that the Act itself being a temporary Act to be in force for a year the question of maximum period did not arise for serious consideration. Bose, J. however was of the view that it was obligatory on Parliament to fix the maximum period of detention.

In the latest case of *State of West Bengal* v. *Ashok Dey*(1), which was a judgment by four learned Judges, Dua, J. speaking for the Court said :

> "Now, the argument raised in the High Court and accepted by it and repeated before us by Shri S. N. Chatterji on behalf of the respondents is that caluse (7)(b) of Article 22 makes it obligatory for the Parliament to prescribe by law the maximum period for which a person may be detained as also the procedure to be followed by the Advisory Board in holding the enquiry under clause (4)(a) of this Article. According to the submission, in the absence of such a law by Parliament no order of detention can authorise detention of any person for a period longer than three months and at the

(1) [1972] (1) S.C.C. 199.

A expiry of three months all persons detained under the Act must be released.

We are unable to accept this construction of clause (7) of Article 22. It is noteworthy that Shri Chatterji, learned counsel for the respondents, expressly conceded before us that Article 22(7) is only an enabling or a permissive provision and it does not impose a mandatory obligation on the B Parliament to make a law prescribing the circumstances under which a person may be detained for more than three months as stated therein. But according to him sub-clause (b) and (c) of clause (7) do contain a mandate to the Parliament which is obligatory. In our view, clause (7) of this Article on its plain reading merely authorises or enables the Parliament to make a law prescribing (i) the circumstances under C which a person may be detained for a period longer than three months, (ii) the maximum period for which a person may in any class or classes of cases be detained under any law providing for preventive detention, and (iii) the procedure to be followed by the Advisory Board in an enquiry under clause (4)(a) of this Article. The respondents' contention that "may" in the opening part of this Article must D be read as "shall" in respect of sub-clauses (b) and (c) though it retains its normal permissive character in so far as clause (a) is concerned, in the absence of special compelling reasons can be supported neither on principle nor by precedent of which we are aware. On the other hand this Court has in *S. Krishnan* v. *State of Madras* agreeing with the obser- E vations of Kania, C.J. in *Gopalan* v. *State of Madras* held sub-clause (b) of clause (7) to be permissive. This opinion is not only binding on us but we are also in respectful agreement with it."

This decision does directly deal with the point but not by detailed analysis of the relevant provisions as done by Mathew, J. and Bhagwati, J. and as I have tried to do later on. The decision, however, was F mainly concerned with the power of the State Legislature to make a law with regard to preventive detention and the whole approach is coloured by this consideration rather than the question whether the prescription of the maximum is obligatory.

The power of Parliament to legislate with regard to preventive detention arises under Entry 9, List 1 of the Seventh Schedule as well G as Entry 3, List 3 of the Seventh Schedule. The State Legislature has the power to legislate with regard to preventive detention under Entry 3 in List 3 of the Seventh Schedule. This, of course, is subject to the provisions of Article 254(2) of the Constitution. Article 22 is found in Part III of the Constitution regarding fundamental rights. According to Article 13(2) the State shall not make any law which takes away or abridges the rights conferred by that Part. Therefore, Article 22 is H an article restricting the powers of Parliament and State Legislatures in regard to preventive detention in the manner laid down therein. Of the learned Judges who dealt with *Gopalan's case*, Kania, C.J., Patanjali Sastri and Dass JJ. took the view that Article 22 does not

form a complete code of constitutional safeguards relating to preventive detention. While Mahajan, J. thought that it contains a self-contained code of constitutional safeguards relating to preventive detention, Das, J. thought that Article 22 lays down the minimum rules of procedure that even the Parliament cannot abrogate or overlook. Mukherjea, J. proceeded to state his conclusions on the assumption that Art. 22 is not a self-contained code relating to preventive detention. Fazl Ali, J. took the view that Art. 22 does not form an exhaustive code by itself relating to preventive detention. All this goes to show that all the learned Judges more or less took the view that Art. 22 obtained certain constitutional safeguards regarding the preventive detention.

Now let us look at Article 22 in so far as it is necessary for the purpose of this discussion :

"Art. 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).

(7) Parliament may by law prescribe—

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

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

(c) .....

I shall now place the various parts of the above provisions separately so as to make matters clear :

1. No law providnig for preventive detention shall authorise the detention of a person for a longer period than three months unless the Advisory Board, consisting of persons who are, or have been, or are qualified to be

A appointed as Judges of the 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.

2. This does not authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7).

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3. No law providing for preventive detention shall authorise the detention of a person for a period longer than three months unless such person is detained in accordance with the provisions of any law made by Parliament prescribing—

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

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

The 1st proposition means that a law providing for preventive detention can authorise the detention of a person for a longer period than three months only if an Advisory Board has reported that there is sufficient cause for such detention.

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Proposition (2) means that even with the advice of an Advisory Board the detention cannot exceed the maximum period prescribed by law made by Parliament under sub-clause (b) of clause (7). I shall deal with the question whether it is obligatory on Parliament to make such a law a little later.

F Proposition (3) means that if a person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) *and* (b) of clause (7) the detention can be for a period longer than three months. It should be noticed that the law contemplated under this proposition is one made under sub-clauses (a) and (b) of clause (7). Therefore a Parliamentary statute can provide for preventive detention without obtaining the opinion of an Advisory Board by laying down the circumstances under which and class or classes of cases G in which it can be done. In that case the maximum period for which a person can be detained should also be specified by the parliamentary law *i.e.* a person cannot be detained for a period exceeding three months without obtaining the opinion of an Advisory Board unless the concerned provision of law also provides for the maximum period for which such a person is to be detained. The Constitution makers have H contemplated that if the Advisory Board's opinion is to be dispensed with, the maximum period of detention should be laid down. It is obvious, therefore, that the word "may" in Art. 22(7) amounts to "shall". It is also obvious that the power to dispense with the opinion

of an Advisory Board is given only to Parliament. When it makes a law under clause (7)(a) & (b) of Art. 22 that also would bind the State Legislatures in so far as they enact any legislation with regard to preventive detention. This is not, of course, to say that State Legislatures have no power with regard to preventive detention. But they do not have the power to prescribe the circumstances under which and the class or classes of cases in which a person may be detained for a period longer than 3 months without obtaining the opinion of an Advisory Board. That power is completely that of Parliament - and any State legislation will also be subject to the maximum period prescribed by Parliament under a legislation made under Art. 22(7)(a) and (b).

The only question that now remains to be considered is whether if an Advisory Board is provided for in a law providing for preventive detention under Article 22(4) a maximum period of detention should be prescribed or not. In considering this question one thing would be obvious : that if Parliament does prescribe a maximum period under proposition (2) i.e. the proviso to Art. 22(4)(a), that would apply to all laws relating to preventive detention whether made by Parliament or by a State Legislature. Apparently the power to prescribe a maximum period given to Parliament (referred to in this proviso) is to prevent the State Legislatures making laws with regard to preventive detention without any maximum limit. This is another limitation on the powers of the State Legislature to legislate with regard to preventive detention. The Constitution makers apparently did not want the State Legislatures to have an unfettered power with regard to preventive detention even in the field allotted to them under Entry 3 of List 3 of Seventh Schedule. This provision can be usefully compared with the provision of Art. 31(3) which provides for a legislation made under the provisions of clause (2) of Art. 31 being reserved for consideration of the President and receiving his assent in order that it may have effect. This was intended to act as a fetter on the power of the State Legislatures to legislate under the provisions of Art. 31(2). The only difference between Art. 31(3) and the proviso to Art. 22(4)(a) is that in the one case the power is given to the President and in the other case the power is given to the Parliament. Now if under sub-clauses (a) *and* (b) of clause (7), read together, Parliament has to prescribe the maximum period of detention, does the fact that the proviso to Art. 22(4)(a) mentions only sub-clause (b) of clause (7) but not also sub-clause (a), makes any difference? If, as I have already pointed out, this proviso at least contemplates Parliament making a law providing for the maximum period of detention which cannot be exceeded by any State law regarding preventive detention the reasonable construction would be to hold that it is obligatory on Parliament to legislate under sub-clause (b) fettering the hands of the State Legislature in regard to the maximum period of detention. It is true that Parliament cannot fetter its own hands in the matters of legislating with regard to the maximum period of detention. If the Parliament can fix the maximum period it can also alter it. But if the maximum period so fixed is unreasonably long Art. 19(1) would be attracted. An harmonious construction of the whole of Articles 22(4) and 22(7) would thus necessitate that Parliament should provide a maximum period of detention not merely in respect of laws relating to preventive detention

made by State Legislatures but also its own laws regarding preventive detention. If legislation with regard to the provision of a maximum period is merely optional there was no need for the proviso at all. The fact that only sub-clause (b) of clause (7) is mentioned in the proviso to Article 22(4)(a) does not make any difference to the obligatory character of having a maximum period for preventive detention because, as we have already seen, fixing of maximum period of detention is obligatory under Article 22(7)(a) and (b). It can also be said that where Parliament has prescribed the maximum period of detention under sub-clauses (a) and (b) of clause (7) such a maximum would be automatically attracted to the proviso under Article 22(4)(a). Furthermore, sub-clause (a) of clause (7) is not mentioned in the proviso to sub-clause (4)(a) because Article 22(4) does not deal with detention without the opinion of an Advisory Board. That is why clause (b) alone is mentioned. It is clear that the concept of a maximum period of detention runs through the whole of Article 22(4) and (7). This is because while Parliament and State Legislatures make laws it is the executive that makes orders of detention and if no maximum period of detention is specified by law it would be open to the executive to keep persons in detention indefinitely. It is not reasonable to hold that the Constitution makers while providing that if a person is to be detained without the opinion of an Advisory Board being taken there should be a maximum period of detention, thought that no maximum period of detention need be fixed if the Advisory Board's opinion is taken. It should be noticed that the opinion of the Advisory Board is only as regards the sufficiency of the cause for such detention and not as regards the period for which such detention can be made. Therefore, taking an overall view and analysing the provisions of caluses (4) and (7) of Article 22 it is clear that a maximum period of detention should be laid down by Parliament whether it is a case of detention after obtaining the opinion of an Advisory Board or without obtaining the opinion of an Advisory Board. I am fortified in this view by the debates in the Constituent Assembly to which Bhagwati J. has referred.

I agree, however, with Mathew J. that the law under consideration has prescribed the maximum period and therefore the contention of the petitioners should be overruled and the writ petitions be listed for disposal.

BHAGWATI, J. The question which arises in these petitions is of the highest importance. It affects personal liberty which is one of our most cherished freedoms. How far shall we permit it to be abridged by judicial construction? Shall we by interpretation vest large and unlimited power in the legislature to detain a person without trial as long as it pleases or shall we read constitutional limitations on the exercise of that power? That is the real issue before the Court.

The law is now well-settled by the decision of this Court in *A. K. Gopalan* v. *State of Madras*(1) that the legislative power to enact a law providing for preventive detention is derived from Entry 9, List I and Entry 3, List III of the Seventh Schedule to the Constitution. The

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

Parliament alone has the power to make law for preventive detention for reasons connected with the subjects enumerated in entry 9, List I, while the Parliament and the State Legislature both can make law for preventive detention for reasons connected with the subjects specified in entry 3, List III. The legislative power of the Parliament and the State Legislature to make law for preventive detention within their allotted fields is plenary, subject only to constitutional limitations, and this legislative power necessarily carries with it as incidental or ancillary to it the power to fix the period for which a person may be detained under such law. Now, if there were no limitations on the exercise of this power, the Parliament or the State Legislature, particularly the latter, could fix any period of detention it liked and indefinitely detain a person without trial. That would be a large and fearful power destructive of personal liberty and Art. 21 would not afford any protection against it, because the only guarantee that article provides is that no person shall be deprived of his personal liberty except according to procedure established by law. The constitution-makers, therefore, introduced Art. 22 with a view to placing limitations on the power of Parliament and the State Legislature to make law for preventive detention, so as to safeguard personal liberty of the individual against excessive inroads by legislative incursions in the area of personal liberty. Clauses 3 to 7 of Art. 22 impose these limitations. We are concerned only with cls. 4 to 7 which run as follows :

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"(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 :

E

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

F

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

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

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

H

A (7) Parliament may by law prescribe—

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

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

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

C It is clear on a combined reading of cls. (4) and (7) that if a law made by Parliament or the State Legislature authorises the detention of a person for a period not exceeding three months, it does not have to satisfy any other constitutional requirement except that it must be within the legislative competence of the Parliament or the State legislature, as the case may be. The Constitution permits the Parliament and the State Legislature to make law providing for detention upto a period D of three months without any limitation, presumably because detention for such a relatively short period of time without any further safeguard may be justifiable on practical and administrative grounds. But when the law seeks to provide for detention for a longer period than three months, it must comply with certain constitutional safeguards. These safeguards are to be found in sub-cls. (a) and (b) of cl. (4). Sub-cl. (a) of cl. (4) lays down that no law shall provide for detention for a E period longer than three months unless an Advisory Board consisting of persons with the qualifications there mentioned has reported before the expiration of the period of three months that there is in its opinion sufficient cause for such detention. The law must, therefore, provide for reference to an Advisory Board and its report within a period of three months, if the detention is to last longer than three months. If the Advisory Board opines that there is no sufficient cause for detention, F the person concerned cannot be detained beyond a period of three months. It is only if the opinion of the Advisory Board is in favour of detention that the person concerned can be detained for a longer period than three months, but in such a case what shall be the period of detention is entirely a matter for the detaining authority to decide. Vide *Puranlal Lakhanpal* v. *Union of India*.[1] There is, however, an outside limit to the period of detention laid down by the proviso which says G that nothing in sub-cl. (a) of cl. (4) shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under cl. (7), sub-cl. (b). It will, therefore, be seen that under cl. (4), sub-cl. (a) there is a double safeguard. One is that there can be no detention beyond the period of three months without the intercession of the Advisory Board and the other is that even where the Advisory Board is of the opinion that there is sufficient cause for H the detention, the person concerned cannot be detained beyond the maximum period prescribed by Parliamentary law made under cl. (7),

(1) [1958] S.C R. 460.

sub-cl. (b). Clause (4), sub-cl. (b) lays down an alternative situation where a person may be detained for a period longer than three months without obtaining the opinion of the Advisory Board and that is where the detention is in accordance with the provisions of any law made by Parliament under sub-cls. (a) and (b) of cl. (7). Sub-cl. (a) of cl. (7) empowers the Parliament to make a law prescribing the circumstances under which and the class or classes of cases in which a person may be detained for a period longer than three months without obtaining the opinion of the Advisory Board and sub-cl. (b) of cl. (7) provides that Parliament may by law prescribe the maximum period for which any person may in any class or classes of cases be detained under any law of preventive detention. When the Parliament has made a law under sub-cls. (a) *and* (b) of cl. (7), a person can be detained in accordance with such law for a period longer than three months without the intercession of the Advisory Board. Now we are not concerned in these petitions with the question as to what is the scope and ambit of sub-cl. (a) of cl. (7) and what kind of law is contemplated by this constitutional provision. That question arose for decision before this Court in *Sambhu Nath Sarkar v. State of West Bengal*(1) and there is an authoritative pronouncement of seven judges of this Court on that point. But that need not detain us. Our concern is with sub-cl. (b) of cl. (7). The question that we are called upon to consider is whether it is obligatory on the Parliament to prescribe the maximum period of detention under cl. (7), sub-cl. (b), if the detention is to be made for a longer period than three months under sub-cl. (a) of cl. (4).

Now one thing is clear that the Parliament is under no obligation to make a law under sub-cl. (a) of cl. (7). It is only if the requirement of obtaining the opinion of the Advisory Board is intended to be dispensed with that the Parliament must make a law under sub-cl. (a) of cl. (7). If the Parliament does not make such a law, cl. (4), sub-cl. (b) will not come into operation and detention for a period longer than three months, whether under Parliamentary law or under State law, would be impermissible without obtaining the opinion of the Advisory Board. It was not disputed on behalf of the respondents that under sub-cl. (a) of cl. (7), it must be accompanied by a law made by the Parliament under sub-cl. (b) of cl. (7). Mere enactment of a law under sub-cl. (a) of cl. (7) would be futile without a law under sub-cl. (b) of cl. (7), because what sub-cl. (b) of cl. (4) requires is that the detention must be in accordance with the law made by Parliament under sub-cls. (a) *and* (b) of cl. (7). The language of cl. (4), sub-cl. (b) posits clearly and in no uncertain terms that there must be law both under sub-cls. (a) and (b) of cl. (7) in order that cl. (4), sub-cl. (b) may operate. If there is a law only under sub-cl. (a) of cl. (7) and no law under sub-cl. (b) of cl. (7), a person cannot be detained longer than three months without obtaining the opinion of the Advisory Board as contemplated under cl. (4), sub-cl. (a). The making of a law by the Parliament under sub-cl. (b) of cl. (7) is therefore obligatory if the detention is to be

(1) [1973] 1 S.C.C. 856.

for a longer period than three months without the intercession of the Advisory Board. The object of the constitution makers in insisting on this requirement clearly was that though in "exceptional circumstances and exceptional classes of cases" the Parliament may by law authorise detention for a period more than three months without reference to the Advisory Board, such detention should be a maximum period specified by the Parliament beyond which it should not extend. There should be an outside limit to the detention by the specification of the maximum period by the Parliament. This was the safeguard provided by the constitution makers in protection of personal liberty. The maximum period specified by the Parliament must obviously be a reasonable one, because otherwise the Parliamentary law would be bad as offending cls. (a) and (d) of Art. 19(1). So much is clear and beyond dispute. But the question is: does the same requirement of specification of the maximum period by the Parliament also apply where the detention is sought to be made for a longer period than three months under sub-cl. (a) of cl. (4)? The answer to this question depends on the true interpretation of the Proviso to sub-cl. (a) of cl. (4) read in the context of cl. (4), sub-cl. (b) and cl. (7), sub-cls. (a) and (b).

Since the purpose of interpretation is to ascertain the real meaning of a constitutional provision, it is evident that nothing that is logically relevant to this process should be excluded from consideration. It was at one time thought that the speeches made by the members of the Constituent Assembly in the course of the debates on the Draft Constitution were wholly inadmissible as extraneous aids to the interpretation of a constitutional provision, but of late there has been a shift in this position and following the recent trends in juristic thought in some of the Western countries and the United States, the rule of exclusion rigidly followed in Anglo-American jurisprudence has been considerably diluted. Crawford in his book on *Statutory Construction* points out at page 388 :

> "The judicial opinion on this point is certainly not quite uniform and there are American decisions to the effect that the general history of a statute and the various steps leading up to an enactment including amendments or modifications of the original bill and reports of Legislative Committees can be looked at for ascertaining the intention of the legislature where it is in doubt, but they hold definitely that the legislative history is inadmissible when there is no obscurity in the meaning of the statute."

This Court, speaking through Krishna Iyer, J., has also noted this change in the methodology of interpretation and recognized its validity in *State of Mysore* v. *R. V. Bidan*(1) where, after referring to the rule laid down in earlier decisions excluding reference to legislative proceedings for the purpose of interpretation, the learned Judge said :

> "This rule of exclusion has been criticised by jurists as artificial. The trend of academic opinion and the practice

(1) C.A. No. 992 of 1972, dec. on 3-9-1973.

in the European system suggest that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. Recently, an eminent Indian Jurist has reviewed the legal position and expressed his agreement with Julius Stone and Justice Frankfurter. Of course, nobody suggests that such extrinsic materials should be decisive but they must be admissible. Authorship and interpretation must mutually illumine and interact. There is authority for the proposition that resort may be had to these sources with great caution and only when incongruities and ambiguities are to be resolved. There is strong case for wittling down the rule of Exclusion followed in the British courts and for less sapologitic reference to legislative proceedings and like materials to read the meaning of the words of a statute. Where it is plain, the language prevails, but where there is obscurity or lack of harmony with other provisions and in other special circumstances, it may be legitimate to take external assistance such as the object of the provisions, the mischief sought to be remedied the social context, the words of the authors and other allied matters."

We may, therefore, legitimately refer to the Constituent Assembly debates for the purpose of ascertaining what was the object which the constitution makers had in view and what was the purpose which they intended to achieve when they enacted cls. (4) and (7) in their present form. When cl. (15) of the Draft Constitution, corresponding to Art. 21, was adopted by the Constituent Assembly, there was no clause in the Draft Constitution corresponding to Art. 22. A large section of the Constituent Assembly, including Dr. Ambedkar, was greatly dissatisfied with the wordings of cl. (16) and it was felt that cl. (15) as adopted gave to the legislature a *carte blanche* to provide for the arrest and detention of any person under any circumstances and for any period it deemed fit. Dr. Ambedkar, therefore, introduced a new cl. 15A providing certain safeguards, but in the course of a long and spirited debate which followed, it was found that these safeguards were not adequate. In view of the discussion which took place, Dr. Ambedkar amended cl. 15A so as to incorporate some of the suggestions and the amended cl. 15A was then further revised by the Drafting Committee. In the course of revision, the Drafting Committee re-numbered cls. 15 and 15A as Arts. 21 and 22 respectively. Thereafter when the revised Draft Constitution came up for consideration before the Constituent Assembly, on behalf of the Drafting Committee itself Mr. Krishnamchari moved two amendments which sought further to redraft clauses (4) and (7) so as to indicate clearly that there would be a maximum period laid down by Parliament for which any person or any class or classes of persons could be detained by any law providing for such detention; even in cases where the Advisory Board approved of detention beyond three months, no authority in India could in any circumstances order the detention of a person beyond the maximum limit

A so laid down by Parliament. Certain apprehensions as to the true effect of these amendments were voiced by some members but Dr. Ambedkar while replying to the debate clarified the position and explained the scope of the amended article as follows :

> "First, every case of preventive detention must be authorised by law. It cannot be at the will of the executive.
>
> B Secondly, every case of preventive detention for a period longer than three months must be placed before a judicial board, unless it is one of those cases in which Parliament, acting under clause (7), sub-clause (a), has by law prescribed that it need not be placed before a judicial board for authority to detain beyond three months.
>
> C Thirdly, *in every case, whether it is a case which is required to be placed before the judicial board or not, Parliament shall prescribe the maximum period of detention* so that no person who is detained under any law relating to preventive detention can be detained indefinitely. There shall always be a maximum period of detention which
> D Parliament is required to prescribe by law.
>
> Fourthly, in cases which are required by article 22 to go before the judicial board, the procedure to be followed by the Board shall be laid down by Parliament."

The amendments were then adopted by the Constituent Assembly and Art. 22 emerged in its present form. There can, therefore, be no
E doubt that according to the constitution makers, it was clearly intended that if detention is to be for a longer period than three months, whether under sub-cl. (a) or under sub-cl. (b) of cl. (4), the Parliament must prescribe the maximum period of detention and to use the words of Dr. Ambedkar, "there shall always be a maximum period of detention which Parliament is required to prescribe by law". The problem before us therefore resolves itself into a very narrow one,
F namely, are we going to accept an interpretation which gives effect to the intention of the constitution makers, or are we going to defeat their intention by a highly literal interpretation? Are we going to preserve the safeguard which the constitution makers in their overweening anxiety to protect personal liberty intended to fashion or are we going to dilute it by a process of construction?

G Fortunately the language of the Proviso to sub-cl. (a) of cl. (4) is not so intractable that it cannot be interpreted so as to effectuate the intention of the constitution makers and protect the citizen from indefinite incarceration without trial. I shall presently examine the language, but before that, let me once again look at the object of the provision in cl. (7), sub-cl. (b). This provision, as I have pointed out in relation to cl. (4), sub-cl. (b), is intended to provide a safe-
H guard or insulation against indefinite detention in cases where detention for a longer period than three months without reference to the Advisory Board is authorised by Parliamentary legislation under sub-cl. (a) of cl. (7). Now, if this protection or safeguard is necessary

where the detention may be for a longer period than three months under a law made by Parliament under sub-cl. (a) of cl. (7), a *fortiorari* it should equally be necessary where the detention is under sub-cl. (a) of cl. (4) because under that provision too the detention would be for a period longer than three months. It can hardly be supposed that the constitution-makers should have thought that in one case detention for an indefinite period should be impermissible as grave encroachment of personal liberty while in the other it should be allowed without any inhibition. The provision for reference to the Advisory Board would certainly ensure that there is sufficient cause for the detention, but, as held by this Court in *Puranlal Lakhanpal* v. *Union of India*(1) the Advisory Board would have no say in the matter of determination of the period of detention and how long to detain would be solely within the power of the detaining authority. There would thus be no check or control of the Advisory Board so far as the period of detention is concerned. The power of the detaining authority in regard to the period of detention would, therefore, be as large and unlimited in a case falling under sub-cl. (a) of cl. (4) as it would be in a case falling within a law made by Parliament under sub-cl. (a) of cl. (7). Equally in both cases, this power could lend itself to abuse by detention for indefinite duration and render the guarantee of personal freedom illusory and meaningless. It was to counteract this menace and safeguard personal liberty from attenuation by excessive inroads that the constitution-makers enacted sub-cl. (b) of cl. (7) providing for fixation of maximum period by the Parliament beyond which no person can be detained whether under parliamentary law or under State law. The compelling reasons which necessitated the enactment of the safeguard in sub-cl. (b) of cl. (7) apply equally whether the detention for a period longer than three months is authorised under sub-cl. (a) of cl. (4) or sub-cl. (a) of cl. (7). It therefore stands to reason that where the detention is to be for a longer period than three months under sub-cl. (a) of cl. (4), the safeguard of the maximum period to be prescribed by Parliament under cl. (7), sub-cl. (b) must be there so that there can be no detention for indefinite duration. If there is no maximum period prescribed by Parliament under cl. (7), sub-cl. (b), detention cannot be authorised for a period longer than three months under sub-cl. (a) of cl. (4). To take a different view would mean that where the Parliament itself authorises detention for a longer period than three months under cl. (7). sub-cl. (a), the Parliament is required to prescribe a maximum period but where the State Legislature authorises detention for a period longer than three months under sub-cl. (a) of cl. (4), no maximum period need be prescribed and once the Advisory Board gives a favourable opinion, the State Legislature can authorise detention for an indefinite period. That would indeed be a highly regrettable result. It would free the State Legislature from any restraint as to the period for which it may authorise detention under sub-cl. (a) of cl. (4) and open the flood gates for excessive invasion of personal liberty. I do not think such is the meaning of the constitutional provision.

(1) [1958] S.C.R. 460.

A The Proviso to sub-cl. (a) of cl. (4) says that though a person may be detained for a longer period than three months after obtaining the opinion of the Advisory Board, such detention shall not extend "beyond the maximum period prescribed by any law made by Parliament under sub-cl. (b) of cl. (7)". It is clear on a combined reading of the Proviso and the main provision in sub-cl. (a) of cl. (4) B that the Proviso is an integral part of the main provision. It is intended to cut down the large amplitude of the power of detention conferred under the main provision. The scope and boundary of the power of detention under cl. (4), sub-cl. (a) can, therefore, be defined only by reading the Proviso and the main provision *as one single enactment*. Both together represent the will of the constitution makers. One cannot be disjoined from the other and given effect to, C though the other is not operative. If the Proviso does not operate, the main provision also would not, for the main provision is intended to operate only with the limitation imposed by the Proviso. It is difficult to believe, for reasons already discussed, that the constitution makers should have intended that the power to detain for a longer period than three months should be exercisable, even if the limitation imposed by the Proviso were non-existent. The Proviso and the main D provision form part of one integral scheme and either both operate together or none. Here the Proviso is not used in its traditional orthodox sense. It is intended to enact a substantive provision laying down an outside limit to the period of detention. If there is no outside limit by reason of Parliament not having prescribed the maximum period under sub-cl. (b) of cl. (7), the provision enacted in cl. (4), sub-cl. (a) cannot operate and in that event detention cannot be continued E beyond three months, even though the opinion of the Advisory Board may be obtained. The Proviso clearly posits the existence of a law made by Parliament under sub-cl. (b) of cl. (7) and makes it an essential element in the operation of cl. (4), sub-cl. (a). The constitution makers have, by enacting the Proviso in cl. (4), sub-cl. (a) achieved the same legislative end as they have in cl. (4), sub-cl. (b) by using the words "and sub-cl. (b)". The legislative device has F been different because of the differing structural arrangements of the two sub-clauses. This is in my opinion the correct construction of cl. (4), sub-cl. (a) read with cl. (7), sub-cl. (b). In any event, it is highly possible construction and if it carries out the intention of the constitution makers and inhibits the power of the legislature to authorise detention for indefinite duration, there is no reason why we G should not prefer it. We must remember that it is a constitution we are expounding—a constitution which gives us a democratic republican form of government and which recognizes the right of personal liberty as the most prized possession of an individual. Shall we not then lean in favour of freedom and liberty when we find that it can be done without any violence to the language of the constitutional provision? Shall we not respond freely and fearlessly to the intention H of the founding father and interpret the constitutional provision in the broad and liberal spirit in which they conceived it, instead of adopting a rather mechanical and literal construction which defeats their intention?

It may be argued : what is the value of this safeguard, how does it strengthen the guarantee of personal liberty, when the fixation of the maximum period is not immutable, but can fluctuate according to the pleasure of the Parliament. I do not think this argument is valid. It fails to take into account two important considerations. In the first place, cl. (4), sub-cl. (b) clearly shows that even though the fixation of maximum period is within the discretion of Parliament, the constitution makers regarded it as a valuable safeguard, for otherwise they would not have insisted upon prescription of maximum period as a condition of detention for a period longer than three months under a law made by Parliament under cl. (7), sub-cl. (a). Even where Parliament itself makes a law under cl. (7), sub-cl. (a) authorising detention for a period longer than three months, the Constitution says that in order that such law may operate, Parliament should prescribe the maximum period. That shows the great importance attached by the constitution makers to this safeguard, even though the maximum period is to be fixed by the Parliament and a *fortiorari,* theoretically at least, it may be varied from time to time according to the pleasure of the Parliament. Now if the prescription of maximum period is regarded by the Constitution makers as a valuable safeguard necessary to be complied with even where Parliament makes a law under cl. (7), sub-cl. (a) authorising detention for a longer period than three months, how much more necessary and valuable it would be where instead of a parliamentary law, a State law authorises detention for a period longer than three months under cl. (4), sub-cl. (a). Secondly, if the maximum period is required to be prescribed, Parliament would necessarily have to apply its mind to the question and when it does so, it can safely be presumed that, being a highly responsible body that it is, it would fix a maximum period which is reasonable and that would provide a check against indefinite detention by the Government. It is true that theoretically it may be possible to say that the fixation of the maximum period can be varied by Parliament arbitrarily according to its sweet-will, but in practice such an eventuality would be highly remote having regard to the pressure of democratic forces and sanction of public opinion. Moreover, if the maximum period fixed is unreasonable, it can always be struck down by the court as violative of cls. (a) and (d) of Art. 19. It would not, therefore, be correct to say that the prescription of maximum period by Parliament is an illusory safeguard. At least the constitution makers did not think it to be so.

These reasons compel me to differ from the view taken in the leading judgment of my learned brother Mathew, J. In my opinion Parliament is free to prescribe or not to prescribe a maximum period under cl. (7), sub-cl. (b). It is under no obligation to do so. But if no maximum period is prescribed, neither the Parliament nor the State Legislature can authorise detention for a longer period than three months either under sub-cl. (a) or sub-cl. (b) of cl. (4). If the Parliament or the State Legislature wishes to authorise detention for a period longer than three months, it must conform to the provisions of either sub-cl. (a) or sub-cl. (b) of cl. (4) and that requires

A that maximum period must be prescribed by Parliament by law made under cl. (7), sub-cl. (b). There would thus always be a maximum period of detention : either the initial period of three months or the maximum period prescribed by Parliament under cl. (7), sub-cl. (b). There can be no detention for a period longer than three months unless the maximum period of detention is prescribed by Parliament under cl. (7), sub-cl. (b). I know it is not customary to refer to
B opinions expressed in the text book of a living author but I cannot help mentioning that Mr. Seervai in his book on *Constitutional Law* also echoes the same line of thought. (*Constitutional Law of India*, p. 450, para 12.52).

This is the view which I am taking on construction bu I must consider whether there is anything in the earlier decisions of this
C Court which precludes me from doing so. Three decisions were cited before us and I must now refer to them. The first is *Gopalan's* case (supra) where six learned judges comprising the constitution bench delivered separate judgments in regard to the validity of certain provisions of the Preventive Detention Act, 1950. None of the learned judges, except Kania, C.J., dealt with the present point or expressed any opinion upon it. Kania, C.J., alone had something to say and he
D observed : "Sub-clause (b) is permissive. It is not obligatory on the Parliament to prescribe any maximum period. It was argued that this gives the Parliament a right to allow a person to be detained indefinitely. If that construction is correct, it springs out of the words of sub-clause (7) itself and the court cannot help in the matter." It will be seen that these observations merely express the *inse dixit* of the learned Chief Justice. There is no discussion of the point and
E no reasons are given in support of it. That cannot bind us.

The next decision is that of the constitution Bench in *S. Krishnan* v. *The State of Madras*(1). There were three main judgments in this case. The first was by Patanjali Sastri, J., (as he then was), with whom Kania, C.J., agreed. (Patanjali Sastri, J., did not deal with this question at all and his judgment does not throw any light on it. The
F second judgment was by Mahajan, J., (as he then was), with whom S. R. Das, J. (as he then was) substantially agreed. Mahajan, J., certainly dealt with this question but it is evident from the relevant portion from his judgment extracted by brother Alagiriswami, J., that the question was not raised before the Court in that case in the form in which it has been presented before us. The argument which was advanced in that case was that the word 'may' in cl. (7) of Art. 22
G must be read in the sense of 'must' and it must, therefore, be held to be obligatory on the part of Parliament to make a law under sub-cl. (b) of cl. (7) of Art. 22. This argument was rejected by Mahajan, J. That does not help us because the argument before us is quite different. Moreover, Mahajan, J., regarded this point as concluded by the majority decision in *Gopalan's* case (supra) and relied on the observations of Kania, C.J., which I have quoted above. But this was
H obviously under some misapprehension, because, as pointed out above, the other learned Judges did not express themselves on this point and

(1) [1951] S.C.R. 621.

the observations of Kania, C.J., did not represent the majority decision. In any event, this view expressed by Mahajan, J., was shared only by S. R. Das, J., and Bose, J., emphatically dissented from the view. Bose, J., in a strong and powerful judgment held that though it is not obligatory on Parliament to fix a maximum period of detention under sub-cl. (b) of cl. (7) of Art. 22, if a person is to be detained for a period longer than three months, a maximum period must be prescribed by Parliament. This is the same view which has found favour with me. This decision does not therefore compel me to hold otherwise.

The last decision to which I must refer is that in *State of West Bengal* v. *Ashok Dev*(1). It cannot be disputed that the question in the form in which it has been presented before us was raised before the Court in that case. But, if we look at the judgment of Dua, J., and particularly the portion extracted in the judgment of brother Alagiriswami, J., it will be clear that the argument advanced before the Court in that case was the same as that in *Krishnan's* case (supra), namely, "that 'may' in the opening part of" cl. (7) of Art. 22 "must be read as 'shall' in respect of sub-clauses (b) and (c) though it retains its normal permissive character in so far as clause (a) is concerned", and it was this argument which was rejected by the Court by saying that "in the absence of special compelling reasons" it "can be supported neither on principle nor by precedent". The argument here is quite different : it is not contended that 'may' must be read as 'shall'. It is an argument from a different angle and approach and that does not appear to have been canvassed before the Court nor has it been discussed. Moreover, this decision is by a Bench of four judges. It cannot therefore deflect me from the view I am taking.

Now in the present case s. 13 of the Maintenance of Internal Security Act, 1971 (hereinafter referred to as the Act) as it originally stood, provided that the maximum period for which any person may be detained in pursuance of any detention which has been confirmed under s. 12 shall be twelve months from the date of detention. It was common ground between the parties that the period of twelve months prescribed by the unamended s. 13 as the maximum period for which a person could be detained under the provisions of the Act was "maximum period" as contemplated under sub-cl. (b) of cl. (7) of Art. 22. But by s. 6(d) of the Defence of India Act, 1971, which came into force on 4th December, 1971, s. 13 was amended so as to provide that the maximum period of detention shall be "twelve months from the date of detention or until the expiry of the Defence of India Act, 1971 whichever is latter". Sec. 1(3) of the Defence of India Act, 1971 laid down the duration of that Act and said that that Act shall remain in force for the duration of the proclamation of emergency and a period of six months thereafter. Sec. 13, as amended, thus provided that the maximum period of detention under the Act shall be twelve months from the date of detention or until the expiry of a period of six months

(1) [1972] (1) S.C.C. 199.

A after the cessation of the proclamation of emergency whichever is later. The question is whether this period prescribed by the amended s. 13 could be said to be "maximum period" within the meaning of that expression as used in sub-cl. (b) of cl. (7) of Art. 22. The argument of the petitioners was that the period specified in the amended s. 13 was indefinite inasmuch as it could not be predicated as to when the proclamation of emergency would come to an end and it could not
B therefore be regarded as "maximum period" so as to satisfy the mandate of sub-cl. (b) of cl. (7) of Art. 22. The petitioners contended that since no maximum period was prescribed by Parliament the amended s. 13 being inadequate for that purpose—the petitioners could not be detained beyond a period of three months and they were therefore entitled to be freed. This argument requires serious consideration.

C

The question is what is the meaning of the expression 'maximum period' in sub-cl. (b) of cl. (7)? When a period is fixed with reference to the happening of an event, which is bound to happen, but of which it cannot be predicated with any definiteness as to when it would happen, as for example, cessation of emergency or death of an individual, can it be said that the period fixed is 'maximum period'
D within the meaning of sub-cl. (b) of cl. (7)? The word 'maximum' according to the *Shorter Oxford Dictionary* means "highest attainable magnitude or quantity (of something); a superior limit" and the word 'period' means "a course of extent of time; time of duration". Therefore, as a matter of plain grammatical English, the words 'maximum period' mean the highest or greatest extent or stretch of time which
E fixes an outside limit. Now this highest or greatest extent or stretch of time may be determined by means of a fixed date or in terms of years, months or days or by reference to the occurrence of an event. But whatever be the mode of determination, 'maximum period' must be a definite period. The measure of the period must not be uncertain. The outside limit must be definite and known. The period fixing the outside limit may be prescribed by reference to an event,
F but the date of occurrence of the event must not be uncertain. It should be possible to predicate that the event will happen at a definite ascertained point of time. It is not enough to say that the event is certain and bound to happen. What is necessary is that the point of time at which the event would happen must be definite. Then only it can be said to fix the 'maximum period' of detention. It is indeed difficult to see how 'maximum period' can be said to be pres-
G cribed, when no one knows how long it will be. It may be five years, or ten years or more. That would be uncertain. How can such a period be regarded as 'maximum period' fixed by law? The very notion of 'maximum period' carries with it a sense of definiteness. When maximum period is prescribed, there must be definite qualification of the length or duration of the period. If the length of duration is uncertain in that it depends on when a particular event
H would happen, the prescription of such a period would hardly act as a check against indefinite detention, for there would be no guarantee that the detention would not continue beyond a determinate point of time. The period of detention which could be authorised by the

Legislature would in such a case be indefinite, because it would be uncertain as to when the event, by reference to which the period is to be measured, would happen. That would fail to effectuate the object and purpose of the requirement of prescription of maximum period enacted in sub-cl. (b) of cl. (7). A

I may at this stage pause to consider what would be the consequences if a construction contrary to that I have discussed above were accepted. It is true that the consequences of a suggested construction do not alter the meaning of a statute but they certainly help to fix its meaning. If I accept the construction that maximum period can be prescribed with reference to an event, even though the event is such that though certain, it cannot be predicated of it with any definiteness as to when it would occur—and it is only on the basis of this construction that the fixation of maximum period with reference to the duration of an emergency can be upheld and not otherwise—logically it would mean that 'maximum period' can be fixed with reference to the life of the person detained and if such maximum period is fixed, it would be open to the legislature to authorise detention of a person for the duration of his life. That would be a most startling and devastating result. It is impossible to believe that the constitution-makers who had themselves suffered long periods of incarceration at the hands of the British rulers should have become so obvious of the need to safeguard personal liberty that they should have given *carte blanche* to the Parliament to permit detention of a person for life without trial. The power to detail without trial is itself a drastic power justified only in the interest of public security and order. It is tolerated in a free society as a necessary evil. But the power to detain a person for *life* without trial is something unthinkable in a democracy governed by the rule of law. It is a draconic power subversive of freedom and liberty and can have no place in our constitutional arrangement. To grant such a power would be to destroy the democratic way of life, to annihilate one of the most cherished values of a free society and to vest in the State authoritarian power which is the anti-thesis of the rule of law. It would rob the fundamental guarantee of personal liberty of all meaning and content and reduce it to a mere husk. It would amount to the Constitution telling all persons residents in the land, in the words of Bose, J.: B C D E F

> "Here is the full extent of your liberty so far as the length of detention is concerned. We guarantee that you will not be detained beyond three months unless Parliament otherwise directs, either generally or in your particular class of case; but we empower Parliament to smash the guarantee absolutely if it so chooses without let or hindrance, without restriction. Though we authorise Parliament to prescribe a maximum limit of detention if it so chooses, we place no compulsion on it to do so and we authorise it to pass legislation which will empower any person or authority Parliament chooses to name, right down to a police constable, to arrest you and detain you as long as he pleases, for the G H

A duration of your life if he wants, so that you may linger and rot in jail till you die, as did men in the Bastille."

I shedder to accept such a construction. I think the maximum period must be prescribed either by reference to a fixed date or in terms of years, months or days or by reference to some event of which it can be predicated with certainty that it would happen at a determinate B point of time, so that there is complete ascertainment of what the period is meant to be and it is not indefinite. Of course, the maximum period which is so prescribed must be reasonable, for otherwise it would be violative of cls. (a) and (d) of Art. 19. This construction ensures two safeguards against detention for a longer period than three months, one under cl. (7), sub-cl. (b) of Art. 22 and the other under cls. (a) and (d) of Art. 19.

C

I am conscious that the power to detain a person without trial is a necessary power for preservation of the State and maintenance of public security and order and therefore when there is an emergency, it may be thought expedient that the State should have the power to detain a person without trial for the duration of the emergency and the conferment of such a power may not be regarded as unreasonable. D But this consideration cannot persuade me to accept a meaning of the words 'maximum period' which would render the fundamental guarantee of personal liberty precarious. It must be remembered that the Constitution is meant to provide not only for times of emergency but also for normal times, and it would not, therefore, be right to construe a constitutional provision such as sub-cl. (b) of cl. (7), as if it were an emergency provision. The law of preventive detention is not E necessarily a product of emergency. Indeed it has been there in our country in one form or another since the coming into force of the Constitution. Sub-cl. (b) of cl. (7) should not, therefore, be interpreted according to the cannon of construction which is sometimes adopted in interpreting war time or emergency legislation. It must be construed like any other constitutional provision having regard to its object and intentment. The fact that we are living today in an F emergency should not colour our interpretation of the constitutional provision. The constitutional provision must speak the same voice whether it be in times of emergency or in normal times. We must not forget what Mr. Justice Brande is said in *Whitney* case (1) : "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." We may also recall the words of Mr. Justice Murphy G in *Bridges* case(2) where he said "The strength of this nation is weakened more by those who suppress the freedom of others than by those who are allowed freely to think and act as their consciences dictate." Moreover, I may point out that the interpretation which I am accepting does not in any way whittle down or affect the power of the State to detain with a view to meeting a situation arising out H of the emergency. Parliament can always prescribe a suitable maximum period as interpreted by me and authorise detention for the

(1) 274 U.S. 380. (2) 326 U.S. 376

duration of such 'maximum period'. If at the end of such 'maximum period' when the person detained is released, it is found that, having regard to the relevant circumstances then existing, it is still necessary to detain him, the detaining authority can once again place him under detention provided of course—and that would be an important safeguard—that if the case falls within cl. (4), sub-cl. (a), the Advisory Board gives an opinion that there is sufficient cause for such further detention.

I am, therefore, of the view that since it cannot be predicated with any definiteness in the present case as to when the emergency would come to an end, the period prescribed by s. 13 of the Act cannot be said to be 'maximum period' within the meaning of sub-cl. (b) of cl. (7). The result is that the Parliament has not prescribed the maximum period of detention as contemplated under sub-cl. (b) of cl. (7), and if that be so, no person can be detained under the provisions of the Act for a period longer than three months.

I would accordingly allow these petitions and order the petitioners to be set at liberty forthwith since a period of three months has already elapsed in the case of each of them since the date of his detention.

ORDER

In accordance with the opinion of the majority, the contentions of petitioners are over-ruled. The petitions be listed before the appropriate Bench for disposal.

P.B.R.