A.K. Roy Summary

CONSTITUTION OF INDIA - Article 13(2)--Ordinances issued by Governors or the President--Subject to same restraints and inhibitions.

An Ordinance issued by President or the Governors is an executive and not a legislative act. An Ordinance issued by the Governor or the President of India is as much law as an Act passed by the Parliament and is, therefore, subject to the same inhibitions. In those inhibitions lies the saftey of the people.

CONSTITUTION OF INDIA - Articles 14, 19, 21 and 22--National Security Act-Section 3 (3)--Not violate of Articles 14, 19, 21 or 22 of the Constitution.

It is impossible to accept the contention that the National Security Act, which is in pari materia with the Maintenance of Internal Security Act, 1971, is unconstitutional on the ground that by its very nature it is generally violative of Articles 14, 19, 21 and 22 of the Constitution of India.

CONSTITUTION OF INDIA - Article 21--Ordinance issued by Governor or the President--Is law under Article 21.

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

CONSTITUTION OF INDIA - Articles 21, 22--Preventive detention--is permissible under the Constitution.

But, the liberty of the individual has to be subordinated, within reasonable bounds, to the good of the people. Therefore, acting in public interest, the Constituent Assembly made provisions in Entry 9 of List I and Entry 3 of List III, authorising the Parliament and the State Legislatures by Article 246 to pass laws of preventive detention. Therefore, the contention that preventive detention is basically impermissible under the Indian Constitution.

CONSTITUTION OF INDIA - Article 22--Preventive Detention--Advisory Board--Proceedings before--Right of detenu in proceedings before the Advisory Board.

A detenu detained preventively does not have a right to be represented by a lawyer before the Advisory Board.

A detenu does not have a right to claim cross-examination in proceedings before Advisory Board.

The Government or the detaining authority can take the aid of a legal practitioner or a legal adviser before the Advisory Board, but in that case the detenu must be allowed the facility of appearing before the Advisory Board through a legal practioner.

A detenu entitled to be represented through a friend or assisted by the friend.

Detnu has a right to adduce documentary and oral evidence in rebutal of the allegations made against him. Witnesses sought to be produced by detenu before the Advisory Board must be got ready at the appointed date, time and place and the Advisory Board is under no obligation to summon them. Advisory Board, like a Tribunal, is free to regulate its own procedure within the constraints of the Constitution and the statute. It would be open to it, in the exercise of that power to limit the time within the detenu must complete his evidence.

CONSTITUTION OF INDIA - Article 32--Writ of mandamus--issue of--Constitution 44th Amendment Act--Central Government not issuing notification enforcing Section 3 In spite of the fact that the Amendment Act received the assent of the President--Mandamus cannot be issued to force the Central Government to do the same.

Failure of the Central Government to issue notification enforcing Section 3 of the Constitution 44th Amendment Act, 1978. Supreme Court under Article 32 not to compel Central Government to issue the notification which lies in the discretion of the Central Government.

CONSTITUTION OF INDIA - Article 123--Ordinance promulgated by President--Nature of--Limitations for--Satisfaction of President for.

Ordinance issued by the President and the Governors and the law made by the President or his delegate under Article 357(1)(a) of the Constitution partake fully of legislative character and are made in the exercise of legislative power, within the contemplation of the Constitution of India. An ordinance is law within the meaning of and is subject to same inhibitations as a Statue passed by a legislature. The argument that the Ordinance-making power, if extended to cover matters mentioned in 21, will destroy the basic struclure of the separation of powers as envisaged in the Constitution, because Article 123(1) is a part of the Constitution as originally enacted as also the Constitution does not follow the American pattern of a strict separation of powers.

The question if the pre-condition of the exercise of power under Article 123 are satisfied cannot be regarded as purely a political question. An ordinance promulgated by the President or Governors are subject to same inhibitations contained in Article 13(2) of the Constitution. An Ordinance has to comply with the mandate of Article 13(2) of the Constitution.

CONSTITUTION OF INDIA -Article 356--Satisfaction of President of India--Justiciablity of.

In view of 44th Amendment of the Constitution deleting Clause (5), there is no doubt that judicial review is not totally excluded in regard to the question relating to the President's satisfaction under Article 356 of the Constitution.

NATIONAL SECURITY ACT, 1980 - Section 8--Grounds of detention--Communication of--Normal rule for.

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

NATIONAL SECURITY ACT, 1980 - Section 9 --Advisory Board--Constitution of--Constitution in accordance with Article 22 (4) of the Constitution is not bad or invalid.

The validity of the constitution of Advisory Boards has therefore to be tested in the light of the provisions contained in Article 22 (4) as it stands now and not according to the amended Article 22 (4). According to that Article as it stands now, an Advisory Board may consist of persons, inter alia, who are qualified to be appointed as Judges of a High Court. Section 9 of the National Security Act provides for the constitution of the Advisory Boards in conformity with that provision. We find it impossible to hold that the provision of a statute, which conforms strictly with the existing provisions of the Constitution, can be declared bad either on the grounds that it does not accord with the provisions of a constitutional amendment which has not yet come into force, or on the ground that the provision of the section is harsh or unjust. The standard which the Constitution, an originally enacted, has itself laid down for constituting Advisory Boards cannot be characterised as harsh or unjust. The argument, therefore, that Section 9 of the National Security Act is bad for either of these reasons must fail.

NATIONAL SECURITY ACT, 1980 - Sections 9, 10--Detenu--Treatment of--Facilities reasonable should be provided to a detenu.

We shall have to examine each case as it comes before us, in order to determine whether the restraints imposed upon the detenu in any particular case are excessive and unrelated to the object of detention. If so, they shall have to be struck down. We would, however, like to say that the basic commitment of our Constitution is to foster human dignity and the well-being of our people. In recent times, we have had many an occasion to alert the authorities to the need to treat even the convicts in a manner consistent with human dignity. It highlights that places of incarceration are "part of the Indian earth" and that, "the Indian Constitution cannot be held at bay by jail officials 'dressed in a little, brief authority". It is to impress upon the Government that the detenus must be afforded all reasonable facilities for an existence consistent with human dignity. We see no reason why they should not be permitted to wear their own clothes, eat their own food, have interviews with the members of their families at least once a week and, last but not the least, have reading and writing material according to their reasonable requirements. Books are the best friends of man whether inside or outside the jail.

NATIONAL SECURITY ACT, 1980 - Sections 9, 10--Preventive detention--Detenu to be kept separately in detention place.

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

If any of the persons detained under the National Security Act arc at present housed in the same ward or cell where the convicts are housed, immediate, steps must be taken to segregate them appropriately.

NATIONAL SECURITY ACT, 1980 - Sections 10, 11--Advisory Board--Procedure to be followed by--Rights of the detenue before the Advisory Board.

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 itseif has provided a yardstick for the application of that standards, through the medium of the provisions contained in Article 22 (3) (b). Howsoever much we would have liked to hold otherwise, we experience serious difficulty in taking the view that the procedure of the Advisory Boards in which the detenu is denied the right of legal representation is unfair, unjust or unreasonable. If Article 22 were silent on the question of the right of legal representation, it would have been possible, indeed right and proper, to bold that the detenu cannot be denied the right of legal representation in the proceedings before the Advisory Boards. It is unfortunate that courts have been deprived of that choice by the express language of Article 22 (3) (b) read with Article 22 (1).

Neither the Constitution nor the National Security Act contains any provision denying to the detenu the right to present his own evidence in rebuttal of the allegations made against him. The detenu may therefore offer oral and documentary evidence before the Advisory Board in order to rebut the allegations which are made against him. We would only like to add that if the detenu desires to examine any witnesses, he shall have to keep them present at the appointed time and no obligation can be cast on the Advisory Board to summon them. The Advisory Board, like any other tribunal, is free to regulate its own procedure within the constraints of the Constitution and the statute. It would be open to it, in the exercise of that power to limit the time within which the detenu must complete his evidence. We consider it necessary to make this observation particularly in view of the fact that the Advisory Board is under an obligation under Section 11 (1) of the Act to submit its report to the appropriate Government within seven weeks from the date of detention of the person concerned. The proceedings before the Advisory Board have therefore to be completed with the utmost expedition.

NATIONAL SECURITY ACT, 1980 - Sections 10, 11--Advisory Board--Proceedings before--Not to be open to public.

It is difficult to accept the plea made by the learned counsel that the proceedings of the Advisory Board should be thrown open to the public. The right to a public trial is not one of the guaranteed rights under our Constitution as it is under the 6th Amendment of the American Constitution which secures to persons charged with crimes a public, as well as a speedy, trial. Even under the American Constitution, the right guaranteed by the 6th Amendment is held to be personal to the accused, which the public in general cannot share. Considering the nature of the inquiry which the Advisory Board has to undertake, we do not think that the interest of justice will be served better by giving access to the public to the proceedings of the Advisory Board.

NATIONAL SECURITY ACT, 1980 - Section 11 (2)--Preventive detention--Detention after submission by report by the Advisory Board--Advisory Board cannot decide the question with regard to.

Section 11 (2) of the Act provides specifically that the report of the Advisory Board shall specify its opinion "as to whether or not there is sufficient cause for the detention of the person concerned". This implies that the question to which the Advisory Board has to apply its mind is whether on the date of its report there is sufficient cause for the detention of the person. The inquiry necessarily involves the consideration of the question as to whether there was sufficient cause for the detention of the person when the order of detention was passed, but we see no justification for extending the jurisdiction of the Advisory Board to the consideration of the question as to whether it is necessary to continue the detention of the person beyond the date on which it submits its report or beyond the period of three months after the date of detention. The question as to whether there are circumstances on the basis on which the detenu should be kept in detention after the

Advisory Board submits its report and how long, is for the detaining authority to decide and not or the Board.

NATIONAL SECURITY ACT, 1980 - Section 13--Preventive Detention--Maximum period for--Question of discretion.

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

NATIONAL SECURITY ACT, 1980 - Section 16--Unwarranted protection of Officer under--Not invalid on account of.

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

If the policy of a law is to protect honest acts, whether they are done with care or not, it cannot be said that the law is unreasonable. In fact, honest acts deserve the highest protection. Then again, the line which divides a dishonest act from a negligent act is often thin and speaking generally, it is not easy for a defendant to jusify his conduct as honest, if it is accompanied by a degree of negligence. The fact, therefore, that the definition contained in Section 3 (22) of the General Clauses Act include, negligent act in the category of acts done in good faith will not always make

material difference to the proof of the matters arising in proceedings under Section 16 of the Act.