CHAPTER - 8

ROLE OF THE ADVISORY BOARD
8.1 **INTRODUCTION:**

One of the safeguards provided by the Constitution for minimising as much as possible the danger of the misuse of preventive detention laws is review by Advisory Board. The reference to the Advisory Board is a safeguard against Executive vagaries and high handed action and is a machinery to review the decision of the Executive on the basis of a representation made by the detenu, the grounds of detention. Advisory Board is to be set up for all cases of detention under a law authorising detention for more than three months. The Advisory Board is required to report whether there is sufficient cause for the detention of detenu. If the Advisory Board reports that there is sufficient cause for detention then only the detaining authority can continue the detention of the detenu beyond three month's period. If the Advisory Board reports that there is not sufficient cause for the detention then the detained person must be released. The function of the Advisory Board is purely consultative. Review by Advisory Board may be dispensed with under Article 22 (4) (b) of the Constitution by enacting a law of preventive detention by the Parliament under clause 7 (a) and (b) of Article 22 of the constitution.

8.2 **COMPOSITION OF ADVISORY BOARD:**

Article 22 (4) provides that no law providing for preventive detention shall authorise the detention of a person for a longer period than 3 months unless 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 3 months that there is in it's opinion sufficient cause for such detention.
Various preventive detention laws provide constitution of Advisory Boards. The Central Government and each State Government, whenever necessary are required to constitute one or more Advisory Boards. According to S. 9 of the National Security Act, 1980 the Advisory Board shall consist of three persons who are, or have been, or qualified to be appointed as Judges of a High Court and such persons shall be appointed by the appropriate Government. The Chairman of the Advisory Board is to be one of the members who is, or who has been, a Judge of a High Court.

44th Constitution Amendment Act, 1978 made some changes in Article 22. Most of the provisions of the 44th Amendment to the Constitution were brought into force in 1979 except S. 3 whereby Article 22 was amended. National Security Ordinance which came into force on September 22, 1980 provided by clause (9) for the constitution of Advisory Boards strictly in accordance with the provisions of S. 3 of the 44th Amendment Act in spite of the fact that the aforesaid section was not brought into force. The National Security Act was passed on December 27, 1980 replacing the Ordinance retrospectively. Section 9 of the Act makes a significant departure from clause (9) of the Ordinance by providing for the constitution of Advisory Boards in accordance with Article 22 (4) in it's original form and not in accordance with amendment. The Supreme Court in A.K. Roy v. Union of India\(^1\) observed that the true position is that the amendments introduced by the 44th Amendment Act did not become a part of the Constitution as yet. They will acquire that status only when the Central Government brings them into force by issuing a notification under S. 1 (2) of the Amendment Act. Amendment of the Constitution can have no effect unless it comes or is brought into force. The Court found itself unable to intervene in a matter of this nature by issuing a mandamus to the Central Government obligating it to bring the provision of S. 3 into force. The Court observed that it is difficult to appreciate what practical difficulty can possibly prevent the Government from bringing into force the
provisions of S. 3 of the 44th Amendment after the passage of two and half years. The Parliament could not have intended that the Central Government may exercise a kind of veto over its constituent will by not ever bringing the Amendment or some of its provisions into force. It is not open to the Central Government to sit in judgment over the wisdom of the policy of that section. The Court expressed the hope that the Central Government will, without further delay, bring S. 3 of the 44th Amendment Act into force. That section affords to the detenu an assurance that his case will be considered by an impartial tribunal.

Section 3 of the 44th Constitution Amendment Act, 1978 made an important amendment to Article 22 (4) by providing that:

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

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

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

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

The Supreme Court observed that the safeguards against unfounded accusations and the opportunity for establishing innocence which constitute the hallmark of an ordinary criminal trial are not applicable to the detenu. He is detained on the basis of *ex parte* reports in regard to his past conduct, with a view to preventing him from persisting in that course of conduct in future. It is, therefore, of the utmost importance from the detenu's point of view that the Advisory Board should consist of persons who are independent, unbiased and competent and who possess a trained judicial mind.

The Court further observed that the question as to whether Section 9 of the National Security Act is bad for the reason that it is inconsistent with the provisions of S. 3 of the 44th Amendment Act, has to be decided on the basis that S. 3 though a part of the 44th Amendment Act, is not a part of the Constitution. If S. 3 is not a part of the Constitution, it is difficult to appreciate how, the validity of S. 9 of the National Security Act can be tested by applying the standard laid down in that section. The validity of the Constitution of Advisory Boards has therefore to be tested in the light of the provisions contained in Article 22 (4) as it stands now and not according to the amended Article 22 (4). The standard which the Constitution, as originally enacted, has itself laid down for constituting Advisory Boards, cannot be characterised as harsh or unjust. The argument, therefore, that S. 9 of the
National Security Act is bad must fail. The Court hastened to add that the fact that S. 3 of the 44th Amendment has not yet been brought into force does not mean that the Parliament cannot provide for the constitution of Advisory Boards in accordance with it's requirements. The Parliament is free to amend S. 9 of the National Security Act so as to bring it in line with Section 3 of the 44th Amendment. The Court expressed it's hope that the Parliament will take the earliest opportunity to amend Section 9 of the Act by bringing it in line with Section 3 of the 44th Amendment as the Ordinance did and that the Central Government and the State Governments will constitute Advisory Boards in their respective jurisdiction in accordance with S. 3 whether or not S. 9 of the Act is so amended.

Advisory Boards consisting of serving or retired Judges of High Courts, preferably serving and drawn from a panel recommended by the Chief Justice of the concerned High Court will give credibility to their proceedings, their opinion will be with objectivity, fairness and competence.

8.3 **SCOPE OF ADVISORY BOARD**

Intercession of the Advisory Board is one of the important safeguards to protect personal liberty of a detenu. Under Article 22 (7)(c), power is given to Parliament to prescribe the procedure to be followed by an Advisory Board in an inquiry under Article 22 (4) (a). Various preventive detention laws provide for the constitution of Advisory Boards, reference to such Boards, procedure to be followed by them and final confirmation of their reports by appropriate Government.

The Government considers the representation of the detenu to ascertain essentially whether the order is in conformity with the power under the law. The Advisory Board, on the other hand, considers whether in the light of the representation there is sufficient cause for detention.
Relying on *Puranlal Lakhanpal's case* the Supreme Court in *A.K. Roy v. Union of India* held that the contention that the Advisory Board must determine the question as to whether the detention should continue after the date of its report must fail. The duty and function of the Advisory Board is to determine whether there was sufficient cause for detention of the person concerned on the date on which the order of detention was passed and whether or not there is sufficient cause for the detention of that person on the date of its report.

According to S. 8 of the COFEPOSA Act, 1974 as amended by Amendment Act of 1984, the Advisory Board is to state its opinion not merely whether detention is necessary but whether 'continued detention' is necessary. That is why in a case to which S. 9 applies it is important that the Advisory Board specifically considers and answers the question whether in its opinion there is sufficient cause for the 'continued detention' of the person concerned. If the Advisory Board merely states that the detention of the person is necessary, it is not for any one else to supplement the Advisory Board's opinion and substitute the words 'continued detention' for the word 'detention'. It was held that in the absence of the Advisory Board's opinion to the effect that there is sufficient cause for the 'continued detention' of the detenus, their detention for a period exceeding one year is without legal sanction. (While generally the period for which a person may be preventively detained under the COFEPOSA in connection with smuggling activities may not exceed a period of one year, in case of certain kinds of activities of smuggling into, out of or through 'any area vulnerable to smuggling' the period may extend up to two years. In the latter event a declaration is required to be made in the manner provided by S. 9 (1) of the Act).

The requirement of clause (4) of Article 22 is satisfied by the enactment of S. 8 in the COFEPOSA Act. Section 8 clause (b) provides that in
case of every detention, the appropriate Government shall, within five weeks from the date of detention, make a reference to the Advisory Board. The Supreme Court, in *Masuma v. State of Maharashtra* held that this provision for reference to the Advisory Board is not confined to cases where the detaining authority has already come to a decision that the detention shall be continued for a period longer than three months. It applies equally where the detaining authority has not yet made up its mind as to how long the detention shall continue or even where the detention is to continue for a period of three months or less. Whenever any order of detention is made, whether the detention is to continue for a period longer than three months or a period of three months or less or the detaining authority has not yet applied its mind and determined how long the detention shall be continued, the appropriate Government is bound within five weeks from the date of detention to make a reference to the Advisory Board and if it fails to do so, the continuance of the detention after the expiration of the period of five weeks would be rendered invalid.

Where the Act provides for making successive orders of detention, if the report of the Advisory Board is not made within three months of the date of detention, the detention becomes illegal notwithstanding that it is within three months from the date of the second order of detention in view of the constitutional mandate of Article 22 (4). It was held in *Abdul Latif v. B.K. Jha* that in this view, it became imperative to read down S. 15 of the Gujarat Prevention of Anti-social Activities Act (16 of 1985) which provides for the making of successive orders of detention so as to bring it in conformity with Article 22 (4) of the Constitution. The Court further observed that in a *habeus corpus* proceeding against preventive detention, it is not a sufficient answer to say that the procedural requirements of the Constitution and the statute have been complied with before the date of hearing and therefore the detention should be upheld. The procedural requirements are the only safeguards
available to a detenu since the court is not expected to go behind the subjective satisfaction of the detaining authority. The procedural requirements are, therefore, to be strictly complied with if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in this regard. If a reference to an Advisory Board is to be made within three weeks, it is no answer to say that the reference, though not made within three weeks, was made before the hearing of the case. If the report of the Advisory Board is to be obtained within three months, it is no answer to say that the report, though not obtained within three months, was obtained before the hearing of the case.

In *Gopalan v. State of Madras* two alternative interpretations of the words 'such detention' occurring in the end of clause 4 (a) were put forward: (1) 'such detention' means preventive detention; (2) 'such detention' means detention for a period longer than three months. If the first interpretation is correct, then the function of the advisory board would be to go into the merits of the case of each person and simply report whether there was sufficient cause for his detention. According to the other interpretation, the function of the advisory board will be to report to the Government whether there is sufficient cause for the person being detained for more than three months. Fazl Ali J. agreed with the second interpretation. Patanjali Sastri J. was inclined to think that the words 'such detention' refer back to the preventive detention mentioned in clause (4) and not to detention for a longer period than three months. According to him an Advisory Board, composed of Judges or lawyers, would hardly be in a position to judge how long a person under preventive detention, say, for reasons connected with defence should be detained. That must be a matter for the executive authorities. All that an Advisory Board can reasonably be asked to do is to judge whether the detention is justified and not arbitrary or *mala fide*. Kania C.J. expressed the
opinion that the words 'such detention' meant detention beyond the period of three months.

The order for detention made in Gopalan's case was of a kind where reference to the Advisory Board was not obligatory. That being so, it was not necessary for the Court in that case to decide the precise meaning of the words "such detention". Nonetheless, however, three of the learned judges indicated their views on the question and the other three do not seem to have dealt with it.

In Puranlal Lakhanpal v. Union of India the Supreme Court observed that sub-clause (a) of Clause (4) of Article 22 had no application to the Preventive Detention Act, 1950 as it stood in Gopalan's case but it applied to the Act as it stood after the amendment. The Supreme Court by majority observed that the Constitution contemplates that any law which authorises detention for more than three months should be subject to certain safeguards as provided in Clause (4) of Article 22 which directs that the case of a detained person under any law authorising detention for more than three months must be subject of a report by an Advisory Board. The Advisory Board is to report whether there is sufficient cause for such detention. If the Advisory Board reports that the detention is justified, then only the detaining authority determines the period of detention. On the other hand, if the Advisory Board reports that the detention is not justified, the detained person must be released. Clause (4) of Article 22 does not state that the Advisory Board has to determine whether the person detained should be detained for more than three months. What it has to determine is whether the detention is at all justified. The matter before the Advisory Board is the subject of detention of the person concerned and not for how long he should be detained. Under the Constitution an Advisory Board is to be set up for all cases of detention under a law authorising detention for more than three months. When the case of a detained person is placed before the Advisory Board under such law it
must be assumed that the Advisory Board knows that if it reports that the
detention is justified, the detenu may be detained for more than three months
and up to the maximum period provided by the law. The expression ‘such
detention’ in Article 22 (4) (a) refers to preventive detention and not to how
long the person is to be detained. Considering the circumstances that the
detention is of a preventive nature, the Executive has necessarily to consider
whether a person should be detained and the period for which he should be
detained. It could not have been the intention to give the power of determining
the necessity of detention of a particular person to the Executive and leave to
another authority the Board in this case to say whether the detention should be
for three months or more. In the very nature of things the decision as to the
period of detention must be of the detaining authority, because, it is the
authority upon which the responsibility for detention has been placed. The
reference to the Board is not a limitation on the Executive’s discretion as to
the discharge of its duties connected with preventive detention, it is a
safeguard against misuse of power.

Relying on *Makhan Singh Tarsikka v. State of Punjab*¹⁰ the Supreme
Court held that the appropriate Government must determine what the period of
detention should be under sub-section (1) of S. 11 of the Act only after the
Advisory Board to which the case is referred reports that the detention is
justified.

For all the above reasons, it was held that the sub-section (1) of S. 11 of
the Act does not contravene any of the provisions of Article 22 and is
accordingly valid.

Sarkar J. in his dissenting judgment held that the words “such
detention” in Article 22 (4) (a) must necessarily refer to detention for a period
longer than three months and not to preventive detention *simpliciter*; and
hence S. 11(1) of the Preventive Detention Act must be held to be *ultra vires*.
He observed that as a matter of pure construction of the language used in sub-clause (a), the words ‘such detention’ must mean detention for a longer period than three months. The word ‘such’ as given in the Oxford Dictionary means of the kind or degree already described. In the present context the kind or degree of detention earlier described in the clause is detention for a longer period than three months.

8.4 **DISPENSING WITH ADVISORY BOARD:**

Article 22 (4) says a law which provides for preventive detention for a period longer than three months shall contain a provision establishing an Advisory Board which has to report before the expiration of three months if in it's opinion there was a sufficient cause for such detention. The proviso says, the detention is not to be permitted beyond the maximum period, if any, prescribed by Parliament under Article 22 (7) (b). The whole of this sub-clause is made inoperative by Article 22 (4) (b) in respect of an Act of preventive detention passed by Parliament under clause 7 (a) and (b). Sub-clause (a) of Article 22 (7) permits detention beyond a period of three months and excludes the necessity of consulting an advisory board, if the opening words of the sub-clause are complied with.

Kania C.J. in *Gopalan v. State of Madras*11 held that Article 22 (4) (a) and Article 22 (7) are two alternatives provided by the Constitution for making laws on preventive detention and that Article 22 (4) (a) is not to be read as a rule and Article 22 (7) as the exception. S. 12 of the Preventive Detention Act 1950 was challenged in this case on the ground that it did not conform to the provisions of Article 22 (7). It was argued that Article 22 (7) permits preventive detention beyond three months, when Parliament prescribes ‘the circumstances in which and the class or classes of cases in which’ a person may be detained. It was argued that both these conditions must be fulfilled. However, Kania C.J. held that the use of the word ‘which’
twice in the first part of the sub-clause, read with the comma put after each, shows that the legislature wanted these to be treated as disjunctive and not conjunctive. Power of preventive detention beyond three months may be exercised either if the circumstances in which or the class or classes of cases in which, a person is suspected or apprehended to be doing the objectionable things mentioned in the section. It was argued that in S. 12 of the impugned Act, the wording of Schedule 7 – List I Entry 9 and List III Entry 3, except the last part (the maintenance of supplies and services essential to the community) are only copied. This did not comply with the requirement to specify either the circumstances or the class or classes of cases. Circumstances ordinarily mean events or situation extraneous to the actions of the individual concerned, while a class of cases mean determinable groups based on the actions of the individuals with a common aim or idea. But this argument did not appeal to Kania C.J. as he held that each of the expressions used in those entries was capable of complying with the requirements of mentioning circumstances or classes of cases and the classification of cases, having regard to an object may itself amount to a description of the circumstances.

Fazl Ali J. (Minority) held that Article 22 (7) practically engrafts an exception. It states in substance that the Parliament may by an Act provide for preventive detention for more than three months without reference to an advisory board, but in such cases it shall be incumbent on the Parliament to prescribe (1) the circumstances and (2) the class or classes of cases in which such course is found to be necessary. The circumstances and the class or classes of cases must be of a special or extraordinary nature, so as to take the case out of the rule and bring it within exception. He was of the opinion that the Constitution never contemplated that the Parliament should mechanically reproduce all or most of the categories in Item 9 of List I and Item 3 of List III of Schedule 7 almost verbatim and not apply it's mind to decide in what circumstances and in what class or classes of cases the safeguard of an
advisory board is to be dispensed with. The law which the Constitution enables the Parliament to make under Article 22 (7) (a) could be an exceptionally drastic law and on the principle that an exceptionally drastic law must be intended for an exceptional situation, it follows that the class or classes of cases and the circumstances must be of a special nature to require such legislation. In his view, 'and' in clause 7(a) must be read as 'and' and not as 'or' and 'may' must be read as shall. The class or classes of cases must have some reference to the persons to be detained or to their activities and movements or to both. 'Circumstances' on the other hand refer to something extraneous, such as surroundings, background, prevailing conditions etc. which might prove a fertile ground for the dangerous activities of dangerous persons. Therefore, the provision clearly means that both the circumstances and the class or classes of cases (which are two different expressions with different meanings and connotations and cannot be regarded as synonymous) should be prescribed and prescription of one without prescribing other will not be enough. Prescribing is more than a mere mechanical process. But all that has been done is that words which occur in the Legislative Lists have been taken and transferred into the Act. Fazl Ali J. analysed Article 22 as dealing with three classes of preventive detention: (1) preventive detention for three months; (2) preventive detention for more than three months on the report of the advisory board; and (3) preventive detention for more than three months without reference to the advisory board. These may be labeled as 'dangerous' 'more dangerous' and 'most dangerous'. He held (minority) that S. 12 of the impugned Act did not conform to the requirements of the Article 22 (7) (a) because it failed to prescribe either the circumstances or the class or classes of cases. The word 'and' which links 'class or classes of cases' with 'circumstances' in Article 22 (7) (a) has been wrongly construed to mean 'or' and the distinction between 'circumstances' and 'class or classes' has been completely ignored and they are used as interchangeable terms. Act proceeds
on the assumption that circumstances are identical with class or classes, as will appear from the words 'any person detained in any of the following classes of cases or under any of the following circumstances' used in the Section. S. 12 of the Act, therefore, is not a valid provision.

Patanjali Sastri J. held that Clause 4 (a) and Clause 7 (a) are two distinct and independent provisions. The attempt to correlate them as a rule and an exception is opposed both to the language and the structure of those clauses.

Patanjali Sastri J. held that the five topics in S. 12 of the Preventive Detention Act, 1950 could be regarded as a broad classification of cases or broad description of circumstances. A class can well be designated with reference to the end which one desires to secure. So S. 12, according to him did not contravene Article 22 (7). He added that under Article 22 (7) Parliament may prescribe either the circumstances or the classes of cases or both.

Mahajan J. observed that real purpose of Clause 7 of Article 22 was to provide for a contingency when compulsory requirement of an Advisory Board may defeat the object of the law of preventive detention. The clause was incorporated in the Constitution to meet abnormal or exceptional cases, the cases being of a kind where an Advisory Board could not be taken into confidence. The authority to make such drastic legislation was entrusted to the Supreme Legislature. Law of preventive detention authorising detention for a longer period than three months without the intervention of an Advisory Board had to fulfil both the requirements laid down in clause (7) and not only one of the requirements in the alternative. (The same view was expressed by Fazl Ali J.) 'Circumstances' mean some situation extraneous to the detenu's own acts such as a situation of tense communal feelings, an apprehended internal rebellion or disorder, the crisis of an impending war etc. No
circumstances have been stated in S. 12 though the section ostensibly says so. Draftsman of S. 12 repeated the words of clause (7) of Article 22 without an application of his mind. Classes of cases would be prescribed by Parliament in line with preventive provisions of Ss. 107 to 110 of the Criminal Procedure Code, but this has not been done. S. 12 treats the lamb and the leopard in the same class because they happen to be quadrupeds. Such a classification could not have been in the thoughts of the Constitution makers. S. 12 of the Act does not fulfil the requirements of clause (7) of Article 22 and so is void.

B.K. Mukherjea J. observed that by 'classes of cases' is meant certain determinable groups of the individuals; the individuals comprised in each group being related to one another in a particular way which constitutes the determining factor of that group. 'Circumstances' on the other hand connote situations or conditions which are external to the persons concerned. It is doubtful whether the classification of cases made by Parliament in S. 12 of the Act really fulfills the object which the Constitution had in view.

B.K. Mukherjea J., however, held that S. 12 was not invalid as being ultra vires the Constitution as the Constitution has given unfettered powers to Parliament in the matter of making the classification and it is open to the Parliament in the matter of making the classifications to adopt any method or principle as it likes. He was of the opinion that it was not obligatory on Parliament to prescribe both the circumstances and the classes of cases in order to comply with the requirement of sub-clause (a) of Article 22 (7) as it lays down a purely enabling provision. He further observed that S. 12 specifies the classes, but it is doubtful whether the classes themselves could be described as circumstances.

Das J. held that Article 22 (7)(a) is on enabling provision and so Parliament may prescribe either circumstances or classes of cases or both. The circumstances and the class or classes of cases may coalesce. The
classification may be on a variety of basis. It may be according to provinces the detenus come from. It may be according to object they are supposed to have in view. In Preventive Detention Act, 1950 Parliament has taken five out of the six legislative heads and divided them into two categories. The detenus are thus classified according to their suspected object. The fact that a person falls within one or the other class may well be the circumstances under which he may be detained for a period longer than three months. Prescription of specific circumstances or a more definite specification of classes would have been better and more desirable. But that is crying for the ideal.

In *S.Krishnan v. State of Madras*\(^{12}\) relying on *Gopalan’s case* majority held that sub clause (a) of clause (7) of Article 22 being an enabling provision, the word ‘and’ should be understood in a disjunctive sense. Bose J. dissented saying that ‘and’ means and should mean ‘and’ unless there is compelling reason to make it mean ‘or’. He added that wherever there is a scope for difference of opinion on a matter of interpretation in this behalf, the interpretation which favours the subject must always be used because the right has been conferred upon him and it is the right which has been made fundamental not the fetters and limitations with which it may be circumscribed by legislative action. He insisted that when there is ambiguity or doubt and it is possible to take either this view or that, then we must come down on the side of liberty and freedom.

The facts of *Sampat Prakash v. State of J. & K.*\(^{13}\) were that the District Magistrate of Jammu had made an order of detention of the petitioner under Section 3 of the Jammu and Kashmir Preventive Detention Act No. 13 of 1964. The detention of the petitioner was continued without making a reference to the Advisory Board, as the State Government purported to act under Section 13 A of the Act. The petitioner raised a ground that Section 13 A of the Act was *ultra vires* the Constitution as contravening the provisions of
Article 22 of the Constitution. The Supreme Court ruled that Article 370 of the Constitution has never ceased to be operative in Jammu and Kashmir. The President, therefore, could validly pass Constitution (Application to J. & K.) Orders in 1959 and 1964 extending time for giving protection to any law relating to preventive detention in Jammu and Kashmir against invalidity on the ground of infringement of any of the fundamental rights guaranteed by Part III of the Constitution, from five years under Article 35 (c) to ten years and fifteen years respectively. The J. & K. Preventive Detention Act (13 of 1964) is immune from being declared void on the ground of inconsistency with Article 22. The object of the Orders of 1959 and 1964 was to extend the period of protection to the preventive detention law and not to infringe or abridge the fundamental rights, though the result of the extension is that a detenu cannot, during the period of protection, challenge the law on the ground of it's being inconsistent with Article 22. Such extension is justified *prima facie* by the exceptional state of affairs which continue to exist.

A new Section 17-A was inserted in the Maintenance of Internal Security Act, 1971 by clause (e) of sub-section (6) of Section 6 of the Defence of India Act 42 of 1971. The new section 17-A effectuated three main changes: (1) it's *non-obstante* clause overrides the other provisions of the Act, (2) a person may be detained in a class or classes of cases or under the circumstances set out in sub-clauses (a) and (b) of it's sub-section (1) without obtaining the opinion of an advisory board for a period longer than three months but not exceeding two years from the date of detention. (3) the maximum period of detention of such a person can be three years or until the expiry of the Defence of India Act, 1971 whichever is later. These changes had been brought about by Parliament exercising power contained in clause (4) (b) read with clause 7 (a) and (b) of Article 22. The power is exercised in respect of classes of cases and circumstances relating to all the heads under entries 9 and 3 of List I and III of the Seventh Schedule, except one, viz.
The maintenance of essential supplies and services, in respect of which Parliament has the power to pass preventive detention laws. The clause (1) of new Section 17 A read:

17-A (1) Notwithstanding anything contained in the foregoing provisions of this Act, during the period of operation of the Proclamation of Emergency issued on the 3rd Day of December, 1971, any person (including a foreigner) in respect of whom an order of detention has been made under this Act, may be detained without obtaining the opinion of the Advisory Board for a period longer than three months, but not exceeding two years from the date of his detention in any of the following classes of cases or under any of the following circumstances, namely:

(a) where such person has been detained with a view to preventing him from acting in any manner prejudicial to the defence of India, relations of India with foreign powers or the security of India, or
(b) where such person had been detained with a view to preventing him from acting in any manner prejudicial to the security of the State or the maintenance of public order.

The validity of S. 17 A was challenged in *S.N.Sarkar v. State of W.B.* as regards its incompatibility with and the non-compliance of the requirements of Article 22(7).

Three questions emerged from the contention of the petitioner: (1) whether clause (7) is an exception to the rule laid down in clause (4); (2) whether Parliament's power to enact a detention law is limited by the requirements laid down in clause (7); and (3) whether setting out *verbatim* the heads or subjects or some of them upon which Parliament can enact such a law would mean compliance of the requirements of clause (7). These very questions were considered in one form or another in *Gopalan's case* in connection with S. 12 of the Preventive Detention Act, 1950. *S.N.Sarkar's case* was decided by 7 Judges Bench of the Supreme Court.

The Supreme Court while considering the nature and scope of clauses (4) (a) and (b) of Article 22 observed that under clause (4) (a), no law, whether passed by Parliament under entry 9 of List I or by Parliament and the
State Legislatures under entry 3 of List III can authorise longer detention than three months unless it provides for the intercession of an advisory board. Clause 4 (a) thus lays down a limitation on the legislative power conferred on both the Central and State legislatures while exercising their power under the said entries. Whereas sub-clause (a) of clause (4) applies to legislation enacted by both Parliament and the State legislatures, sub-clause (b) applies only to laws made by Parliament. Sub-clause (b) provides that the limitation placed on the power of Parliament under sub-clause (a) is not to apply to a law made by Parliament under clause 7(a) and (b). On an analysis of the two clauses (4) and (7), the conclusion is inescapable that what they provide is (a) that ordinarily, detention provided by a preventive detention law should not be for a period longer than three months; (b) that if, however, such a law does provide for a longer period than three months, it must provide for intercession of an advisory board; and (c) that situation may arise when in certain classes of cases Parliament alone should be empowered to enact a law which provides for a longer detention even without the intercession of an advisory board. On a careful consideration of the language of clauses (4) and (7), the construction under which clause (4) (b) read with clause (7) (a) lays down an exception to clause (4) (a) harmonizes both the clauses and brings out the true intention in enacting the two clauses. Why did the Constitution makers consider it necessary to provide in clause (7) (a) that the law must prescribe the circumstances and the classes of cases? The insertion of such an expression coupled with Parliament being the only body which can enact such a law seems to suggest that clause (7) (a) is an exception to clause (4) (a) and it being such an exception Parliament alone is empowered to pass a law dealing with exceptional circumstances and exceptional classes of cases. If enumeration of the heads in the entries were to mean compliance of prescribing circumstances and classes of cases, Parliament would in such a law be dealing with all situations and all classes of cases from the lowest to
the most extra-ordinary or abnormal and not with some only requiring a treatment different from that envisaged by clause (4) (a). In such a case clause (4) (a) would again be rendered nugatory, for Parliament can, by enumerating verbatim the heads or subjects set out in the entries, do away with the requirement of clause (4) (a). This clearly could not have been so intended in enacting clause (7) (a). The purposes of the (legislative) entries and of clause (7) (a) are distinct; that of the entries to lay down the topics in respect of which legislation can be made and that of clause (7) (a) to distinguish the ordinary from the exceptional to which only the salutary safeguard provided by clause (4) (a) would not apply. Mere repetition of the subjects or topics of legislation from the entries would not mean prescribing either the circumstances or the classes of cases. Reading clauses (4) (a) and (7) (a) together it is quite clear that intercession of an independent body like the advisory board was regarded by the Constitution-makers as an essential safeguard against a jurisdiction primarily based on suspicion and apprehension, which could be dispensed with in extra-ordinary circumstances and with regard to dangerous persons and their apprehended activities specifically prescribed in the law made under clause (7) (a). In this view, the meaning of the word 'and' in that clause must be held to have it's ordinary conjunctive sense, the context in that clause also requiring not the opposite but it's commonly understood sense, requiring Parliament to prescribe both the circumstances and the classes of cases in which only consideration by the Board can be dispensed with.

The Court ruled that clause (4) (a) of Article 22 lays down a rule to which clause (4) (b) read with clause (7) (a) is an exception. Upon that view, clause (7) (a) must be construed as a restriction on Parliament's power of making preventive detention laws in the sense that it can depart from the rule laid down in clause (4) (a) and dispense with reference of cases to an advisory board only by a law which prescribes both the circumstances under which, and
the class or classes of cases in which, a person may be detained for a period longer than three months without obtaining the opinion of an advisory board in accordance with the provisions of sub-clause (a) of clause (4). Section 17 A of the Act has failed to comply with the requirement of clause (7) (a), and has therefore, to be declared bad as being inconsistent with that clause.

8.5 **LEGAL PRACTITIONER BEFORE ADVISORY BOARD**

Section 10 (3) of the Preventive Detention Act, 1950 excluded the right to appear in person or by any lawyer before the advisory board. In *Gopalan v. State of Madras* it was argued that this section 10 (3) was an infringement of a fundamental right. Kania C.J. pointed out that Article 22 (1) which gives a detained person a right to consult or be defended by his own legal practitioner is specifically excluded by Article 22 (3) in the case of legislation dealing with preventive detention. Moreover, the Parliament is expressly given power under Article 22 (7) (c) to lay down the procedure in an inquiry by an advisory board. If so, how can the omission to give a right to audience be considered against the constitutional rights?

The case of *Francis Coralie v. Union Territory of Delhi* raised a question in regard to the right of a detenu under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Whilst under detention the petitioner experienced considerable difficulty in having interview with her lawyer. Some criminal proceeding was pending against the petitioner for attempting to smuggle hashis out of the country and for the purpose of her defence in such criminal proceeding, it was necessary for her to consult her lawyer, but even her lawyer found it difficult to obtain an interview with her because, according to the Conditions of Detention Order Clause 3 (b) sub-clause (1), in order to arrange an interview, he was required to obtain prior appointment from the District Magistrate, Delhi and the interview could take place only in the presence of a Customs Officer.
nominated by the Collector of Customs. This procedure for obtaining interview caused considerable hardship and inconvenience and there were occasions when even after obtaining prior appointment from the District Magistrate, Delhi, her lawyer could not have an interview with her since no Customs Officer nominated by the Collector of Customs remained present at the appointed time. The petitioner was thus effectively denied the facility of interview with her lawyer.

The Supreme Court observed in this case that having regard to the decision of *Maneka Gandhi's case*\(^{17}\) the law of preventive detention has now to pass the test not only of Article 22, but also of Article 21 and if the constitutional validity of any such law is challenged, the Court would have to decide whether the procedure laid down by such law for depriving a person of his personal liberty is reasonable, fair and just. The Court held in this case that the right of a detenu to consult a legal adviser of his choice for any purpose not necessarily limited to defence in a criminal proceeding but also for securing release from preventive detention or filing a writ petition or prosecuting any claim or proceeding, civil or criminal, is obviously included in the right to live with human dignity and is also part of personal liberty and the detenu cannot be deprived of this right nor can this right of the detenu be interfered with except in accordance with reasonable, fair and just procedure established by a valid law. A prison regulation may, therefore, regulate the right of a detenu to have interview with a legal adviser in a manner which is reasonable, fair and just but it cannot prescribe an arbitrary or unreasonable procedure for regulating such an interview and if it does so, it would be violative of Articles 14 and 21. In the present case the legal adviser could have interview with a detenu only by prior appointment after obtaining permission of the District Magistrate, Delhi. This would obviously cause great hardship and inconveniences because the legal adviser would have to apply to the District Magistrate, Delhi well in advance and then also the time fixed by the
District Magistrate, Delhi may not be suitable to the legal adviser who would ordinarily be a busy practitioner and, in that event, from a practical point of view the right to consult a legal adviser would be rendered illusory. Moreover, the interview must take place in the presence of an officer of Customs/Central Excise/Enforcement to be nominated by the local Collector of Customs/Central Excise or Deputy Director of Enforcement who has sponsored the detention and this too would seem to be an unreasonable procedural requirement because in order to secure the presence of such officer at the interview, the District Magistrate, Delhi would have to fix the time for the interview in consultation with the Collector of Customs/Central Excise or the Deputy Director of Enforcement and it may become difficult to synchronise the time which suits the legal adviser with the time convenient to the concerned officer and furthermore if the nominated officer does not, for any reason, attend at the appointed time, as happened on quite a few occasions in the case of the petitioner, the interview cannot be held at all and the legal adviser would have to go back without meeting the detenu and the entire procedure for applying for an appointment to the District Magistrate, Delhi would have to be gone through once again. So sub-clause (i) of clause 3 (b) regulating the right of a detenu to have interview with a legal adviser of his choice is violative of Articles 14 and 21 and so unconstitutional and void.

The Court added that it would be quite reasonable if a detenu were to be entitled to have interview with his legal advisor at any reasonable hour during the day after taking appointment from the Superintendent of the Jail, which appointment should be given by the Superintendent without any avoidable delay. Interview need not necessarily take place in the presence of a nominated officer of Customs/Central Excise/Enforcement but if the presence of such officer can be conveniently secured at the time of the interview without involving any postponement of the interview, then such officer and if his presence cannot be so secured, then any other Jail official may, if thought
necessary watch the interview but not so as to be within hearing distance of the detenu and the legal adviser.

It may be noted that ruling of the Court in *Francis Coralie's case* does not refer to legal representation before Advisory Board specifically.

In *Kavita v. State of Maharashtra* the Counsel for the petitioner submitted that the detenu was not permitted to be represented by a lawyer despite his request that he might be allowed to engage the services of a lawyer before the Advisory Board. In his representation to the Government the detenu did make a request to be permitted to be represented by a lawyer. The Government informed him that under the provisions of S. 8(e) of the COFEPOSA Act, he was not entitled to be represented by a lawyer before the Advisory Board and therefore, it was not possible to grant his request. The complaint of the counsel for the detenu was that while a detenu may not be entitled as of right to be represented by a lawyer before the Advisory Board, there was no bar against a lawyer being permitted to appear before the Advisory Board and therefore, the request of a detenu to be represented by a lawyer had to be considered on the merits of each individual case. This, the counsel submitted, had not been done in the present case and the detenu's request was never placed before the Advisory Board. The Court held that though it is true that Section 8(e) disentitles a detenu from claiming as of right to be represented by a lawyer, it does not disentitle him from making a request for the services of a lawyer. The importance of legal assistance can never be over-stated and as often than not adequate legal assistance may be essential for the protection of the Fundamental Right to life and personal liberty guaranteed by Article 21 of the Constitution and the right to be heard given to a detenu by S. 8(e), COFEPOSA Act. These rights may be jeopardised and reduced to mere nothings without adequate legal assistance.
That would depend on the facts of each individual case, in the light of the intricacies of the problems involved and other relevant factors.

Therefore, where a detenu makes a request for legal assistance, his request would have to be considered on its own merit in each individual case. In the present case, the Government merely informed the detenu that he had no statutory right to be represented by a lawyer before the Advisory Board. Since it was for the Advisory Board and not for the Government to afford legal assistance to the detenu the latter, when he was produced before the Advisory Board, could have, if he was so minded, made a request to the Advisory Board for permission to be represented by a lawyer. He preferred not to do so. In these circumstances the Court was not prepared to hold that the detenu was wrongfully denied the assistance of counsel so as to lead to the conclusion that procedural fairness, a part of the fundamental right guaranteed by Article 21 of the Constitution was denied to him.

The decision in *Kavita's case* is an authority for the proposition that while there is no right under S. 8 (e) of COFEPOSA Act to legal assistance to a detenu in the proceedings before the Advisory Board, he is entitled to make such a request to the Board and the Board is bound to consider such a request when so made.

In *Nand Lal v. State of Punjab* the main contention of the petitioner was that the procedure adopted by the Advisory Board in allowing legal assistance to the State and denying such assistance to the detenu was both arbitrary and unreasonable and thus violative of Article 21 read with Article 14 of the Constitution. The detenu made a request in writing that he be allowed the assistance of counsel during the hearing before the Advisory Board, but the Government did not accede to his request. However, the detaining authority was represented by the State counsel at the hearing. The detenu thereupon asked the Advisory Board that he may also be afforded an
opportunity of legal assistance. The District Magistrate who was the detaining authority stated in the affidavit that Section 11 (4) of the Prevention of Black marketing and Maintenance of Supplies of Essential Commodities Act, 1980 prohibited the assistance of a lawyer to the detenu before the proceedings of Advisory Board, which are confidential. Sub-section (4) of S. 11 of the Act reads as under:

(4) Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board and the proceedings of the Advisory Board, and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

Under Article 22 (3) (b) of the Constitution, the right to consult and to be defended by a legal practitioner of his choice is denied to any person who is arrested and detained under any law providing for preventive detention. The Supreme Court observed that sub-section (4) of Section 11 of the Act is undoubtedly in conformity with Article 22 (3) (b) of the Constitution. Normally, lawyers have no place in the proceedings before the Advisory Board. The functions of the Advisory Board are purely consultative. In coming to the conclusion, the Board has to make an objective determination on the question as to whether there was sufficient material on which the subjective satisfaction of the detaining authority could be based. It may call further information, hear the detenu in person. The Board is entitled to devise its own procedure. It is the arbitrariness of the procedure adopted by the Advisory Board that vitiates the impugned order of detention. While the Advisory Board disallowed the detenu's request for legal assistance, it allowed the detaining authority to be represented by counsel. Advisory Board blindly applied the provisions of sub-section (4) of Section 11 of the Act to the case of the detenu failing to appreciate that it could not allow legal assistance to the detaining authority and deny the same to the detenu. The Advisory
Board is expected to act in a manner which is just and fair to both the parties. If the matter was so intricate, the Advisory Board should have ensured that both the parties had equal opportunities to place their respective cases. It appears that the dice was loaded against the detenu in that whereas he had to go without legal assistance, the State Government had the benefit of an array of lawyers.

The Court further observed that it is increasingly felt that in the context of 'deprivation of life and liberty' under Article 21, the 'procedure established by law' carried with it the inherent right to legal assistance. The right to be heard before the Advisory Board would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. It is expected that Parliament while making a law to regulate the procedure before an Advisory Board under Article 22 (7) (c) of the Constitution should provide the right to consult and be defended by a legal practitioner of his choice. It is incomprehensible that a person committing a crime should have under Article 22 (1) of the Constitution the right to consult and to be defended by a legal practitioner of his choice, but a person under preventive detention, more often than not for his political beliefs, should be deprived of this valuable right. In the nature of things under the law as it exists, a person under preventive detention is not entitled to legal assistance.

Referring to Kavita's case the Court observed that S. 8 of the COFEPOSA, Act, 1974 which was dealt with in that case was in pari materia with sub section (4) of S. 11 of the Act. In that case there was no denial of procedural fairness, since no such request was made by the detenu before the Advisory Board. In the present case, the detenu made such a request. While the detenu was not afforded legal assistance, the detaining authority was allowed to be represented by counsel. It is quite clear upon the terms of sub-section (4) of Section 11 of the Act that the detenu had no right to legal
assistance in the proceedings before the Advisory Board, but it did not
preclude the Board to allow such assistance to the detenu, when it allowed the
State to be represented by an array of lawyers.

Section 8 (e) of the COFEPOSA Act, 1974 reads as follows:

"A person against whom an order of detention has been made under
this Act shall not be entitled to appear by any legal practitioner in any matter
connected with the reference to the Advisory Board".

It was held in Hemlata v. State of Maharashtra20 that Section 8 (e) does
not bar representation of a detenu by a lawyer. It only lays down that the
detenu cannot claim representation as of right. It has given discretion to the
Board to permit or not to permit according to necessity of case. In complicated
cases assistance of lawyers may be necessary.

As the consideration by the Advisory Board of the matters and material
used against the detenu is the only opportunity available to him for a fair and
objective appraisal of his case, in A.K. Roy v. Union of India21 counsel for the
detenu argued that the Advisory Board must therefore adopt a procedure
which is akin to the procedure which is generally adopted by judicial and
quasi-judicial tribunals. He assailed the procedure prescribed by Ss. 10 and 11
of the National Security Act, 1980 on the ground that it is not in consonance
with the principles of natural justice. Requirements of natural justice which
must be observed by the Advisory Board according to him were that (i) the
detenu must have the right to be represented by a lawyer of his choice; (ii) he
must have the right to cross-examine persons on whose statements the order of
detention is founded; and (iii) he must have the right to present evidence on
rebuttal of the allegations made against him. Counsel also submitted that the
Advisory Board must give reasons in support of its opinion which must be
furnished to the detenu, that the entire material which is available to the
Advisory Board must be disclosed to the detenu and that the proceedings of
the Advisory Board must be open to the public. The Supreme Court observed
that the question as to what kind of rights are available to the detenu in the proceedings before the Advisory Board has to be decided in the light of the provisions of the Constitution and on the basis of the provisions of the National Security Act, 1980 to the extent to which they do not offend against the Constitution. Clause (3) of Article 22 provides that nothing in clauses (1) and (2) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention. By Clause 7 (c) of Article 22, the Parliament is given the power to prescribe by law the procedure to be followed by the Advisory Board in an inquiry under Clause (4) (a). On a combined reading of clauses (1) and 3 (b) of Article 22, it is clear that the right to consult and to be defended by a legal practitioner of one's choice, which is conferred by clause (1), is denied by clause (3)(b) to a person who is detained under any law providing for preventive detention. Thus, according to the express intendment of the Constitution itself, no person who is detained under any law, which provides for preventive detention, can claim the right to consult a legal practitioner of his choice or to be defended by him. It is, indeed true to say, after the decision in the Bank Nationalization case\textsuperscript{22} that though the subject of preventive detention is specifically dealt with in Article 22, the requirements of Article 21 have nevertheless to be satisfied. It is therefore, necessary that the procedure prescribed by law for the proceedings before the Advisory Boards must be fair, just and reasonable. But then, the Constitution itself has provided a yard-stick for the application of that standards through the medium of the provisions contained in Article 22 (3) (b). The Court expressed that it experienced serious difficulty in taking the view that the procedure of the Advisory Boards in which the detenu is denied the right of legal representation is unfair, unjust or unreasonable. If Article 22 were silent on the question of the right of legal representation, it would have been possible, indeed right and proper to hold that the detenu cannot be denied the right of legal
representation in the proceedings before the Advisory Boards. The effect of Section 11 (4) of the Act, which conforms to Article 22 (3)(b), is that the detenu cannot appear before the Advisory Board through a legal practitioner. A criminal trial involves issues of a different kind from those which the Advisory Board has to consider. The rights available to an accused can, therefore, be of a different character than those available to the detenu.

Referring to Francis Coralie's case, the Supreme Court observed that the decision in that case had no bearing on the point which arose in the present case since the limited question which was involved in that case was whether the procedure prescribed by clause 3 (b) (i) of the 'Conditions of detention' governing the interviews which a detenu may have with his legal adviser, was reasonable. The Court was not called upon to consider the question as regards the right of a detenu to be represented by a legal practitioner before the Advisory Board. The Court said that it is neither affirming nor disapproving of the decision in Francis Coralie's case to the effect that the detenu has a right to consult a lawyer of his choice for the purpose of preparing his representation, advising him as to how he should defend himself before the Advisory Board and preparing and filing a habeus corpus petition or other proceedings for securing his release. The Court held 'regretfully' that the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board. The Court added that permitting the detaining authority or the Govt. to appear before the Advisory Board with the aid of a legal practitioner or a legal advisor would be in breach of Article 14, if a similar facility is denied to the detenu. So if the detaining authority or the Govt. takes the aid of a legal practitioner or a legal adviser before the Advisory Board the detenu must be allowed the facility of appearing before the Board though a legal practitioner.
The Court added a new dimension to this matter and observed that the embargo on the appearance of legal practitioners should not be extended so as to prevent the detenu from being aided or assisted by a friend who, in truth and substance, is not a legal practitioner. A detenu taken straight from his cell to the Board’s room, may lack the ease and composure to present his point of view. He may be “tongue-tied, nervous, confused or wanting in intelligence” and if justice is to be done, he must at least have the help of a friend who can assist him to give coherence to his stray and wandering ideas. Whenever demanded, the Advisory Board must grant the facility to be assisted by friend.

It may be that denial of legal representation is not denial of natural justice per se, and therefore, if a statute excludes that facility expressly, it would not be open to the tribunal to allow it.

A ‘friend’ or an ‘agent’ who, in truth and substance is friend of the detenu may appear for the detenu before the Advisory Board, but if such a ‘friend’ or ‘agent’ also happens to be a legal practitioner, he cannot, as of right, appear before the Advisory Board on behalf of the detenu. Further if such a ‘friend’ or an ‘agent’ of the detenu is essentially a comrade in the profession of the detenu for which he is detained, then such a ‘friend’ or ‘agent’ will also be barred from appearance on behalf of the detenu.

So far as representation by the friend is concerned when there was never any such demand by the detenus it was not for the Advisory Board to offer “friendly” representation to the detenus even if the latter did not ask for it.

In Johney D’Couto v. State of T.N., it was held that the word ‘friend’ used in the case of A.K. Roy v. Union of India was not intended to carry the meaning of the term in common parlance. One of the meanings of the word ‘friend’ according to the Collins English Dictionary is “an ally in a fight or
cause; supporter’. The term ‘friend’ used in the judgment was more in this sense than meaning ‘a person known well to another and regarded with liking, affection and loyalty’. A person not being a friend in the normal sense could be picked up for rendering assistance within the frame of the law. Where detaining authority was assisted by Deputy Collector and a Superintendent of Central Excise, before Advisory Board and assistance of retired Asst. Collector of Central Excise was refused to the detenu as a friend, order of detention was quashed.

The safeguards in regard to preventive detention are incorporated under Article 22 (4) and (5). There is no particular procedure prescribed for the Advisory Board since there is no lis to be adjudicated. S.11 of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act (7 of 1980) provides only the broad guidelines for observance. The Advisory Board, however, may adopt any procedure depending upon varying circumstances. But any procedure that it adopts must satisfy the procedural fairness. It is important for laws and authorities not only to be just but also appear to be just. Therefore, the action that gives the appearance of unequal treatment or unreasonableness should be avoided by the Advisory Board. It is the duty of the Advisory Board to see that the case of detenu is not adversely affected by the procedure it adopts. It must be ensured that the detenu is not handicapped by the unequal representation or refusal of access to a friend to represent his case. Where the Advisory Board heard the high ranking officers of the Police Department and others on behalf of the Government and detaining authority, it ought to have permitted the detenu to have the assistance of a friend who could have made an equally effective representation on his behalf. In view of the denial of effective representation the detention order was quashed.26 Section 11 of the Act which provides for procedure to be followed by Advisory Board in it’s clause (4) reads:
“(4) . . . Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to Advisory Board . . .”

The detenu cannot be denied assistance of a friend in proceedings before the Advisory Board on the ground that the detenu himself is a graduate and is competent to defend himself. The position of the detenu in custody has to be appreciated. He may not properly be served by his memory, he may be nervous, incoherent and his faculties may be benumbed. Assistance of a friend would result in fairness of procedure towards the detenu. It is true that the Advisory Board has to report within the prescribed period and the meeting may brook no delay. But a timely request of the detenu for being allowed to be assisted by a friend ought to be considered. Where the person proposed to assist the detenu was present at the relevant time and place the refusal of friend’s assistance on ground that detenu is a graduate would be violative of Article 22 (5) and would render the detention order invalid.27

8.6 RIGHT TO PERSONAL APPEARANCE BEFORE ADVISORY BOARD:

When it was contended in Gopalan v. State of Madras28 that the Preventive Detention Act had not provided a personal hearing to the detenu before an Advisory Board, nor had it given him a right to lead evidence to establish his innocence, Mahajan J. observed that the Advisory Board has been given the power to call for such information as it requires even from the person detained. It has also been empowered to examine the material placed before it in the light of the facts and arguments contained in the representation. The opportunity afforded is not as full as a person gets under normal judicial procedure but when the Constitution itself contemplates a special procedure, then the validity of law cannot be impugned.
Section 11 of the West Bengal (Prevention of Violent Activities) Act, 1970 which provided for procedure for Advisory Board read thus:

"The Advisory Board shall . . . if in any particular case it considers it essential so to do or if the person concerned desires to be heard, after hearing him in person, submit its report . . ."

In *Sk. Kader v. State of W.B.* the Board did not consider it essential to hear the petitioner in person before submitting its report. The Court held that the Board is not bound to give a personal hearing to the detenu unless the detenu requests for a personal hearing.

The Advisory Board may call the detenu at his request. The Board observes the fundamentals of fair play and principles of natural justice. It was held in *H. Saha v. State of W.B.* that it is not the requirement of principles of natural justice that there must be an oral hearing. The representation is to be considered by the Advisory Board by following the substance of natural justice as far as it is consistent with the nature of the Act. Procedural reasonableness for natural justice flows from Article 19.

If report is submitted by the Advisory Board without hearing the detenu who desired to be heard it will be violative of the safeguards provided under Article 22 of the Constitution and Ss. 10 and 11 of the National Security Act, 1980. Failure to produce the detenu, unless it is for wilful refusal of the detenu himself to appear, will be equally violative of those provisions. In fact to appear before the Advisory Board is the only opportunity for the detenu of being heard along with his representation for deciding whether there was sufficient cause for his detention.

8.7 **RIGHT TO CROSS-EXAMINE WITNESSES**

The need to give the detenu the right of cross-examination was considered by the Supreme Court in *A.K. Roy v. Union of India.* The Court
observed that 'due process' requires an opportunity to confront and cross-examine adverse witnesses but the decisions of the U.S. Supreme Court which turn peculiarly on the due process clause in the American Constitution cannot be applied wholesale for resolving questions which arise under our Constitution. It is only proper that we must evolve our own solution to problems arising under our Constitution without, of course, spurning the learning and wisdom of our counterparts in comparable jurisdictions. The principal question which arises is whether the right of cross-examination is an integral and inseparable part of the principles of natural justice. Two fundamental principles of natural justice are commonly recognised, namely, that an adjudicator should be disinterested and unbiased (nemo judex in causa sua) and that, the parties must be given adequate notice and opportunity to be heard (audi alteram partem). There is no fixed or certain standard of natural justice, substantive or procedural. Rules of natural justice are not rigid norms of unchanging content. The ambit of those rules must vary according to the context and they have to be tailored to suit the nature of the proceeding in relation to which the particular right is claimed as a component of natural justice. The Court held that judged by this test, it seems difficult to hold that a detenu can claim the right of cross-examination in the proceedings before the Advisory Board. In proceedings before the Advisory Board, the question for consideration of the Board is not whether the detenu is guilty of any charge but whether there is sufficient cause for the detention of the person concerned. The detention is based not on facts proved either by applying the test of preponderance of probabilities or of reasonable doubt. The detention is based on the subjective satisfaction of the detaining authority that it is necessary to detain a particular person in order to prevent him from acting in a manner prejudicial to certain stated objects. The proceeding of the Advisory Board has therefore to be structured differently from the proceedings of judicial or quasi-judicial tribunals, before which there is a lis to adjudicate upon.
Apart from this consideration, it is a matter of common experience that in cases of preventive detention, witnesses are either unwilling to come forward or the sources of information of the detaining authority cannot be disclosed without detriment to public interest. No one will be willing to come forward to give information of any prejudicial activity if his identity is going to be disclosed, which may have to be done under the stress of cross-examination. The Court observed that just as there can be an effective hearing without legal representation even so, there can be an effective hearing without the right of cross-examination. Parliament has not made any provision in the National Security Act, 1980 under which the detenu could claim the right of cross-examination. The Court was of the opinion that in the proceedings before the Advisory Board, the detenu has no right to cross-examine either the persons on the basis of whose statement the order of detention is made or the detaining authority.

The Court did not see any objection in granting to the detenu the right to lead evidence in rebuttal before the Advisory Board. The Court observed that neither the Constitution nor the National Security Act contains any provision denying to the detenu the right to present his own evidence in rebuttal of the allegations made against him. The detenu may therefore offer oral and documentary evidence before the Advisory Board in order to rebut the allegations which are made against him. If the detenu desires to examine any witnesses, he shall have to keep them present at the appointed time and no obligation can be cast on the Advisory Board to summon them.

8.8 RIGHT TO SPEAKING ORDER:

The Supreme Court held in Bhut Nath v. State of W.B.\textsuperscript{33} that it is not necessary that a speaking order should be passed by Government or by the Advisory Board while approving or advising continuance of detention although a brief expression of the principal reasons is desirable. The subject
matter being the deprivation of freedom, clearly implies a quasi-judicial approach. The bare bones of natural justice in this context need not be clothed with the ample flesh of detailed hearing and elaborate reasoning. It must be self-evident from the order that the substance of the charge and the essential answers in the representation have been impartially considered. A harmonious reconciliation between the claims of security of the nation and the liberty of the citizen are the necessary components of natural justice. Not more. *H. Saha v. State of W.B.*\textsuperscript{34} also reiterated that there is no failure of justice by the order of Government or the Advisory Board, rejecting the representation of the detenu, not being a speaking order.
REFERENCES