Additional District Magistrate, Jabalpur

Vs

Shivakant Shukla

State of Uttar Pradesh

Vs

V. K. S. Chaudhary and Others

Union of India

Vs

Atal Bihari Vajpayee and Others

Union of India

Vs

Mrs. Satya Sharma and Another

State of Karnataka and Others

Vs

N. K. Ganpaiah and Another

State of Maharashtra and Others

Vs

Subhas and Others

State of Rajasthan and Others

Vs

Milap Chand Kanungo and Others

Union of India and Another

Vs

Shri Ram Dhan

And Union of India

Vs

Dr. Mrs. Rekha Awasthi

Applicant/Interveners 1. Smt. Manek Ben 2. Maharaj Jai Singh 3. Surinder Mohan And Suraj Bhan Gupta 4. V. K. Singh Chowdhry 5. Deepchand Jain.

Criminal Appeals Nos. 279 355 and 356,380, 389 , 1845-1849

and 1926 of 1975 and 3 ,41 and 46 of 1976

(CJI A.N. Ray, H.R. Khanna, M.H. Beg, Y.V. Chandrachud, P.N. Bhagwati JJ)

28.04.1976

JUDGMENT

RAY, C.J. -

1. These appeals are by certificates in some cases and by leave in other cases. The State is the appellant. The respondents were petitioners in the High Courts.

2. The respondents filed applications in different High Courts for the issue of writ of habeas corpus. They challenged in some cases the validity of the Thirty-eighth and the Thirty-ninth Constitution Amendment Acts, the proclamation of emergency by the President under Article 352 of the Constitution made on June 25, 1975. They challenged the legality and validity of the orders of their detention in all the cases.

3. The State raised a preliminary objection that the Presidential Order dated June 27, 1975 made under Article 359 of the Constitution suspending the detenus' right to enforce any of the rights conferred by Articles 14, 21 and 22 of the Constitution and the continuance of emergency during which by virtue of Article 358 all rights conferred by Article 19 stand suspended are a bar at the threshold for the respondents to invoke the jurisdiction of the High Court under Article 226 of the Constitutional and to ask for writs of habeas corpus.

4. The judgments are of the High Courts of Allahabad, Bombay (Nagpur Bench), Delhi, Karnataka, Madhya Pradesh, Punjab and Rajasthan.

5. The High Courts held that notwithstanding the continuance of emergency and the Presidential Order suspending the enforcement of fundamental rights conferred by Articles 14, 21 and 22 the High Courts can examine whether an order of detention is in accordance with the provisions of the Maintenance of Internal Security Act (hereinafter referred to as the Act), which constitute the conditions precedent to the exercise of powers thereunder excepting those provisions of the Act which are merely procedural or whether the order was made mala fide or was made on the basis of relevant materials by which the detaining authority could have been satisfied that the order was necessary. The High Courts also held that in spite of suspension of enforcement of fundamental rights conferred by Articles 21 and 22 of the Constitution a person's right to freedom from arrest or detention except in accordance with law can be enforced only where such arrest and detention are not in accordance with those provisions of the statute which form the conditions precedent to the exercise of power under that statute as distinguished from merely procedural provisions or are mala fide or a not based on relevant materials by which the detaining authority could have been satisfied that the order of detention was necessary.

6. The High Court held that the High Courts could not go into the questions whether the proclamation of emergency was justified or whether the continuance thereof was mala fide.

7. The High Courts did not decide about the validity of the Thirty-eighth and the Thirty-ninth Constitution Amendment Acts. The Thirty-eight Constitution Amendment Act amended Articles 123, 213, 239B, 352, 356, 359 and 360. Broadly stated, the Thirty-eighth Constitution Amendment Act renders the satisfaction of the President or the Governor in the relevant articles final and conclusive and to be beyond any question in any court on any ground. As for Article 359 clause (1A) has been inserted by the Thirty-eighth Constitution Amendment Act. The Thirty-ninth Constitution Amendment Act amended Articles 71, 329, 329A and added entries after Entry 86 in the Ninth Schedule.

8. No arguments were advanced on these Constitution Amendment Acts and nothing thereon falls for determination in these appeals.

9. It is appropriate to mention here that on December 3, 1971 in exercise of powers conferred by clause (1) of Articles 352 of the Constitution the President by proclamation declared that a grave emergency exists whereby the security of India is threatened by external aggression.

10. On June 25, 1975 the President in exercise of powers conferred by clause (1) of Articles 352 of the Constitution declared that a grave emergency exists whereby the security of India is threatened by internal disturbances.

11. On June 27, 1975 in exercise of powers conferred by clause (1) of Articles 359 the President declared that the right of any person including a foreigner to move any court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution and all proceedings pending in any court for the enforcement of the abovementioned rights shall remains suspended for the period during which the proclamations of emergency made under clause (1) of Article 352 of the Constitution on December 3, 1971 and on June 25, 1975 are in force. The Presidential Order of June 27, 1975 further stated that the same shall be in addition to and not in derogation of any order made before the date of the aforesaid order under clause (1) of Article 359 of the Constitution.

12. It should be noted here that on January 8, 1976 there was a notification that in exercise of powers conferred by clause (1) of Article 359 of the Constitution the President declares that the right of any person to move any court for the enforcement of the rights conferred by Article 19 of the Constitution and all proceedings pending in any court for the enforcement of the abovementioned rights shall remain suspended for the period during which the proclamation of emergency made under clause (1) of Article 352 of the Constitution on December 3, 1971 and on June 25, 1975 are in force.

13. The questions which fall for consideration are two. First, whether in view of the Presidential Orders dated June 27, 1975 and January 8, 1976 under clause (1) of Article 359 of the Constitution any writ petition under Article 226 before a High Court for habeas corpus to enforce the right to personal liberty of a person detained under the Act on the ground that the order or detention or the continued detention is for any reason not under or in compliance with the Act is maintainable. Second, if such a petition is maintainable what is the scope or extent of judicial scrutiny particularly in view of the Presidential Order dated June 27, 1975 mentioning, inter alia, Article 22 of the Constitution and also in view of sub-section (9) of Section 16A of the Act.

14. The Attorney General contended that the object and purpose of emergency provisions is that the Constitution provides special powers to the Executive because at such times of emergency the considerations of State assume importance. It has been recognised that times of grave national emergency demand grant of special power to the Executive. Emergency provisions contained in Par XVIII including Articles 358, 359(1) and 359(1A) are constitutional imperatives. The validity of law cannot be challenged on the ground of infringing a fundamental right mentioned in the Presidential Order under Article 359(1). Similarly, if the Executive took any action depriving a person of fundamental right mentioned in the Presidential Order by no complying with the law such executive action could not be challenged because such challenge would amount in substance to and would directly impinge on the enforcement of fundamental rights mentioned in the Presidential Order. The reason given by the Attorney General behind the principle is that in times of emergency the Executive safeguards the life of the nation. Challenge to executive actions either on the ground that these are arbitrary or unlawful has been negatived in England in Liversidge v Anderson (1942 AC 206 : (1941) 3 All ER 338) and Greene v. Secretary of State for Home Affairs (1942 AC 284) and also by this Court in Mohan Chowdhury v. Chief Commissioner, Union Territory of Tripura ((1964) 3 SCR 442 : AIR 1964 SC 173 : (1964) 1 Cri LJ 132) and Makhan Singh v. State of Punjab ((1964) 4 SCR 797 : AIR 1964 SC 381 : (1964) 1 Cri LJ 269).

15. The contentions of the respondents are as follows : The arguments on behalf of the State mean that during the emergency there is no rights to life or liberty. Article 358 is more extensive as the fundamental right itself is suspended. The Presidential Order under Article 359(1) does not suspend any fundamental right.

16. Second, the object of Article 359(1) is to bar moving the Supreme Court under Article 32 for the enforcement of certain specified rights without affecting in any manner the enforcement of common law and statutory rights to personal liberty under Article 226 before the High Court.

17. Third, Article 359(1) removes the fetter in Part III but does not remove the fetters arising from the principles of limited power of the Executive under the system of checks and balances based on separation of powers.

18. Fourth, while the Presidential Order operates only in respect of fundamental rights mentioned in the Presidential Order is would not affect the rights of personal liberty at common law or under statute law or under natural law.

19. Fifth, Article 359(1) is not to protect illegal orders of the Executive. The Executive cannot flout the command of Parliament relying on a Presidential Order under Article 359(1). The suspension of fundamental right or of its enforcement cannot increase the power of the Executive vis-a-vis the individual.

20. Sixth, there is no reason to equate the State with the Executive. The suspension of the fundamental right or the right to enforce it has only this consequence that it enables the Legislature to make laws violative of the suspended fundamental right and the Executive to implement such law. The suspension of the fundamental right does not enable the Executive to flout legislative mandates and judicial decisions.

21. Seventh, the Executive can act to the prejudice of citizens only to the extent permitted by valid law. The proclamation of emergency does not widen the executive power of the State under Article 162 so as to empower the State to take any executive action which it is not otherwise competent to

take.

22. Eighth, the right to arrest is conferred by the Act on the States and their officers only if the conditions laid down under Section 3 of the Act are fulfilled. Therefore, if the conditions laid down under Section 3 of the Act are not complied with by the detaining authority then the order or detention would be ultra vires the said Act.

23. Ninth, habeas corpus is a remedy not only for the enforcement of the right to personal liberty, whether under natural law or a statute, but is also a remedy for the enforcement of the principle of ultra vires, viz., when the detaining authority has failed to comply with the conditions laid down in Section 3 of the Act. In such as case the High Court has jurisdiction to issue to writ of habeas corpus for the enforcement of the principle of ultra vires.

24. In England it was the practice in times of danger to the State of pass what were popularly known as Habeas Corpus Suspension Acts. Suspension did not legalise illegal arrest; it merely suspended a particular remedy in respect of particular offences. Accordingly it was the practice in England at the close of the period of suspension to pass an Indemnity Act in order to protect officials concerned from the consequences of any incidental illegal act which they might have committed under cover of the suspension of the prerogative writ.

25. In England the Defence of the Realm Acts, 1914-18 empowered the Executive to make regulations by order in council for securing the public safety or for the defence of the realm. In King v. Halliday, ex parte Zadig (1917 AC 260 : 86 LJKB 1119) the House of Lords held that a regulation was valid which authorised the Secretary of State of detain a British subject on the grounds of his hostile origin or association. It was contention on behalf of Zadig that there was no provision for imprisonment without trial. The substantial contention was that general words in a statute could not take away the vested right of a subject or alter the fundamental law of the Constitution because it would be repugnant to the constitutional tradition of the country. The majority of the court swept aside these arguments and held that on the construction of the Act the Executive had unrestricted powers.

26. During the Second World War the Emergency Powers (Defence) Act, 1939 in England empowered the making of regulations for the detention of persons by the Secretary of State in the interests of the public safety or the defence of the realm, and for authority to enter and search any premises.

27. Although access to the courts was not barred during the Second World War in England the scope for judicial review of executive action was limited. The courts could not consider whether a particular regulation is necessary or expedient for the purpose of the Act which authorised it. The question of necessity or expediency was one for the Government to decided. The court could, however, hold an act to be illegal as being not authorised by the regulation relied upon to justify it.

28. It was open to the subject in England to challenge detention by application for a writ of habeas corpus, but such application had little chance of success in view of the decision of the House of Lords in Liversidge's case (supra). The House of Lords took the view that the power to detain could not be controlled by the courts, if only because considerations of security forbade proof of the evidence upon which detention was ordered. It was sufficient for the Home Secretary to have as belief which in his mind was reasonable. The courts would not enquire into the grounds for his belief, although apparently they might examine positive evidence of mala fides or mistaken identity.

In Greene's case (supra) the House of Lords held that a mistake on the part of the advisory committee in failing, as was required by the regulation, to give the appellant correct reasons for his detention did not invalidate the detention order. It is noticeable how the same House expressed this view without any dissent.

29. Dicey states that this increase in the power of the Executive is no trifle, but it falls far short of the process known in some foreign countries as "suspending the constitutional guarantees" or in France as the "proclamation of a state of siege". Under the Act of 1881 the Irish Executive obtained the absolute power of arbitrary and preventive arrest, and could without breach of law detain in prison any person arrested on suspicion for the whole period for which the Act continued in force. Under the Prevention of Crime (Ireland) Act, 1882 the Irish Executive was armed with extraordinary power in the case of certain crimes to abolish right to trial by jury.

30. The Act of Indemnity in England is a retrospective statute which frees persons who had broken the law from responsibility for its breach, and thus make acts lawful which when they were committed were unlawful. A Habeas Corpus Suspension Act does not free any person from civil or criminal liability for a violation of the law. The suspension, indeed, of the Habeas Corpus Act may prevent the person arrested from taking at the moment any proceeding against the Secretary of State. While the suspension lasts, he will not be able to get himself discharged from prison. If the prisoner has been guilty of no legal offence then on the expiration of the Suspension Act the Secretary of State and his subordinates are liable to actions or indictments for their illegal conduct.

31. Dicey stated that the unavowed object of a Habeas Corpus Suspension Act is to enable the Government to do acts which, though politically expedient, may not be strictly legal. The Parliament which suspends one of the guarantees for individual freedom must hold that a crisis has arisen when the rights of individuals must be postponed to considerations of State. A Suspension Act would, in fact, fail of its main object, unless the officials felt assured that, as long as they bona fide, and uninfluenced by malice or by corrupt motives, carried out the policy of which the Act was visible sigh, they would be protected from penalties for conduct which, though it might be technically a breach of law, was nothing more than the free exertion for the public good of that discretionary power which the suspension of Habeas Corpus Act was intended to confer upon the Executive.

32. The position in America is described in Cooley on the General Principles of Constitutional Law in the U.S.A., Fourth Edition. In America the right to the writ of habeas corpus is not expressly declared in the Constitution, but it is recognised in the provision Article I in Section 9 clause (2) that the privilege of writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it. In America the power to suspend the privilege is a legislative power and the President cannot exercise it except as authorised by law. The suspension does not legalise what is done while it continues. It merely suspends for the time this particular remedy. All other remedies for illegal arrests remain, and may be pursued against the parties making or continuing them.

33. Liberty is confined and controlled by law, whether common law or statute. It is in the words of Burke a regulated freedom. It is not an abstract or absolute freedom. The safeguard of liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved. If extraordinary powers are given, they are given because the emergency is extraordinary, and are limited to the period of the emergency.

34. Unsuitability of a court of law for determining matters of discretionary policy was referred to by Lord Parker in the Zamora case ((1961) 2 AC 107) and Lord Finlay in the Zadig case (supra). In the Liversidge case (supra) it was held that the court is not merely an inappropriate tribunal, but one the jurisdiction of which is unworkable and even illusory in these cases. A court of law could not have before it the information on which the Secretary acts still less the background of statecraft and national policy what is and what must determine the action which he takes upon it.

35. The Liversidge case referred to these observations in the Zadig case :

> However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war or escape from national plunder or enslavement.

Liberty it itself the gift of the law and may by the law be forfeited or abridged.

36. There is no record of any life of an individual being taken away either in our country during emergency or in England or America during emergency in their countries. It can never be reasonably assumed that such a thing will happen. Some instances from different countries were referred to by some counsel for the respondents as to what happened there when people were murdered in gas chambers or people were otherwise murdered. Such instances are intended to produce a kind of terror and horror and are hortative in character. People who have faith in themselves and in their country will not paint pictures of diabolic distortion and mendacious malignment of the governance of the country. Quite often arguments are heard that extreme examples are given to test the power. If there is power, extreme examples will neither add to the power nor rob the same. Extreme examples tend only to obfuscate reason and reality.

37. The effect of the Suspension of Habeas Corpus Acts and Indemnity Acts in England has been to give every man security and confidence in periods of public danger or apprehension. Rarely, however, has this been suffered without jealousy, hesitation and remonstrance. Whenever the perils of the State have been held sufficient to warrant this sacrifice of personal liberty, no minister or magistrate has been suffered to tamper with the law at his discretion. Where the Government believes the State to be threatened by traitorous conspiracies during times of grave emergencies the rights of individuals of ordinary times becomes subordinate to considerations of the State.

38. The pre-eminent questions are four. First, is the Presidential Order under Article 359 a bar at the threshold ? Second, is Article 21 the sole repository of right to life and personal liberty ? Third, is the Presidential Order subject to the rubric of rule of law ? Fourth, is Section 16A of the Act a rule of evidence ?

39. The first question turns on the depth and content of the Presidential Order. The vital distinction between Article 358 and Article 359 is that Article 358 suspends the rights only under Article 19 to the extent that the legislature can make law contravening Article 19 during the operation of a proclamation of emergency and the Executive can take action which the Executive is competent to take under such laws. Article 358 does not suspend any fundamental right. While a proclamation of emergency is in operation the Presidential Order under Article 359(1) can suspend the enforcement of any or all fundamental rights. Article 359(1) also suspends any pending proceedings for the enforcement of such fundamental right or rights. The purpose and object of Article 359(1) is that the enforcement of any fundamental right mentioned in the Presidential Order is barred or it remains suspended during the emergency. Another important distinction between the two articles that Article

358 provide for indemnity whereas Article 359(1) does not, Article 359(1A) is on the same lines as Article 358 but Article 359(1A) now includes all fundamental rights which may be mentioned in a Presidential Order and is, therefore, much wider that Article 358 which includes Article 19 only.

40. A person can enforce a fundamental right both in the case of the law being made in violation of that right and also if the Executive acts in non-compliance with valid law or acts without the authority of law. It cannot be said that the scope of Article 359(1) is only to restrict the application of the article to the legislative field and not to the acts of the Executive. The reasons is that any enforcement of the fundamental rights mentioned in the Presidential Order is barred and any challenge either to law or to any act of the Executive on the ground that it is not in compliance with the valid law or without authority of law will amount to enforcement of fundamental rights and will, therefore, be within the mischief of the Presidential Order. The effect of the Presidential Order suspending the enforcement of fundamental right amounts to bar the locus standi of any person to move the court on the ground of violation of a fundamental right.

41. The Constitution is the mandate. The Constitution is the rule of law. No one can rise above the rule of law in the Constitution. The decision of this Court in Mohan Chowdhury's case, Makhan Singh's case and Dr. Ram Manohar Lohia v. State of Bihar ((1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608) are that any court means all courts including this Court and High Courts and the right to initiate legal proceedings. A person can enforce fundamental rights in this Court under Article 32 as well as in the High Courts under Article 226. It is idle to suggest that the object of Article 359(1) is that right to move this Court only is barred and not the right to move any High Court. Article 226 does not provide a guaranteed fundamental right like Article 32. This guaranteed right under Article 32 itself may be suspended by a Presidential Order under Article 359(1). In such a case it could not be said that the object of the makers of the Constitution is that a person could not move this Court for the enforcement of fundamental rights mentioned in the Presidential Order but could do so under Article 226. The bar created by Article 359(1) applies to petitions for the enforcement of fundamental rights mentioned in the Presidential Order whether by way of an application under Article 32 or by way of any application under Article 226. (See Makhan Singh's case and Ram Manohar Lohia's case.)

42. It is incorrect to say that the jurisdiction and powers of this Court under Article 32 and of the High Courts under Article 226 are virtually abolished by the Presidential Order without any amendment of the Constitution. No amendment of the Constitution is necessary because no jurisdiction and power either of this Court or of the High Court is taken away. When a Presidential Order takes away the locus stands of the detenus to move any court for the enforcement of fundamental rights for the time being the jurisdiction and powers of this Court and of the High Courts remain unaltered. Article 359(1) is not directed against any court. It is directed against an individual and deprives him of his locus standi.

43. The courts cannot either increase or curtail for freedom of individuals contrary to the provisions of the Constitution. The courts interpret the Constitution and the laws in accordance with law and judicial conscience and not emotion. It is wrong to say that the Executive has asked or directed anyone not to comply with the conditions of the Act. The question is not whether the Executive should comply or should not comply with the Act but whether a detenu has locus standi to move any court for a writ in the nature of habeas corpus on the ground of non-compliance with the provisions of the Act.

44. In period of public danger or apprehension the protective law which gives every man security

and confidence in times of tranquillity, has to give way to interests of the State. The opinion in England has been that when danger is imminent, the liberty of the subject is subordinated to the paramount interests of the State. Ringleaders are seized and outrages anticipated. Plots are disconcerted, and the dark haunts of conspiracy filled with distrust and terror (See May : Constitutional History of England, Vol. I, pp. 130-135).

45. While the courts of law are in normal times peculiarly competent to weigh the competing claims of individuals and government, they are ill-equipped to determine whether a given configuration of events threatens the life of the community and thus constitutes an emergency. Neither ar they equipped, once an emergency has been recognised particularly a war emergency or emergency on account of the country being threatened by internal aggression to measure the degree to which the preservation of the life the community may require government control of the activities of the individual. Jurists do not have the vital sources of information and advice which are available to the Executive and the Legislature; nor have they the burden of formulating and administering the continuing programme of the government, and the political responsibility of the people, which, although intangibles, are a crucial importance in establishing the context within which such decisions must be made.

46. Article 359(1) makes no distinction between the threat to the security of India by war or external aggression on one hand and threat to the security of India by internal disturbance on the other. In fact, both situations are covered by the expression "grave emergency" in Article 352(1). Apart from Article 359(1) all provisions of the Constitution laying down the consequences of a proclamation of emergency under Article 352(1) would apply to both situations. The consequences of a proclamation of emergency under Articles 352(1) of our Constitution are much wider than in England or America.

47. Article 353 provides that the executive power of the Union shall extend to giving of directions to any State as to manner in which the executive power thereof is to be exercised. The exercise of such executive power by the Union totally displaces the provisions of Article 162. Non-compliance with directions of the Union Executive under Article 353 by any State Executive may attract the provisions of Article 356 and the President's Rule may be imposed on that State. In such an event, Parliament may, under Article 357(1) confer on the President the power of the Legislature of that State to make laws or to delegate such legislative power to any other authority. In such a situation, the federal structure and representative government on which the Constitution is based, may be completely changed in the State or States concerned. Article 250 provides that during the operation of proclamation of emergency Parliament may make laws with respect to any of the matters enumerated in the State List. The federal structure and representative government may suffer its full place in that situation.

48. On the expiry of the operation of the President Order under Article 359(1), the infringement of the fundamental rights mentioned in the order, either by the legislative enactment or by an executive action, may be challenged in a court of law and if after such expiration Parliament passes an Act of Indemnity, the validity and the effect of such legislation may have to be scrutinised. [See Makhan Singh's case (supra), at p. 813].

49. The provisions in our Constitution relating to emergency are of wide amplitude. The Executive is armed with special powers because individual interests are subordinated to State security. If law is invalid vis-a-vis fundamental rights there cannot be any challenge during the operation of Articles 358 and 359 on the ground that law violates fundamental rights. It is contradictory to say that there

can yet be challenge to orders under that law as being not in accordance with law. Article 19 is a prohibition against law. Article 19 has nothing to do with the Executive. Law under Article 21 can be punitive or preventive. In Article 22 reference is made to grounds and representative in cases of preventive detention. If enforcement of Article 22 is suspended one is left with Article 21.

50. The Act in the present case in law. The executive orders are under that law. Any allegation that orders are not under that law will not rob the orders of the protective umbrella of Article 359. The challenge by a detenu that law is broken will be enforcement of Article 21 because law contemplate under Article 21 is substantive as well as procedural law. A law can be broken either of substantive or procedural parts. Neither enforcement of nor relief to personal liberty is based on Article 19. Non executive action is valid unless backed by law. In the present cases there is law authorising detention. In the present cases, the writs questioned the validity of detention. The Legislature under Article 358 is authorised to act in breach of Article 19. The Executive can act only in terms of that law. If this is pre-emergency law it has to satisfy Part III of our Constitution. If it is emergency law it can violate Article 19 because it is protected by Article 358.

51. Under Article 359 the Presidential Orders have been of two types. On November 13, 1962 in exercise of powers conferred by clause (1) of Article 359 of the Constitution the President declared that the right of any person to move any court for the enforcement of the rights conferred by Article 21 and Article 22 shall remain suspended for the period during which the proclamation of emergency issued under clause (1) of Article 352 on October 26, 1962, is in force, if such a person has been deprived of any right under the Defence of India Ordinance, 1962 or of any rule or order made thereunder.

The 1975 Presidential Order under Article 359(1) does not have the words.

if such a person has been deprived of any such right under the Defence of India Ordinance, 1962 or any rule or order made thereunder.

In other words, the 1962 Presidential Order is limited to the condition of deprivation of rights under the Defence of India Ordinance or any rule or order made thereunder whereas in the 1975 Presidential Order no statute is mentioned. The illegality of orders was challenged in Makhan Singh's case (supra) in spite of the Presidential Order under the 1962 proclamation on the ground that the impeached orders are not in terms of the statute or they are made in abuse of law.

52. The decisions of this Court in Mohan Chowdhury's and Makhan Singh's cases (supra) are that during the operation of a proclamation of emergency no one has any locus standi to move any court for the enforcement of any fundamental rights mentioned in the Presidential Order. The ratio must necessarily apply to executive acts because executive acts are challenged on the grounds of being contrary to law and without the authority the law. The submission of the respondents that a person in detention can come to a court of law in spite of the Presidential Order under Article 359(1) and contend that a habeas corpus should issued for his release or that the Executive should answer the detenu's challenge that the Act complained of is without authority of law or the challenge of the detenu that the provisions of the legislative Act under which the detention has been made have not been complied with are all rooted in the enforcement of fundamental rights to liberty under Articles 21 and 22. If courts will in spite of the Presidential Order entertain such applications and allow the detenus to enforce, to start or continue proceedings or enforce fundamental rights, Article 359(1) will be nullified and rendered otiose.

53. This Court in Makhan Singh's case said that if there was challenge to the validity of the detention order based on any right other than those mentioned in the Presidential Order the detenu's right to move any court could not be suspended by the Presidential Order because the right was outside Article 359(1). This was explained by stating that if the detention was challenged on the ground that it contravened the mandatory provisions of the relevant Act or that it was mala fide and was proved to be so, the bar of the Presidential Order could have no application.

54. This observation in Makhan Singh case is to be understood in the context of the question that arose for decision there. Decision on a point not necessary for the purpose of or which does not fall to be determined in that decision becomes an obiter dictum (see Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur v. Union of India ((1971) 3 SCR 9, 97-98, 193-194 : (1971) 1 SCC 85, 164, 196-197). In Makhan Singh's case the detention orders which were the subject-matter of the judgment were orders made by the Executive under the Defence of India Ordinance or Act and rules and order made thereunder which was the express condition for detention in respect of which the Presidential Order of 1962 under Article 359(1) applied.

55. The Presidential Order in the present case is on the face of it an unconditional order and as such there is the vital and telling difference between the effect of the Presidential Order of 1962 and the present Presidential Order. It is obvious that the Government fully conscious of the Presidential Order of 1962 and its effect as determined by the decisions of this Court in Makhan Singh's case and subsequent cases deliberately made the present Presidential Order an unconditional order under Article 359(1).

56. Reference may be made to State of Maharashtra v. Prabhakar Pandurang Sangzgiri ((1966) 1 SCR 702 : AIR 1966 SC 424 : 1966 Cri LJ 311), which clearly pointed out that the Presidential Order of 1962 was a conditional one and therefore if a person was deprived of his personal liberty not under the Act or rules and orders made thereunder but in contravention thereof, his right to move the courts in the regard would not be suspended. The decision of this Court in Pandurang's case is by the Constitution Bench of five learned Judges, three in whom were on the Constitution Bench of seven learned Judges deciding Makhan Singh's case. In Pandurang's case the ratio was that if a person was deprived on his personal liberty not under the Act or rules and orders made thereunder but in contravention thereof, his right to move the courts in that regard was not suspended.

57. It, therefore, follows from the decisions in Pandurang's case and Makhan Singh's case that the ratio in both the case was that the 1962 Presidential order being a conditional one the enforcement of rights under Articles 21 and 22 was suspended only to the extent of the conditions laid down in the Presidential Order and the suspension could not operate in areas outside the conditions. There is no aspect whatever of any condition in the present Presidential Order. Therefore, the decisions in Makhan Singh's case and subsequent cases following it have no application to the present case where the suspension is not hedged with any condition of enforcement of any right under Articles 21 and 22. The conclusion for the foregoing reasons is that the Presidential Order is a bar at the threshold.

58. The heart of the matter is whether Article 21 is the sole repository of the right to personal liberty. If the answer to that question be in the affirmative the Presidential Order will be a bar.

59. The contentions of the Attorney General are twofold. First, the legal enforceable right to personal liberty for violation thereof by the Executive is a fundamental right conferred by the

Constitution and is embodies in Article 21. Second, apart from Article 21 of the right to personal liberty against the Executive is nether a common law right nor a statutory right nor a natural right. He relies on three decisions. The earliest is Girindra Nath Banerjee v. Birendra Nath Pal (ILR 54 Cal 727 : AIR 1927 Cal 496). The others are King Emperor v. Sibnath Banerjee (72 IA 241 : AIR 1945 PC 156) and Makhan Singh's case. In the first two decisions it has been held that the right to habeas corpus is only under Section 491 of the Code of Criminal Procedure. In Makhan Singh's case it has been said that this right under Section 491 of the Code of Criminal Procedure has been deleted from the new Code of Criminal Procedure which came into effect on April 1, 1974.

60. The arguments on behalf of the respondents are that the right to life and personal liberty is not only in Article 21 but also under common law statutes and for theses reasons.

61. The right to personal liberty is contained in Articles 19, 20 and 22, and, therefore, Article 21 is not the sole repository to personal liberty. The respondents rely on the decision in Rustom Cavasjee Cooper v. Union of India ((1970) 3 SCR 530 : (1970) 1 SCC 248, 284) where it was said that the ruling in A. K. Gopalan v. State of Madras (1950 SCR 88 : AIR 1950 SC 27 : 51 Cri LJ 1383) that Articles 19 and 22 are mutually exclusive no longer holds the field. The respondents also rely on the decision in Sambhu Nath Sarkar v. State of West Bengal ((1974) 1 SCR 1 : (1973) 1 SCC 856, 827); Haradhan Saha v. State of West Bengal ((1975) 1 SCR 778 : (1975) 3 SCC 198, 205-206) and Khudiram Das v. State of West Bengal ((1975) 2 SCR 832 : (1975) 2 SCC 81, 94), in support of the proposition that these decisions followed the ruling in the Bank Nationalisation case (supra). The respondents contend that the Presidential Order bars enforcement of rights under Articles 14, 19, 21 and 22 but it is open to the respondents to enforce violation of rights under Article 20. The other reasons advanced by the respondents are dealt with hereinafter.

62. The majority view in His Holiness Kesavananda Bharati Sripadagalavaru v. State of Kerala (1973 Supp SCR 1 : (1973) 4 SCC 225) is that there are no natural rights. Fundamental rights in our Constitution are interpreted to be what is commonly said to be natural rights. The only right of life and liberty is enshrined in Article 21.

63. In A. K. Gopalan's case it has been said that to read law as meaning natural law is to lay down vague standards. Law means law enacted by the State. Law must have some firmness. Law means positive State-made law. Article 21 has been interpreted in A. K. Gopalan's case to include substantive was well as procedural law in the phrase "procedure established by law". The reason is obvious. A law providing for procedure depriving a person of liberty must be a law made by statute. P. D. Shamdasani v. Central Bank of India Ltd. (1952 SCR 391 : AIR 1952 SC 59) held the Article 21 is prohibition against unauthorised executive action. In Shrimati Vidya Verma through next friend R. V. S. Mani v. Dr. Shiv Narain Verma ((1955) 2 SCR 983 : AIR 1956 SC 108) law in Article 21 has been held to mean State-made law.

64. In Makhan Singh's case it was decided that during the subsistence of the Presidential Order suspending the enforcement of fundamental rights neither a petition under Article 32 nor a petition under Article 226 could be move invoking habeas corpus. An application invoking habeas corpus. An application invoking habeas corpus under Section 491 of the Code of Criminal Procedure cannot similarly be move in the High Court.

65. Part III of our Constitution confers fundamental rights in positive as well as in negative language. Articles 15(1), 16(1), 19, 22(2), 22(5), 25(1), 26, 29(1), 30 and 32(1) can be described to be articles in positive language. Articles 14, 15(2), 16(2), 20, 21, 22(1), 22(4), 27, 28(1), 29(2),

31(1) and (2) are in negative language. It is apparent that most categories of fundamental rights are in positive as well as in negative language. A fundamental rights couched in negative language accentuates by reasons thereof the importance of that right. The negative language is worded to emphasise the immunity from State action as a fundamental right. (See State of Bihar v. Maharajadhiraja Sir. Kameshwar Singh of Darbhanga (1952 SCR 889, 988-989 : AIR 1952 SC 252)). These fundamental rights conferred by our Constitution have taken different forms. Some of these fundamental rights are said to have the texture of basic human rights [See A. K. Gopalan's case at pp. 96-97, 248, 249, 293 and Bank Nationalisation case at pp. 568-71, 576-78 (SCC pp. 282-285, 288-290)].

66. Article 31(1) and (2) subordinate the exercise of the power of the State of the concept of the rule of law enshrined in the Constitution. (See Bank Nationalisation case at p. 568.) Similarly, Article 21 is our rule of law regarding life and liberty. No other rule of law can have separate existence as a distinct right. The negative language of fundamental right incorporated in Part III imposes limitations on the power of the State and declares the corresponding guarantee of the individual to that fundamental right. The limitation and guarantee are complementary. The limitation of State action embodies in a fundamental right couched in negative form is the measure of the protection of the individual.

67. Personal liberty in Article 21 includes all varieties of right which go to make personal liberty other than those in Article 19(1)(d). (See Kharak Singh v. State of U.P. ((1964) 1 SCR 332 : AIR 1963 SC 1295)) The Bank Nationalisation case merely brings in the concept of reasonable restriction in the law. In the present appeals, the Act is not challenged nor can it be challenged by reason of Article 358 and Article 359(1A) and the Presidential Order mentioning Article 19 as well.

68. If any right existed before the commencement of the Constitution and the same right with its same content is conferred by Part III as a fundamental right the source of that right is in Part III and not in any pre-existing right. Such pre-Constitution right has been elevated by Part III as a fundamental right. The pre-existing right and the fundamental right have to be grouped together as a fundamental right conferred by the Constitution. (See Dhirubha Devisingh Gohil v. State of Bombay ((1955) 1 SCR 691,693-697 : AIR 1955 SC 47).)

69. If there is a pre-Constitution right which is expressly embodies as a fundamental right under our Constitution, the common law right has no separate existence under our Constitution. (See B. Shankara Rao Badami v. State of Mysore ((1969) 3 SCR 1, 11-13 : (1969) 1 SCC 7, 8-10).) If there be any other right other than and more extensive than the fundamental right in Part III, such right may continue to exist under Article 372.

70. Before the commencement of the Constitution the right to personal liberty was contained in statute law, e.g. the Indian Penal Code, the Criminal Procedure Code as also in the common law of torts. In the event of any wrongful infringement of the right to personal liberty the person affected could move a competent court by way of a suit for false imprisonment and claim damages.

71. Suits for false imprisonment are one of the categories of law of torts. The common law of torts prevailed in our country before the Constitution on the basis of justice, equity and good conscience. (See Waghela Rajsanji v. Shekh Masludin (14 IA 89, 96); Satish Chandra Chakravarti v. Ram Doyal De (ILR 48 Cal 388, 407-410, 425, 426 : AIR 1921 Cal 1); and Baboo s/o Thakur Dhobi v. Mt. Subanshi w/o Mangal Dhobi (AIR 1942 Nag 99 : ILR 1942 Nag 650).) This principle of justice, equity and good conscience which applied in India before the Constitution is generally known as the

English common law. Apart from the law of torts, there was no civil remedy for unlawful infringement of the right to personal liberty in India before the Constitution.

72. After the enactment of Section 491 of the Code of Criminal Procedure in the present form in 1923, the right to obtain a direction in the nature of a habeas corpus became a statutory right to a remedy in India. After 1923 it was not open to any party to ask for a writ of habeas corpus as a matter of common law. (See Makhan Singh's case at pp. 818-19; District Magistrate, Trivandrum v. K. C. Mammen Mappillan (ILR 1939 Mad 708 : AIR 1939 Mad 120); Matthen v. District Magistrate, Trivandrum (LR 66 IA 222 : AIR 1939 PC 213); Girindra Nath Banerjee's case (supra) and Sibnath Banerjee's case (supra). The provisions of Section 491 of the Criminal Procedure Code have been repealed recently as being superfluous in view of Article 226. [See 41st Report of Law Commission of India (Vol. 1) p. 307]

73. The present appeals rise from petitions filed in High Court for writs in the nature of habeas corpus. The statutory right to remedy in the nature of habeas corpus under Section 491 of the Criminal Procedure Code cannot be exercised now in view of the repeal of that section. Even if the section existed today it could not be exercised as a separate right distinct from the fundamental right, the enforcement of which is suspended by the Presidential Order as was held by this Court in Makhan Singh's case at pp. 818-825. There was no statutory right to enforce the right to personal liberty other than that in Section 491 of the Criminal Procedure Code before the commencement of the Constitution which could be carried over after its commencement under Article 372. Law means enacted law or statute law. (See A. K. Gopalan's case at pp. 112, 199, 276, 277, 288, 307, 308, 309, 321, 322.) It follows that law in Article 21 will include all post-constitutional statute law including the Act in the present case and by virtue of Article 372 all pre-constitutional statute law including the Indian Penal Code and the Criminal Procedure Code.

74. The expression "procedure established by law" includes substantive as well as procedural law. (See A. K. Gopalan's case at p. 111 and S. K. Krishnan v. State of Madras (1951 SCR 621, 639 : AIR 1951 SC 301 : 52 Cri LJ 1103)). It means some steps of method or manner of procedure leading up to deprivation of liberty. A law depriving a person of personal liberty must be a substantive and procedural law authorising such deprivation. It cannot be a bare law authorising deprivation of personal liberty. The makers of the Constitution had the Criminal Procedural Code in mind. The repealed Criminal Procedure Code as well as the present Criminal Procedure Code has substantive as well as provision provisions. The substantive as well as the procedural parts in a law depriving a person of personal liberty must be strictly followed. There is no distinction between the expression, "save with the authority of law" in Article 31(1) and the expression "except by authority of law" in Article 265. Laws under Article 31(1) must lay down a procedure containing reasonable restrictions. Law under Article 265 also lays down a procedure. Therefore, there is no difference between the expression "except according to procedure established by law" in Article 21 and the expression save with the authority of law" in Article 31(1) or the expression "except by authority of law" in Article 265. When Article 21 was enacted it would be a blunder to suggest that the founding fathers only enshrined the right to personal liberty according to procedure and did not frame the constitutional mandate that personal liberty would not be taken except according to law.

75. The Attorney-General rightly submitted at the outset that Article 21 confers a fundamental right against the Executive and law in that article means State law or statute law. In the present appeals, the respondents allege that Section 3 of the Act has not been complied with. In the present appeals the Act is not challenged nor can it be challenged on the ground of infringement of Article 19 by reason of Article 358, 359(1) and the Presidential Order. It has been pointed out earlier that non-

compliance with the provisions of the Act cannot be challenged as long as the Presidential Order is in force.

76. Article 20 states that no person shall be prosecuted and punished for the same offence more that once. The present appeals do not touch any aspect of Article 20. The reason why reference is made at this stage to Article 20 is to show that Article 20 is a constitutional mandate to the Judiciary and Article 21 is a constitutional mandate to the Executive.

77. The respondents contend that "State" in Article 12 will also include the Judiciary and Article 20 is enforceable against the Judiciary in respect of illegal orders. The answer is that Article 20 is a prohibition against the Judiciary in the cases contemplated there. If a person is detained after the Judiciary acts contrary to the provisions in Article 20 such detention cannot be enforced against the Judiciary. In the event of the Judiciary acting contrary to the provisions in Article 20 such detention can be challenged by moving the court against the Executive for wrongful detention, or conviction or punishment as the case may be. The expression "No person shall be prosecuted for the same offence more than once" in Article 20 would apply only to the Executive.

78. The decision in Makhan Singh's case is that fundamental rights cannot be enforced against the Judiciary in case of illegal orders. The decision in Ram Narayan Singh v. State of Delhi (1953 SCR 652 : AIR 1953 SC 277), is no authority for the proposition that fundamental rights can be enforced against the Judiciary. This Court held that the detention of Ram Narayan was illegal because Ram Narayan was being detained without any order of remand by the Magistrate. In Ram Narayan's case there was no aspect of the bar under Article 359. It is not correct to say that the suspension of fundamental rights or of their enforcement can increase the power of the Executive. The effect of suspension or enforcement of fundamental rights is that an individual cannot move any court for the enforcement of his fundamental right to personal liberty for the time being.

79. Reference to Articles 256, 265 and 361 was made by the respondents to show that Article 21 is not the repository of rights to life the liberty. These references are irrelevant. Article 256 does not confer any right on any person. It deals with relations between the Union and the State. Article 265 has nothing to do with the right to personal liberty. Article 361(3) refers to the issue of a process from any court which is a judicial act and not any executive action. In any event, these articles have no relevance in the present appeals.

80. Reference was made by the respondents to an accused filing an appeal relating to criminal proceedings to show that Article 21 is not the sole repository of right of life and liberty. In a criminal proceeding the accused defends himself against the accusation of an offence against him. He does not move any court for the enforcement of his fundamental right of personal liberty. In an appeal against the order of conviction the accused challenges the correctness of the judicial decision. An appeal or revision is a continuation of the original proceeding. (See Garikapatti Veeraya v. N. Subbiah Choudhury (1957 SCR 488 : AIR 1957 SC 540) and Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ram Tahel Ramnand ((1973) 1 SCR 185 : (1972) 1 SCC 898).)

81. The respondents posed the question whether a decree given against the Government could be enforced because of the Presidential Order. This is irrelevant. However, a decree conclusively determines the rights of the parties in the suit and after a decree is passed the right of the decree-holder is not founded on the right which is recognised by the decree but on the decree itself. This right arising from a decree is not a fundamental right, and, therefore, will not be prima facie covered by a Presidential Order under Article 359(1).

82. The other examples given by the respondents are seizure of property by Government, requisition by Government contrary to Articles 31 and 19(1)(f). If any seizure of property is illegal or an acquisition or requisition is challenged it will depend upon the Presidential Order to find out whether the proceedings are for the enforcement of fundamental rights covered by the Presidential Order.

83. Fundamental rights including the right to personal liberty are conferred by the Constitution. Any pre-Constitution rights which are included in Article 21 do not after the Constitution remain in existence which can be enforced if Article 21 is suspended. If it be assumed that there was any pre-constitutional right to personal liberty included in Article 21 which continued to exist as a distinct and separate right then Article 359(1) will be an exercise in futility. In Makhan Singh's case there was no suggestion that apart from Article 21 there was any common law or pre-Constitution right to personal liberty.

84. The theory of eclipse advanced on behalf of the respondents in untenable. Reliance was placed on the decision in Bhikaji Narain Dhakras v. State of Madhya Pradesh ((1955) 2 SCR 589 : AIR 1955 SC 781). The theory of eclipse refers to pre-Constitutional law which were inconsistent with fundamental rights. By reason of Article 13 (1) such law did not become void but became devoid of legal force. Such laws became eclipsed for the time being. The theory of eclipse has no relevance to the suspension of the enforcement of fundamental rights under Article 359(1). The constitutional provisions conferring fundamental rights cannot be said to be inconsistent with Article 13(1).

85. Article 21 is not a common law right. There was no pre-existing common law remedy to habeas corpus. Further, no common law right which corresponds to a fundamental right can exist as a distinct right apart from the fundamental right. [See Dhirubha Devisingh Gohil v. State of Bombay (supra) and B. Shankara Rao Badami's case (supra).] In Gohil's case the validity of the Bombay Act of 1949 was challenged on the ground that it took away or abridged fundamental rights conferred by the Constitution. The Act was held to be beyond question in view of Article 31-B which had been inserted in the Constitution by the First Amendment and the Act being mentioned as Item 4 of the Ninth Schedule. It was said that one of the rights secured by Part III of our Constitution is a right that the property shall be acquired for a public purpose and under a law authorising such acquisition and providing for compensation. That is also the very right which was previously secured to a person under Section 299 of the Government of India Act, 1935. This Court said that what under the Government of India Act was a provision relating to the competency of the Legislature, was also clearly in the nature of a right of the person affected. The right under Article 299 which was pre-existing, became along with other fundamental rights for the first time secured by our Constitution when grouping them together as fundamental rights.

86. The respondents gave the example that although Section 12(2) of the Act makes it obligatory on the Executive to revoke the detention order and if the Executive does not do so such executive action will amount to non-compliance with the Act. Here again, the detenu cannot enforce any statutory right under the Act for the same reason that it will amount to enforce his fundamental right to personal liberty by contending that the Executive is depriving him of his personal liberty not according to "procedure established by law". Similarly, the example given of an illegal detention of a person by a police officer will be met with the same plea.

87. An argument was advanced on behalf of the respondents that if pre-existing law is merged in Article 21 there will be conflict with Article 372. The expression "law in force" in Article 351 cannot include laws which are incorporated in the Constitution viz., in Part III. The expression

"law" in Article 19(1) and 21 takes in statute law.

88. The respondents contended that permanent law cannot be repealed by temporary law. The argument is irrelevant and misplaced. The Presidential Order under Article 359(1) is not a law. The order does not repeal any law either. The suggestion that Article 21 was intended to afford protection to life and personal liberty against violation by private individual was rejected in Shamdasani's case (supra) because there cannot be any question of one private individual being authorised by law to deprive another of his property or taking away the life and liberty of any person by procedure established by law. The entire concept in Article 21 is against executive action. In Vidya Verma's case (supra) this Court said that there is no question of infringement of fundamental right under Article 21 where the detention complained of is by a private person and not by a State under the authority or orders of a State.

89. The Act in the present case is valid law and it has laid down procedure of applying the law. The validity of the Act has not been challenged and cannot be challenged. The Legislature has competence to make the law. The procedure, therefore, cannot be challenged because Articles 21 and 22 cannot be enforced. The suggestion of the respondents that the power of the Executive is widened is equally untenable.

90. The suggestion on behalf of the respondents that the right to private defence is available and if anyone resorted to private defence in resisting detention there might be civil war is an argument to excite emotion. If there are signs of civil war, as the respondents suggested, it is for the Government of our country to deal with the situation. It is because of these aspects that emergency is not justiciable because no court can have proper standard to measure the problems of emergency in the country. If any person detained finds that the official has the authority to arrest him no question of resistance arises and if there is no authority the same cannot be challenged during the operation of the Presidential Order but the person shall have his remedy for any false imprisonment after the expiry of the Presidential Order.

91. The respondents submitted that if Article 21 were the repository of a right to personal liberty it would mean that Article 21 destroyed pre-existing rights and then made a fresh grant. There is no question of destruction of any right. Our fundamental rights came into existence for the first time under the Constitution. The fact that Section 491 of the old Criminal Procedure Code has been abolished in the new Code established that the pre-existing right was embodied as a fundamental right in the Constitution. The right to personal liberty became identified with fundamental right to personal liberty under Article 21.

92. The third question is whether rule of law overrides the Presidential Order. The Presidential Order does not alter or suspend any law. The rule of law is not a mere catchword or incantation. Rule of law is not a law of nature consistent and invariable at all times and in all circumstances. The certainty of law is one of the elements in the concept of the rule of law but it is only one element and, taken by itself, affords little guidance. The essential feature of rule of law is that the judicial power of the State is, to a large extent, separate from the Executive and the Legislature. Rule of law is a normative as much as it is descriptive term. It expresses an ideal as much as a jurists fact. The rule of law is not identical with a free society. If the sphere of the rule of law involves what can be called the "Existence of the Democratic System" it means two things. In the first place the individual liberties of a democratic system involve the right of the members of each society to choose the Government under which they live. In the second place come freedom of speech, freedom of assembly and freedom of association. These are no absolute rights. Their exceptions are

justified by the necessity of reconciling the claims of different individuals to those rights. The criterion whereby this reconciliation can be effected is the concern of the law to ensure that the status and dignity of all individuals is to the greatest possible extent observed.

93. Freedom of speech may be limited by conceptions as "clear and present danger", "attack on the free democratic order". The institutions and procedure by which the fundamental regard for the status and dignity of the human person can be effected is that rights and remedies are complementary to the other. The phrases such "as equality before law" or "equal protection of the laws" are in themselves equivocal. The supremacy of the law means that the faith of civil liberty depends on the man who has to administer civil liberty much more than on any legal formula. Aristotle pointed out that the rigid certainty of law is not applicable to all circumstances. This plea would be echoed by the modern administrator called upon to deal with the everchanging circumstances of economic and social life of the nation.

94. The respondents contend that all executive actions which operate to the prejudice of any person must have the authority of law to support it. Reliance is placed on the decision in Rai Sahib Ram Jawaya Kapur v. State of Punjab ((1955) 2 SCR 225 : AIR 1955 SC 549); M.P. State v. Bharat Singh ((1967) 2 SCR 454 : AIR 1967 SC 1170); Collector v. Ibrahim & Co. ((1970) 3 SCR 498 : (1970) 1 SCC 386); Bennett Coleman & Co. v. Union of India ((1973) 2 SCR 757 : (1972) 2 SCC 788); and Meenakshi Mills v. Union of India ((1974) 2 SCC 398 : (1974) 1 SCC 468). This is amplified by the respondents to mean that the Executive cannot detain a person otherwise than under any legislature and on the suspension of Article 21 or the right to enforce it, the Executive cannot get any right to act contrary to law.

95. The Executive cannot detain a person otherwise than under valid legislation. The suspension of any fundamental right does not affect this rule of the Constitution. In normal situations when there is no emergency and when there is no Presidential Order of the type like the present the situation is different. In Bharat Singh's case this Court was concerned with the pre-emergency law and an order of the Executive thereunder. It was held that the pre-emergency law was void as violative of Article 19, and, therefore, such a law being pre-emergency law could not claim the protection under Article 358.

96. The ratio in Bharat Singh's case is this : Executive action which operates to the prejudice of any person must have the authority of law to support it (see also Ram Jawaya Kapur's case). The provisions of Article 358 do not detract from the rule. Article 358 expressly authorises the State to take legislative or executive action provided such action was competent for the State to make or take but for the provisions contained in Part III of our Constitution. Article 358 permits an executive action under a law which may violate. Article 19 but if the law is void or if there by no law at all, the executive action will not be protected by Article 358. Bharat Singh's case considered the effect of Article 358 so far the executive action is concerned, but was no concerned with any executive action taken infringing any fundamental right mentioned in a Presidential Order under Article 359(1).

97. Ibrahim's case (supra), the Bennett Coleman case (supra) and the Meenakshi Mills case (supra) follow Bharat Singh's case regarding the proposition that the terms of Article 358 do not detract from the position that the Executive cannot act to the prejudice of a person without the authority of law.

98. The ratio in Bharat Singh's case is that the Madhya Pradesh Public Security Act was brought

into force before the emergency. Article 358 empowers the legislature to make a law violating Article 19. Article 358 does not mean that a pre-emergency law violating Article 19 would have constitutional validity during the period of emergency. The executive action which was taken during the emergency on the basic of the pre-emergency law did not have the authority of law inasmuch as the Madhya Pradesh Act of 1959 was a void law when it was enacted in violation of Article 19.

99. In Ibrahim's case the Sugar Control Order, 1963 permitted allocation of quotas of sugar. The State Government ordered that the sugar allocated to the two cities of Hyderabad and Secunderabad were in entirety to be given to the cooperative stores. Under Article 358 the respondents there could not challenge an executive action which, but for the provisions contained in Article 19, the State was competent to take. But the executive order there was one which had the effect of cancelling the licences of the respondents which could be done only after and enquiry according to the procedure prescribed in the order. The executive order there was contrary to the provisions contained in the Sugar Control Order. In other words, the executive action which in breach of the order could not be immune from attack under Article 358. In the Bennett Coleman case it was said that the Newsprint Control Order could not authorise the number of pages. In the Meenakshi Mills case it was said that the Yarn Control Order could not be resisted on the ground that it had no direct impact on the rights of the mills.

100. In these four cases referred to there was no question of enforcement of fundamental right mentioned in the Presidential Order. These four case were not concerned with any executive action taken infringing any fundamental right mentioned in the Presidential Order under Article 359.

101. The suspension of right of enforce fundamental right has the effect that the emergency provisions in Part XVIII are by themselves the rule of law during times of emergency. There cannot be any rule of law other than the constitutional rule of law. There cannot be any pre-constitution or post-constitution rule of law which can run counter to the rule of law embodies in the Constitution, nor can there be any invocation to any rule of law to nullify the constitutional provisions during the times of emergency.

102. The respondents relied on the decision in Eshugbayi Eleko v. Officer Administering the Government of Nigeria (1931 AC 662 : 1931 All ER 44), in support of the proposition that rule of law will always apply even when there is Presidential Order. It has to be realised that the decision in Eshugbayi Eleko cannot overreach our Constitution.

103. Article 358 does not permit the executive action to have the authority of law. Article 359 prevents the enforcement of the fundamental rights mentioned in the Presidential Order. It bars enforcement against any legislation or executive action violating a fundamental right mentioned in the Presidential Order.

104. The principle in Eshugbayi Eleko's case will not apply where Article 359 is the paramount and supreme law of the country. There is no question of amendment of the concept of rule of law or any suggestion of destruction of rule of law as the respondents contended because the Presidential Order under Article 359 neither nullifies nor suspends the operation of any law. The consequence of the Presidential Order is of a higher import than the suspension of any law because the remedy for the enforcement of fundamental rights is barred for the time being because of grave emergency.

105. The respondent contend that if an individual officer acts outside his authority, is will be an illegal act and the High Court under Article 226 can deal with it. Reliance is placed on the English

decision in Christie v. Leachinsky (1947 AC 573) in support of the proposition that the action of an individual officer will be an executive action when he acts within the scope of his authority.

106. The decision in Leachinsky's case is an action for false imprisonment and damages against two persons of Liverpool City Police for wrongfully arresting a person without informing that person of the grounds for arrest. That case has no relevance here.

107. An individual officer acting within the scope of his official duty would not cease to be so if he makes and order which is challenged to be not in compliance with the statute under which he is authorised to make the order. Any challenge to the order of detention would come within the fold of breach of fundamental right under Article 21, namely, deprivation of personal liberty.

108. The obligation of the Executive to act in accordance with the Act is an obligation as laid down in Article 21. If such an obligation is not performed, the violation is of Article 21. It will mean that the right of the person affected will be violation of fundamental right.

109. The expression "for any other purpose" in Article 226 means for any purpose other than the enforcement of fundamental rights. A petition for habeas corpus by any person under Article 226 necessarily involves a question whether the detention is legal or illegal. An executive action if challenged to be ultra vires a statute cannot be challenged by any person who is not aggrieved by any such ultra vires action.

110. Section 18 of the Act has been argued by the respondents to mean that a mala fide order of detention cannot be regarded as an order made under the Act. Section 18 has also been challenged to suffer from the vice of excessive delegation. Section 18 has been amended by the words "in respect of whom an order is made or purported to be made under Section 3" in substitution of the words "detained under this Act". The result is that no person in respect of whom an order is made or purported to be made under Section 3 shall have any right to personal liberty by virtue of natural law or common law, if any. It has been earlier held that there is no natural law or common law right to habeas corpus. The respondents rely on the decisions in Poona Municipal Corporation v. D. N. Deodher ((1964) 8 SCR 178 : AIR 1965 SC 555); Bharat Kala Bhandar v. Municipal Committee ((1965) SCR 499 : AIR 1966 SC 249); Indore Municipality v. Niyamatulla (AIR 1971 SC 97 : (1969)2 SCC 551); and Joseph v. Joseph ((1966) All ER 486), in support of the proposition that the expression "purports" means "has the effect of". The respondents contend that Section 18 of the Act can apply act when a valid order of detention is made. If the section be interpreted to include mala fide order or orders without jurisdiction then it is said that such interpretation will prevail upon the judicial power and violate Article 226.

111. The expression "purported to be done" occurs in Section 80 of the Code of Civil Procedure. The expression "purported to be made under Section 3 of the Act" in Section 18 will include an executive act made by the District Magistrate within the scope of his authority as District Magistrate, even if the order is made in breach of the section or is mala fide. (See Hori Ram Singh v. Crown (1939 FCR 159 : AIR 1939 FC 43); Bhagchand Dagadusa v. Secretary of State of India (LR 54 IA 338, 352 : AIR 1927 PC 176); Albert West Meads v. King (AIR 1948 PC 156, 157-159 : 1948 FCR 67); Anisminic v. Foreign Compensation ((1969) 1 All ER 208, 212, 213, 237) and Dakshina Ranjan Ghose v. Omar Chand Oswal (ILR 50 Cal 992, 995-1003 : AIR 1924 Cal 145). As long as the District Magistrate acts within the scope of his authority as a District Magistrate an order passed by him is an order made or purported to be made under Section 3 of the Act.

112. The section applies to any person in respect of whom an order has been made or purported to be made. There is no question of excessive delegation. Section 18 of the Act lays down the law. Section 18 of the Act is only an illustration of an application of the Act by the officers authorised by the Act.

113. Section 18 identifies the person the whom it applies and in what cases it applies to such a person. The word "purport" covers acts alleged to be mala fides. The decisions to which reference has been made indicate that the acts whatever their effect be are all acts made or purported to be made under the Act.

114. A contention is advanced by the respondents that Section 18 of the Act will apply only to post-detention challenge. This is wrong. Section 18 applies to all orders of detention.

115. Counsel on behalf of the respondents submitted that the High Courts had only heard that matters on preliminary points and not on the area of judicial scrutiny, and, therefore, this Court should not express any view on the latter question. There are three principal grounds why this Court should express views. First. The Bombay High Court (Nagpur Bench) has read down Section 16(A) of the Act. One of the appeals is from the judgment of the Bombay High Court (Nagpur Bench). This judgment directly raises the question of Section 16A(9) of the Act. Second, The Additional Solicitor General made his submission on this part of the case and all Counsel for the respondents made their submissions in reply. Considerable time was spent on hearing submissions on both sides. Time of the court is time of the nation. Third. It is only proper that when so much time has been taken on these questions this Court should express opinions and lay down areas for judicial scrutiny.

116. The respondents contend that if the Presidential Order does not bar the challenge on the ground that the orders are mala fide or that the orders are not made in accordance with the Act the non-supply of grounds will not affect the jurisdiction of the court. It is said by the respondents that the scope of judicial scrutiny is against orders. The respondents submit that court has gone behind the orders of detention in large number of cases.

117. The respondents submit as follows : It is open to the court to judge the legality of the orders. This the court can do by going beyond the order. Though satisfaction is recorded in the order and such recording of satisfaction raises the presumption of legality of order the initial onus on a detenu is only to the extent of creating "disquieting doubts" in the mind of the court. The doubts are that the orders are based on irrelevant non-existing facts or on facts on which no reasonable person could be satisfied in respect of matters set out in Section 3 of the Act. If such a prima facie case is established the burden shifts and the detaining authority must satisfy the court about the legality of detention and the detaining authority must remove doubts on all aspects of legality which have been put in issue. If the detaining authority for whatever reasons fails to satisfy the court either by not filing an affidavit or not placing such facts which may resolve the doubts about the legality of detention the court may direct release of the detenus.

118. The respondents submit that all that they want is that if the detenus challenge the orders to be mala fide or to be not in compliance with the statute and if the court does not have any "disquieting doubts" the court will dismiss the petitions. If the court has any such doubt the court will call for the return. On a return being made if the court is satisfied that the return is an adequate answer the court will dismiss the petition. If the court wants to look into the grounds the court will ask for the production show the grounds to the detenus. In short, the respondents submit that the jurisdiction of the court to entertain the application should not be taken away as a result of the Presidential Order.

119. The appellants submit that if Article 359 is not a bar at the threshold and if the court entertain a petition, judicial review should be limited within the narrow area. In the forefront Section 16A(9) of the Act is put because that section forbids disclosure of grounds and information in the possession of the detaining authority. The Nagpur Bench of the Bombay High Court read down Section 16A(9) but the Additional Solicitor General submitted that Section 16A(9) should not be read down because it enacts a rule of evidence.

120. The Additional Solicitor General submitted as follows : The scrutiny by courts will extend to examining first whether detention is in exercise or purported exercise of law. That will be to find out whether there is legal foundation of a detention. The second enquiry will be whether the law is valid law. If it is a pre-emergency law the same can be tested as to whether it was valid with reference to Articles 14, 19, 21 and 22. If it is an emergency legislation the validity of law cannot be gone into first, because of Article 358, and second, because of the Presidential Order under Article 359. The other matters which the court may examine are whether the detaining authority is a competent authority under the law to pass the order, whether the detenu has been properly identified, whether the stated purpose is one which ostensibly conforms to law and whether the procedural safeguards enacted by the law are followed.

121. With regard to grounds of detention it is said by the Additional Solicitor General that if the grounds are furnished or are required to be furnished the court can examine whether such grounds ex facie justify reasonable apprehension of the detaining authority. Where the grounds are not to be furnished, it is said that this enquiry does not arise. The Additional Solicitor General submits that judicial scrutiny cannot extend to three matters - first, objective appraisal of the essential subjective satisfaction of the detaining authority, second, examination of the material and information before the detaining authority for the purpose of testing the satisfaction of the authority, and third, directing compulsory production of the file relating to detenu or drawing an adverse inference from the non-production thereof.

122. Material and information on which orders of preventive detention are passed necessarily belong to a class of documents whose disclosure would impair the proper functioning of public service and administration. The file relating to a detention order must contain intelligence reports and like information whose confidentiality it beyond reasonable question. This was the view that in the Liversidge case (at pp. 221, 253, 254, 266, 267, 279 and 280). (See also Rogers case (1973 AC 388, 400, 401, 405)). If privilege were to be claimed in each case such a claim would in terms of Sections 123 and 162 of the Evidence Act have been invariably upheld. Article 22(6) also contemplates such claim on behalf of the State. That is why instead of leaving it to individual detaining authorities to make a claim for privilege, the legislature has enacted Section 16A(9) providing for a general exclusion from evidence of all such material as would properly fall within the classification.

123. Section 16A cannot be said to be an amendment to Article 226. The jurisdiction to issue writs is neither abrogated nor abridged. A claim of privilege arises in regard to documents or information where a part to a suit or proceeding is called upon to produce evidence. Section 16A(9) enacts provisions analogous to a conclusive proof of presumption. Such a provision is a genuine rule of evidence. It is in the nature of an explanation to Section 123 and 162 of the Evidence Act. Section 16A(9) is a rule of evidence. Therefore, when the detaining authority is bound by Section 16A(9) and forbidden absolutely from disclosing such material no question can arise for adverse inference against the authority. If a detenu makes out a prime facie case and the court calls for a return, the affidavit of the authority will be an answer. The court cannot insist on the production of the file or

hold that the case of the detenu stands unrebutted by reason of such non-disclosure. To hold otherwise would be to induce reckless averments of mala fides to force production of the file which is forbidden by law.

124. Section 16A(9) cannot be read down implying an exception in favour of disclosure to the court as was suggested by the Bombay High Court (Nagpur Bench). Such disclosure to the court alone and not to the detenu will introduce something unknown to judicial procedure. This will bring in an element of arbitrariness and preclude both parties from representing their respective cases. Further, it would substitute or superimpose satisfaction of the Court for that of the Executive. This Court has held that the view of the detaining authority is not to be substituted by the view of the court. [See State of Bombay v. Atma Ram Sridhar Vaidaya (1951 SCR 167 : AIR 1951 SC 157); Shibban Lal Saksena v. State of Uttar Pradesh (1954 SCR 418 : AIR 1954 SC 179); Rameshwar Shaw v. District Magistrate, Burdwan ((1964) 4 SCR 921 : AIR 1964 SC 334); Jaichand Lall v. West Bengal (1966 Supp SCR 464 : AIR 1967 SC 483) and Ram Manohar Lohia's case (supra)]

125. The theory of good return mentioned in the English decisions is based on the language of Habeas Corpus Act and the rules of the Supreme Court of England. The practice of our Court is different. The respondents relied on M. M. Damnoo v. J&K. State ((1972) 2 SCR 1014 : (1972) 1 SCC 536) in support of the proposition that the file was produced there and also contended that Section 16A(9) can be struck down as happened in A. K. Gopalan's case where Section 14 of the Preventive Detention Act was struck down. When A. K. Gopalan's case was decided Article 22 was in force. Prevention of court from seeing the grounds contravened Article 22. There was no question of privilege. Section 14 of the Preventive Detention Act in A. K. Gopalan's case offended Article 22. (See A. K. Gopalan's case at pp. 130, 217, 242, 283-284, 332-33).

126. In Damnoo's case there was no question of privilege. The file was produced but there was no direction of the court to produce the file. Second, There was no aspect of Article 359. Third. In Damnoo's case the analogy of Section 14 of the Preventive Detention Act in Gopalan's case considered. No provision like Section 16-A(9) was on the scene. Fourth. The State did not rely on the proviso to Section 8 of the relevant Act there to content that the file could not be produced.

127. Section 16A of the Act contains definite indication of implied exclusion of judicial review on the allegations of mala fide. It is not possible for the court to adjudicate effectively on mala fides. The reason why Section 16A has been enacted is to provide for periodical review by Government and that is the safeguard against any unjust or arbitrary exercise of power.

128. It will be useless to attempt to examine the truth of the fact alleged in the order in a case when the fact relates to the personal belief of the relevant authority formed at least partly on grounds which he is not bound to disclose. It is not competent for the court to decide whether the impugned order of detention under Section 3(1) or the declaration under Section 16A(2) and (3) of the Act during the emergency is a result of malice or ill-will. The reason is that it is not at all possible for the court to call for and to have a look at the grounds of the order of detention under Section 3(1) or the declaration under Section 16A(2) and (3) of the Act that induced the satisfaction in the mind of the detaining authority that it was necessary to detain the person or to make a declaration against him.

129. The grounds of detention and any information or material on which the detention and the declaration were made are by Section 16A(9) of the Act confidential and deemed to refer to matters of State and to be against public interest to disclose. No one under the provisions of the Act and in

particular Section 16A(9) thereof shall communicate or disclose such grounds, material or information except as provided in Section 16A(5) and (8) of the Act. Sub-section (5) and (8) have no application in these case. The court cannot strike down the order as vitiated by mala fide and grant relief since it is not possible for the court without the examination of such grounds, materials and information to decide whether the order of detention is the result of malice or ill-will. When the court cannot give any relief on that basis the contention of mala fides is not only ineffective but also untenable. (See Lawrence Joachim Joseph D' Souza v. State of Bombay (1965 SCR 382,392,393 : AIR 1956 SC 531 : 1956 Cri LJ 935).)

130. The provision for periodic review entrusted to the Government under Section 16A(4) of the Act in the context of emergency provides a sufficient safeguard against the misuse of power of detention or arbitrary mala fide detention during the emergency. The Government is in full possession of the grounds, materials and information relating to the individual detentions while exercising the power of review.

131. The jurisdiction of the court in times of emergency in respect of detention under the Act is restricted by the Act because the Government is entrusted with the task of periodical review. Even if the generality of the words used in Section 3(1) of the Act may not be taken to show an intention to depart from the principle in ordinary times that the courts are not deprived of the jurisdiction where bad faith is involved, there are ample indications in the provisions of the Act, viz., Section 16A(2), proviso to Section 16A(3), Section 16A(4), Section 16A(5), Section 16A(7)(ii) and Section 16A(9) of the Act to bar a challenge to the detention on the basis of mala fides. [See Smith v. East Elloe Rural District Council (1965 AC 736, 776) and Ram Manohar Lohia's case (supra) at pp. 716, 732]. This Court said that an action to decide the order on the grounds of mala fides does not lie because under the provisions no action is maintainable for the purpose. This Court also referred to the decision in the Liversidge case (supra) where the Court held that the jurisdiction of the court was ousted in such wise that even questions of bad faith could not be raised.

132. The production of the order which is duly authenticated constitutes a peremptory answer to the challenge. The onus of showing that the detaining authority was not acting in good faith is on the detenu. This burden cannot be discharged because of the difficulty of proving bad faith in the exercise of subjective discretionary power vested in the administration. De Smith in his Judicial Review of Administrative Actions 1973 Edition at page 257 seq. has said that the reservation for the case of bad faith is hardly more than a formality. Detenu will have to discharge the impossible burden of proof that the detaining authority did not genuinely believe he had reasonable cause.

133. In Lawrence Joachim Joseph D'Souza's case (supra) mala fide exercise of power was untenable having regard to the grounds on which detention was based. In the context of emergency Section 3(1) of the Act confers an unlimited discretion which cannot be examined by courts. This rule of construction of the phrases "is satisfied", "in the opinion of", "it appears to be", "has reason to believe" adopted by courts in times of national emergency will be rendered nugatory and ineffective if allegations of mala fides are gone into. A distinction is to be drawn between purpose and motive so that where an exercise of power fulfils the purpose for which power was given, it does not matter that he who exercised it is influenced by an extraneous motive because when an act is done which is authorised by the Legislature it is not possible to contest that discretion. So long as the authority is empowered by law action taken to realise that purpose is not mala fide. When the order of detention is on the face of it within the power conferred, the order is legal.

134. The width and amplitude of the power of detention under Section 3 of the Act is to be

adjudged in the context of the emergency proclaimed by the President. The court cannot compel the detaining authority to give the particulars of the grounds on which he had reasonable cause to believe that it was necessary to exercise this control. An investigation into facts or allegations of facts based on mala fides is not permissible because such a course will involve advertence to the grounds of detention and materials constituting those grounds which is not competent in the context of the emergency.

135. For the foregoing reasons the conclusions are a follows.

136. First. In view of the Presidential Order dated June 27, 1975 under clause (1) of Article 359 of our Constitution no person has locus standi to move any writ petition under Article 226 before a High Court for habeas corpus or any other writ or order or direction to enforce any right to personal liberty of a person detained under the Act on the ground that the order of detention or the continued detention is for any reason not under or in compliance with the Act or is illegal or mala fide.

137. Second, Article 21 is the sole repository of rights to life the personal liberty against the State. Any claim to a writ of habeas corpus is enforcement of Article 21 and, is, therefore, barred by the Presidential Order.

138. Third, Section 16A(9) of the Act is valid. It is a rule of evidence and it is not open either to the detenu or to the court to ask for grounds of detention.

139. Fourth. It is not competent for any court to go into questions of mala fides of the order of detention or ultra vires character of the order of detention or that the order was not passed on the satisfaction of the detaining authority.

140. The appeals are accepted. The judgments of the High Courts are set aside.

BEG, J. (concurring) -

The two principal questions placed before us for determination in these appeals from decisions given by various High Courts, on certain preliminary objections to the maintainability and hearing of habeas corpus petitions, under Article 226 of our Constitution, have been stated as follows by the Attorney General of India :

> 1. Whether, in view of the Presidential Order dated June 27, 1975, under clause (1) of Article 359, any writ petition is maintainable under Article 226, before a High Court for habeas corpus to enforce the right to personal liberty of person detained under the Maintenance of Internal Security Act on the ground that the order of detention or the continued detention, is, for any reason, not under or in compliance with Maintenance of Internal Security Act ?
>
> 2. If such a petition is maintainable, what it the scope or extent of judicial scrutiny, particularly in view of the aforesaid Presidential Order which covers, inter alia, clause (5) of Article 22, and also in view of sub-section (9) of Section 16A of the Maintenance of Internal Security Act ?

142. If the only reason on which a detention is assailed, could be that the provisions of the Maintenance of Internal Security Act 26 of 1971 (hereinafter referred to a 'the Act') have not been complied with, there could be little difficult in holding, having regard to the natural an obvious

meaning of the suspension of "the right to move any court for the enforcement" of the fundamental right to personal liberty, protected by Article 21 of the Constitution, that this right, with whatever it evolved from or embraced, could not be the basis for any claim to its enforcement during the emergency. All that would then remain to consider would be the exact point at which and the form in which the order of the court denying the petitioner an enforcement of the right could be passed. The last part of the first question, however, also brings into the area of discussion the case where a petitioner alleges that "for any reason" his detention falls completely outside the Act. Detenus allege not merely infraction of some provision of the Act, under which a detention is ordered, but, more often, that the detention is for extraneous reasons falling either entirely or partially outside the Act. "Mala fides" is almost invariably alleged presumably on the assumption that almost everything the detenu considers either wrong or erroneous or improper must be "mala fide".

143. Arguments addressed to us to behalf of the detenu have raised a host of hypothetical questions, such as : What would be the position if the order of detention, on the face of it, either falls outside the provisions of the Act or is made mala fide ? Would a detention order, by any government servant without even an ostensible or purported statutory authority to support it, not stand on the same footing as a detention by a private person ? Would remedy against detention which may be patently illegal, without need for any real investigation into facts at all also be barred ? Could remedy by way of a writ of habeas corpus against any illegal detention by anyone in this country, under any circumstances, be held to be suspended during the emergency ? The next steps in the argument on behalf of detenus consisted of attempts to show that there could be no distinction, in principle, between an order which is, prima facie, ultra vires or made mala fide and one which can be shown to be that only if the facts and circumstances surrounding a detention were fully investigated in a court. Processes of reasoning, based on hypothetical cases put forward for consideration by us, by learned Counsel for the detenus seek, by stages, to so expand the area of maintainability and investigation on claims for writs of habeas corpus in the High Courts that, if we accept them, the result would be the Article 359 of the Constitution and the Presidential Orders of 1975 made under it would become entirely meaningless and infructuous.

144. It seems to me that the two questions set out above, could very well be compressed into a single question : To what extent, if at all, can a High Court be moved to assert a right to personal liberty, by means of a petition under Article 226 for a writ of habeas corpus during the operation of the Presidential Order of June 27, 1975 ?

145. Speaking for myself, I am extremely reluctant to embark on a consideration and decision of any "pure" question of law. In cases coming up before courts, no question of law can be "pure" in the sense that it has not bearing on the facts of a particular case to which it must necessarily be related. Neither Article 136 nor Article 226 of the Constitution is meant for the exercise of an advisory jurisdiction. Attempts to lay down the law in an abstract form, unrelated to the facts of particular cases, not only do not appertain to the kind of jurisdiction exercised by this Court or by the High Courts under the provisions mentioned above, but may result in misapplications of the law declared by courts to situations for which they were not intended at all.

146. Learned Counsel for the detenus have tried to induce us to answer many questions which may arise in purely hypothetical situations some of which seem to me to be far removed from the realms of reality. We cannot assume that those who exercise powers of detention are bound to do so, as a rule, as though they were demented despots without any regard for law, justice, reason, or honesty of purpose, solely for achieving objects other than those which are really meant to be served by the Act. Both sides, however, desire that we should answer questions indicated above on the assumption

that the provisions of law contained in the Act have been infringed, in some way, by the detaining authorities in a particular case. They want us to indicate degrees of transgression of the provisions of the Act, if any, which can justify interference by the High Courts in habeas corpus proceedings. As the facts of no particular case are before us, we can only answer the questions before us with the help, where necessary, of appropriate hypothetical examples.

147. The learned Attorney General has, very frankly and honestly, submitted that there was no need to bestow upon actions of the detaining authorities the protections given to them only for the duration of the emergency proclaimed under Article 352(1) of the Constitution, if the President did not really intend to confer certain immunities from judicial scrutiny and interference upon detentions by executive authorities, even if some of them were contrary to the letter of the law, so that certain over-riding interests of national security and independence may not be jeopardized. The Attorney General's submission is that the risks of misuse of powers by the detaining officers and authorities, which are certainly there, must be presumed to have been overridden by the higher claims of national security which the proclamation of emergency denotes. It was pointed out that a citizen, or other person who may have been unfairly or illegally detained due to some unfortunate misapprehension or error, does not lose his remedy altogether. Only his right to move a court for the enforcement of any of the rights conferred by Part III of the Constitution would be suspended for the time being. He could always approach higher governmental authorities. All of them could not be so unreasonable as to deny redress in a case of genuine injustice.

148. The propositions thus stated appear to be so reasonable and are so well-founded, as I shall endeavour to show later, in the course of this judgment, in the constitutional and legal history and the case law of other countries, during periods of emergency, from whose Constitutions what has been described as the "ancient writ of habeas corpus" has been taken and transplanted into our Constitution that it may seem somewhat surprising that their correctness should be doubted or denied at all. The propositions have, however, not only been vehemently assailed but the attacks upon them were sought to be supported by attempts to engraft theories upon our Constitution which, if accepted, will destroy the basic principle of the supremacy of the written Constitution which I attempted, In Indira Nehru Gandhi v. Raj Narain (1975 Supp SCC 1), to explain at some length.

149. If the clear and unequivocal language of Article 359(1) of our Constitution is the bedrock on which the Attorney General's arguments to sustain the preliminary objections to the maintainability of habeas corpus petitions during the emergency rest, learned Counsel for the detenus have put forward theories of nebulous natural law and a common law which, on close scrutiny appear to me to resolve themselves into what, according to the notions of learned Counsel for the detenus, the law ought to be. Strenuous attempts have been made to dress up these notions in the impressive garb of the "rule of law" which evokes the genuine ardour and respectful devotion of lawyers and public-spirited citizens. But, the mere veneration of a caption, without and understanding of what it really denoted in the past and what it means or should mean today, is another name for obfuscation of thought.

150. Even in England, the reputed home of the rule of law, the rather loose, general, and inexact meanings given to the term by Dicey to describe and glorify certain assumedly special characteristics of the English Constitution, have given place to more realistic, critical and scientific views of the "rule of law" and what Dicey meant by it. Sir. Ivor Jennings, in "The Law and the Constitution" (3rd Edn., p. 296) pointed out :

> Dicey honestly tried (in The Law of the Constitution, not in his polemical works) to

> analyse, but, like most, he saw the Constitution through his own spectacles, and his vision was not exact. The growth of the new functions of the State has made much of his analysis irrelevant. Moreover, the argument from history or, what is the same thing, from the Constitution must be used with discretion. To say that a new policy is 'unconstitutional' is merely to say that it is contrary to tradition, and it must always be considered whether the tradition is relevant to new circumstances. Even if the rule of law as Dicey expounded it had been exact, it would not be a sufficient argument to say of any proposal, as the Committee on Ministers Powers said on a minor point, that it was contrary to the rule of law.

151. Those who glibly talk of the rule of law, as expounded by Dicey, forget that Prof. Dicey had made a very gallant, and effective (I would not like to use here a colloquial expression, "desperate", to describe it) attempt to repel the correctness of what he called "the dark saying" of de Tocqueville that the largely conventional "English Constitution has no real existence (elle n'existe point)" (See : page 22 of Dicey's "Introduction to the Study of the Law of the Constitution" 10th Edn.). He was at pains to show that the Constitutional Law of England did exist. It lived and functioned not only in the hearts and minds of Englishmen, also reflected in Parliament, but through the force of healthy conventions and highly disciplined habits of life and thought of the British people. These conventions and habits had, behind them, the sanction not only of powerful and intelligent public opinion but also of the control by the Houses of Parliament, wrested from the Crown in the course of historic constitutional struggles, over the finances of the nation. Dicey distinguished this peculiarly British Constitutional Law from "political ethics" which, according to him, was "miscalled Constitution Law". It was not, he pointed out, like International Law, the "vanishing point" of law.

152. Dicey succeeded, at least so far as his statement of the rule of law is concerned, in doing nothing more than indicating, under this heading, certain common guiding principles for courts as well as legislators to follows when they needed these. Hence, he said that the rule of law and the legal sovereignty of Parliament were allies in England. According to him, both these principles so operated as to always support and strengthen each other. This idealistic rosy optimism, reflecting the Whig tradition of minimum interference with individual freedoms and representing the constitutional jurisprudence of the heyday of a laissez faire. British economic prosperity, was destined to be displaced by the more "down to the earth" pragmatism of the twentieth century Britain, attempting to meet economic difficulties and distress through socialistic planning and to build a welfare State by making laws which appeared to those brought up on the traditional postulates of Dicey's rule of law to deny the validity of its basic assumptions.

153. The first of these assumptions of meanings was that any deprivation of personal liberty or property must not only be for a "distinct breach of law" but established in the ordinary legal manner before the ordinary courts of the land". He contrasted this "with every system of government based on the exercise by persons in authority of wide, arbitrary, of discretionary powers of constraint". He concluded, from what he regarded as a basic feature of the British Constitution, that all modes of dispensing justice, through specialised administrative authorities and bodies, must necessarily be autocratic and unfair. He compared the British system with the one under which Voltaire, in 1717, was sent to the Bastille for a poem which he had not written, of which he did not know the author and with the sentiments of which he did not agree.

The second assumption of Dicey's rule of law was :

> Every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

He overlooked the not infrequent injustice caused in England of his time, due to want of adequate remedies against the servants of the Crown, by applications of the maxim : "The King can do no wrong". He wrote :

> With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.

The third assumption on which Dicey's rule of law rested was that he called "the predominance of the legal spirit" which he described "as a special attribute of English institutions". He explained :

> We may say that the Constitution is pervaded by the rule of law on the ground that the general principles of the Constitution (as for example the right to persona liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts, whereas under many foreign Constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the Constitution.

Dicey observed :

> There is in the England Constitution an absence of those declarations or definitions of rights so dear to foreign constitutionalists. Such principles, moreover, as you can discover in the English Constitution are, like all maxims established by judicial legislation, mere generalisations drawn either from the decisions of dicta of judges, or from statutes which, being passed to meet special grievances, bear a close resemblance to judicial decisions, and are in effect judgments pronounced the High Court of parliament. To put what is really the same thing in a somewhat different shape, the relation of rights of individuals to the principles of the Constitution is not quite the same in countries like Belgium, where the Constitution is the result of a legislative act, as it is in England, where the Constitution itself is based upon legal decisions.

154. Thus, Dicey depicted the British Parliament, while performing even its legislative functions, as if it was a court following the path shown by judges filled with the spirit of law and with meticulous concern for all the canons of justice. He concluded.

Our Constitution, in short, is a judge-made Constitutional and it bears on its face all the features, good and bad, of judge-made law.

155. Dicey thought that the difference between the unwritten British Constitution and a written Constitution, such as that of Belgium, was not merely a formal one, but revealed entirely differing approaches to basic freedom. He observed :

> The matter to be noted is, that where the right to individual freedom is a result deduced from the principles of the Constitution, the idea readily occurs that the right is capable of being suspended or taken away. Where, on the other hand, the right to

> individual freedom is part of the Constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation.

156. After making the distinction mentioned above, Dicey deals with "the so-called suspension of the Habeas Corpus Act". He said that it bears "a certain similarity to what is called in foreign countries 'suspending the constitutional guarantees'". He euphemistically, explained :

> But, after all, statute suspending the habeas Corpus Act falls very far short of what its popular name seems to imply, and though a serious measure enough, is not, in reality, more than a suspension of one particular remedy for the protection of personal freedom. The Habeas Corpus Act may be suspended and yet Englishmen may enjoy almost all the rights of citizens. The Constitution, as far as such a thing can be conceived possible, would mean with us nothing less than a revolution.

157. If Dicey, bewitched by the beauties of an unwritten British Constitution could have been shocked by any modern transgressions of the basic principles of his "rule of law" in the Introduction to later editions of his books, Dicey modified his earlier views, to some extent, about the nature and purposes of "Droit Administratif", accepted the inevitability of change, and noticed the logical consequences of what he himself had described, in his "Law and Opinion in England", as the collectivist or socialistic trend - he would have been even more shocked by the proposition the he cherished principles of his rule of law could override the statute law which the British Parliament could make and unmake in the exercise of what Dicey called the "sovereignty of Parliament". The truth is that Dicey did not, at first, visualise the possibility of any conflict between the rule of law and the principles of parliamentary sovereignty in England. And, correctly understood and applied, there should not be a serious conflict between them. But, are principles always correctly understood and applied ?

158. Jennings critically commented upon Dicey's view (see : "The Law and the Constitution", 3rd Edn., p. 294) as follows :

> The rules which in foreign countries naturally form part of a constitutional code mostly do not exist in England, for the recognised (or legal) Supremacy of Parliament prevents any fundamental distribution of powers and forbids the existence of fundamental rights. The supremacy of Parliament is the Constitution. It is recognised a fundamental law just as a written Constitution is recognised as fundamental law. Various public authorities - the Crown, the Houses of Parliament, the courts, the administrative authorities - have powers and duties. Most of them are determined by statute. Some are traditional, and so are 'determined' by the common law. The powers of administrative authorities in respect of 'fundamental liberties' are mainly contained in statures. But even if they were not, I do not understand how it is correct to say that the rules are the consequence of the rights of the rights of no individuals and not their source. The powers of the Crown and of other administrative authorities are limited by the rights of individuals, or the rights of individuals are limited by the powers of the administration. Both statements are correct, and both power and rights come from the law - from the rules.

159. Thus Jennings pointed out that what was material was the existence of rules, as a part of constitutional law, and not their sources or forms. He tried to show that the basic rule being the

supremacy of statutory law that was "The Constitution" in Britain. No other rule could compete with it or stand in its way or be a substitute for it. Dicey, on the other hand, believed that the difference in sources and forms of rules made great difference in approach and outlook. But, Dicey also treated the judge-made rule of law and the rights "guaranteed" by a written Constitution as alternatives or different modes of protecting same species to rights. He never dreamt of looking upon them both as simultaneously existing and available under a written Constitution in addition to what such a Constitution contained.

160. Dicey indicated the basic distinction between the constitutional position in England, with an unwritten Constitution where the supremacy of Parliament prevailed, and that in the United States of America, with a written Constitution which was supreme. But, despite the difference in the logical consequences of an unwritten Constitution, in a country so largely governed by its conventions and disciplined habits of life and thought as Dicey's England and those of the written Constitution of the U.S.A., one common feature, shared by both English and American system, was the large amount of judicial constitutional law-making which took place in both countries.

161. In Britain, although the Parliament is the supreme law-giver, yet, as Dicey pointed out, there was, out of respect for the judicial function and the rule of law, an acceptance of judge-made law as the constitutional law of the land which the Parliament could alter, whenever it liked, but did not think of altering presumably because it served very well the needs of British people who took pride in their judge-made law. Of course, if Parliament did make a law on any subject-and it has made some laws on constitutional matter also - the courts could not think of questioning the validity of the law so made.

162. In America, not only was the doctrine of judicial review of legislation, established by Marshal, C.J. in Marbury vs. Madison ((1803) 1 Cranch 137), but the "due process" clauses, introduced by the fifth amendment (1791) and by the fourteenth amendment (1868) of the American Constitution, became the most prolific sources of judicial law-making. They gave to the American courts an amplitude of power of include in what is called "judicial legislation" which our Constitution-makers, after considerable debate, deliberately eschewed by using the expression "procedure established by law" instead of the "due process of law". Wills adverting to the very skeletal character of the America Constitution, said :

> Our original Constitution was not an anchor but a rudder. The Constitution of one period has not been the Constitution of another period. As one period has succeeded another, the Constitution has become larger and larger.

163. In A. K. Gopalan v. State of Madras (1950 SCR 88, 109 : AIR 1950 SC 27 : 51 Cri LJ 1383) the earliest case in which a comprehensive discussion of fundamental guaranteed freedoms in our Constitution took place, Kania, C.J., after referring to observations of Munro, of James Russel Lowell, of Willis, and of Cooley, on the American Constitution, noted about the nature of our Constitution (at p. 109) :

> The Constitution itself provides in minute details the legislative powers of the Parliament and the State legislatures. The same feature is noticeable in the case of the judiciary, finance, trade, commerce and services. It is thus quite detailed and the whole of it has to be read with the same sanctity, without giving undue weight to Part III or Article 246, except to the extent one is legitimately and clearly limited by the other.

164. The position in this country is clearly one in which the fundamental law found in the Constitution is paramount. The Constitution provides the test for the validity of all other laws. It seeks to determine the sphere of executive and legislative and judicial powers with meticulous care and precision. The judicial function, though wider in ranger when interpreting or applying other articles of the Constitution, particularly Articles 14 and 19, the enforcement of which is also suspended during the current emergency, especially constricted by the elaborate provisions of Article 21 and 22, which deal with personal liberty and preventive detention. The wider the sweep of the provisions of Article 21 and 22 the more drastic must be the effect of suspending their enforcement. After all, suspension does not and cannot mean retention under a disguise.

165. The only rule of law which can be recognised by courts of our country is what is deducible from the Constitution itself. The Constitution is, for us, the embodiment of the highest "positive law" as well as the reflection of all the rules of natural or ethical or common law laying behind it which can be recognised by courts. It seems to me to be legally quite impossible to successfully appeal to some spirit of the Constitution or to any law anterior to or supposed to lie behind the Constitution to frustrate the objects of the express provisions of the Constitution. I am not aware of any rule of law or reason which could enable us to do that. What we are asked to do seems nothing short of building some imaginary parts of Constitution, supposed to lie behind our existing Constitutions, which could take the place of those parts of our Constitution whose enforcement is suspended and then to enforce the substitutes. And we were asked by some learned Counsel, though not by all, to perform this ambitious task of judicial Constitution making without even using the crutches of implied imperatives of our constitutional provisions as though we had some plenary legislative constituent powers. Fortunately, judges in this country have no such powers. And, those who are meant to so function as to keep the other authorities and organs of State within the limits of their powers cannot themselves usurp powers they do not possess. That is the path of descent into the arena of political controversy which is so damaging for the preservation of the impartiality and prestige of the judicial function. We cannot, therefore, satisfy those who may feel the urge, as Omar Khayyam did "to shatter" what they regards as 'this sorry scheme of things entire" and to "remould" it nearer their "heart's desire". I think we must make it clear that the spirit of law or the rule of law, which we recognise, cannot, however ominously around like some disembodied ghost serving as a substitute for the living Constitution we actually have. It has to be found always within and operating a harmony with an never outside or in conflict with what our Constitution enjoins. All that we can do is to faithfully explain what the Constitution and its spirit mean. We cannot alter or twist these.

166. The distinction made above between law as it exists and as it has to be recognised an enforced by the State's judicial organs, and "the law", if we may call it that at all, which could only constitute some rules of ethics but could not be enforced at all, whatever may its moral worth was thus stated by John Codman Hurd in his "Law of Freedom and Bondage in the United States" (Negro Universities Press, New York Vol. I, at p. 3) :

> Now, jurisprudence is taken to be the science of a rule not merely existing, but one which is actually operative or enforced in or by the will of society or the State. The science of what rule ought to be made operative by the will of the State is a different thing, it is a science of rules regarded only as existing, whether operative in civil society - that is, enforced - or not.

A rule made operative by the authority of society, or of the State, is a rule identified with the expressed will of society or of the State. The will of the State, indicated in some form of expression,

is the law, the subject of jurisprudence, and no natural rule which may exist, forms a part of law unless identified with the will of the State so indicated. What the State wills is the conterminous measure of law; no pro-existing rule is the measure of that will.

167. John Codman Hurd went on to point out that judicial authorities constituted by the Stated can only the mandates of the positive law which, for purposes of enforcement, must be deemed to embody all the pre-existing enforceable natural and ethical values.

168. Enforceability, as an attribute of a legal right, and the power of the judicial organs of the State to enforce the right, are exclusively for the State, as the legal instrument of society, to confer or take away in the legally authorised manner. It follows from these basic premises of our constitutional jurisprudence that courts cannot, during a constitutionally enjoined period of suspension of the enforceability of fundamental rights through courts, enforce what may even be a "fundamental right" sought to be protected by Part III of the Constitution. The Attorney General has, very fairly and rightly, repeatedly pointed out that no substantive right, whether declared fundamental or not, exept the procedure right converted into substance ones by Article 32, could be suspended. Even the enforcement in general, of all such rights through courts is suspended. Only the emforcement of specified right through courts is suspended for the time being.

169. The enforceability of the right by a constitutionally appointed judicial organ has necessarily to depend upon the fulfillment of two conditions : firstly, its recognition by or under the Constitution as a right; and, secondly, possession of the power of its enforcement by the judicial organs. Now, if a right is established, on facts, as a right, it will certainly satisfy the first condition. But, if the right is unenforceable, because the power of its enforcement by court is constitutionally suspended or inhibited, for the duration of the emergency its mere recognition or declaration by courts, either as a right or as a fundamental right, could not possibly held a petitioner to secure his personal liberty. Article 226 of the Constitution is not meant for futile and unenforceable declarations of right. The whole purpose of a writ of habeas corpus is to enforce a right to personal freedom after the declaration of a detention as illegal when it is so found upon investigation.

170. It may be that many moral and natural obligations exist outside the Constitutional and even outside any positive law - this is not denied by the learned Attorney General at all -but, their existence is not really relevant for purposes of petitions for writs of habeas corpus which lie only to enforce legally enforceable rights. Neither the existence nor the possibilities of denials of any rights by the detaining officers of the State, due to frailties of human nature and errors of judgment, are denied by the Attorney General. All that is denied is the correctness of the assertion that they are enforceable, during the period of emergency, through courts, if they fall within the purview of rights whose enforcement is suspended.

171. The result of the few very general observations made above by me, before examining, in greater depth, any of the very large number of connected questions and side issues raised - I doubt whether it is necessary or of much use, in view of my opinion on the preliminary issue of enforceability, to consider all of them even if it were possible for me to do so - may be summarised as follows.

172. Dicey's rule of law, with special meanings given to it, was meant to prove the existence and peculiarities of the uncodified English Constitutional Law. According to Dicey himself, these features either did not exist elsewhere or were the very objectives of provisions of written Constitutions of other countries. On Dicey's very exposition, no ordinary judge-made law or

common law could survive in opposition to statutory law in England, or, in conflict with a written Constitution where there was one. Enforceability of rights, whether they are constitutional or common law or statutory, in constitutionally prescribed ways by constitutionally appointed judicial organs, is governed solely by the terms of the written instrument in a Constitution such as ours. The scope for judicial law-making on the subject of enforcement of the right to personal freedom was deliberately restricted by our Constitution-makers. In any case, it is difficult to see any such scope when "enforcement" itself is suspended. All we can do is to determine the effect of this suspension. We have now to consider in greater detail : What is it the enforcement of which is suspended and what, if anything, remains to be enforced ?

173. In this country, the procedure for the deprivation as well as enforcement of a right to personal freedom is governed partly by the Constitution and partly by ordinary statutes. Both fall within the purview of "procedure". Article 21 of the Constitution guarantees, though the guarantee is negatively framed, that

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

If an enforcement of this negatively framed right is suspended, a deprivation contrary to the prescribed procedure is not legalised. The suspension of enforcement does not either authorise or direct any authority to violate the procedure. It has to be clearly understood that what is suspended is really the procedure for the enforcement of a right through courts which could be said to flow from the infringement of a statutory procedure. If the enforcement of a right to be free, resulting derivatively from both the constitutional and statutory provisions, based on an infraction of the procedure, which is statutory in case of preventive detention, is suspended, it seems to me to be impossible to lay down that it becomes enforceable when that part of the procedure which is mandatory is violated by remains unenforceable so long as the part of the procedure infringed is directory. Such a view would, in my opinion, introduce a distinction which is neither warranted by the language of Article 359 of the Constitution nor by that of the Presidential Orders of 1975. If the claim to assert the right is one based on violation of procedure, the degree of violation may affect the question whether the right to be free is established at all, but, it should not, logically speaking, affect the result where the enforcement of the right, even in case in which it has become apparent, is suspended.

174. The question, however, which has been most vehemently argued is : Does Article 21 exhaust every kind of protection given to rights to personal freedom ? Another way in which this question was put is : Is Article 21 of the Constitution "the sole repository" of the substantive as well as procedural rights embraced by the expression "personal liberty" ? One of the contentions before us was that Article 21 does not go beyond the procedural protection to persons who may be deprived of personal liberty.

175. Mr. Jethmalani, learned Counsel appearing for one of the detenus, contended that personal freedom was a bye-product of the removal of constraints or hindrances to the positive freedom of action of the individual. The contention seemed to be that procedure for deprivation of personal liberty being one of the ways of imposing positive constraints, the removal of a negative procedural protection could not dispense with the necessity to establish a right of the detaining authority under some positive or statutory law to deprive a person detained of his liberty whether the authority concerned followed the right procedure or not in doing so. The argument is that proof of a just and reasonable cause, falling within the objects of the Act, so as to create a liability to be detained must

precede the adoption of any procedure to detain a person under the Act. A "satisfaction" that one of the grounds of detention, prescribed by Section 3 of the Act, is there, was thus said to be a "condition precedent" to the exercise of jurisdiction to detain. This argument obviously proceeded on a restricted meaning given to the "procedure established by law". It is very difficult to see why the satisfaction, required by Section 3 of the Act, is not really part of "procedure established by law".

176. There is, however, an even more formidable difficulty in the way of this argument. If, as it is undeniable, the procedure under Article 226 is the direct procedural protection, which is suspended by the terms of the Presidential Order, read with Article 359, Article 226 will not be available to the detenu at all, for the time being, for showing absence of the required "satisfaction", as a condition precedent to a valid detention order under Section 3 of the Act. If the "right to move any court" can be suspended Article 359 is very clear on the point - there remains no right, for the time being, to an inquiry into conditions which may enable a party to secure release in assertion of rights guaranteed either by Article 21 or by other articles whose "enforcement" is suspended. Indeed, the clear object of such a suspension seems to me to be that courts should not undertake inquiries into the violations of the alleged right.

177. If the fundamental rights in Part III of the Constitution are not suspended, as they obviously are not, but only their enforcement can be and is suspended what is really affected is the power conferred on courts by Articles 32 and 226 of the Constitution. The power of the courts is the direct and effective protected of the rights sought to be secured indirectly by Article 21, and perhaps less indirectly, by some other article and law. Indeed, it is the basic protection because other protections operated through it and depend on it. If this is curtailed temporarily, the other affected protections become automatically inoperative or ineffective so far as courts are concerned.

178. It is no answer to say that the constitutional power of High Courts cannot be affected by a Presidential Order under Article 359 which is as much a part of the Constitution as Article 226. Both article were there from the commencement of the Constitution. I do not see how it can be reasonably urged that our Constitution-makers did not visualise and intend that the Presidential Orders under Article 359 must, for the duration of the emergency, necessarily limit the powers of High Courts under Article 226 albeit indirectly by suspending rights to enforcement of fundamental rights.

179. It is also not possible for a detenu to fall back upon the last part of Article 226 of the Constitution which enables the use the powers given by this article "for any other purpose". So long as that purpose is enforcement of a right which is covered by Article 14 or 19 or 21 or 22 either separately or conjointly, as the enforcement of each of these is now suspended, the inhibition will be there. Moreover, we have no case before us in which a detenu asks for an order of any purpose other than the one which can only be served by the issue of a writ of habeas corpus. Each detenu asks for that relief and for no other kind of writ or order. Therefore, there is no need to consider "any other purpose".

180. It is true that some of the learned Counsel for the detenus have strongly relied upon "any other purpose", occurring at the end of Article 226, for enabling the High Court to undertake and investigation suo motu into the question whether the Executive is performing its duties. Other Counsels have submitted that such an enquiry suo motu can be undertaken by this Court or by a High Court in exercise of powers to issue writs of habeas corpus quite apart from the enforcement of the right of a detenu to any writ or order. As I have indicated earlier, I am no prepared to answer

purely hypothetical questions, except within certain limits, that is to say, only so far as it is necessary for the purposes of illustrating my point of view. I do not think that the powers of courts remain unaffected by the suspension of rights or locus standi of detenus. A court cannot, in exercise of any supposed inherent or implied or unspecified power, purport to enforce or in substance enforce a right the enforcement of which is suspended. To permit such circumvention of the suspension is to authorise doing indirectly what law does not allow to be done directly. Assuming, for purposes of argument, that there is some unspecified residue of judicial power in courts of record in this country, without deciding what it could be, as that question does not really arise in cases before us, there must be undeniable facts and circumstances of some very grave, extraordinary, and exceptional character to justify the use of such powers, if they exist at all, either by this Court or by the High Courts. So long as the powers of Government are exercised by the chosen representatives of the people, their exercise is presumed to be of the people and for the people. It has to be borne in mind that the validity of the declaration of emergency under Article 352 has neither been nor can it be constitutionally challenged in view of Article 352(5) of the Constitution. And, the validity of Presidential Orders of 1975 under Article 359 has not been questioned.

181. So far, I have only indicated the nature of the problems before us and may general approach to them. Before specifically answering questions, stated at the outset, I will deal, as briefly as possible, under the following six main heads, with such of the very large number of points raised and authorities cited before us as appear to me to be really necessary for answering the questions calling for our decisions :

(A) "Rights conferred by Part III" of our Constitution from the points of view of personal freedom.

(B) Power to issue writs of habeas corpus an other powers of High Court under Article 226 of the Constitution.

(C) The objects of the Maintenance of Internal Security Act ('the Act') and the amendments of it.

(D) The purpose and meaning of emergency provisions, particularly Article 359 of our Constitution.

(E) The effect of the Presidential Orders, particularly the order of June 27, 1975, on the rights of detenus.

(F) The rule of law, as found in our Constitution, and how it operates during the emergency.

A. "RIGHTS CONFERRED BY PART III" FROM THE POINT OF VIEW OF PERSONAL FREEDOM.

182. It is somewhat difficult to reconcile the language of a purported conferment of rights upon themselves by citizens of India with their political sovereignty. The language of the preamble of the Constitution recites that it is they who were establishing the legally Sovereign Democratic Republic with the objects given there. Of course, some rights are "conferred" even on non-citizens, but that does not remove the semantic difficulty which gave rise to some argument before us. It seems to me that if, as this Court has already explained earlier (e.g. by me in Indira Nehru Gandhi"s case) the

Constitution, given unto themselves by the people, is legally supreme, it will not difficult to assign its proper meaning to the term "conferred". I do not find the theory unacceptable that there was a notional surrender by the people of India of control over their several or individual rights to a Sovereign Republic by means of a legally supreme Constitution to which we owe allegiance. It only means that we recognise that the Constitution is supreme and can confer rights and powers. We have to look to it alone and not outside it for finding out the manner in which and the limits subject to which individual citizen can exercise their separate freedoms. There has to be necessarily, as a result of such a process of Constitution-making, a notional surrender of individual freedom so as to convert the possibility of "licence" to all, which ends in the exploitation and oppression of the many weak by the few strong, into the actuality of a freedom for all regulated by law or under the law applicable at all. This seems to me to be a satisfactory explanation of the language of conferment used with reference to rights.

183. Apart from the explanation given above, of the language of conferment, the meaning of placing some rights in Part III, whatever be the language in which this was done, is surely to select certain rights as most essential for ensuring the fullness of lives of citizens. The whole object of guaranteed fundamental rights is to make those basis aspects of human freedom, embodied in fundamental rights, more secure than others not so selected. In thus recognising and declaring certain basic aspects of rights as fundamental by the Constitution of the country, the purpose was to protect them against undue encroachments upon them by the legislative, or executive, and, sometimes even judicial (e.g. Article 20) organs of the State. The encroachment must remain within permissible limits and must take place only in prescribed modes. The intention could never be to preserve something concurrently in the field of natural law or common law. It was to exclude all other control or to make the Constitution the sole respository of ultimate control over those aspects of human freedom which were guaranteed there.

184. I have already referred to Dicey's attempt to show that one of the meanings of the rule of law in England was that the law made by the ordinary courts served purposes sought to be achieved in other countries by means of written Constitutions. This meant that one of the two systems governs the whole field of fundamental rights but not both. This very idea is thus put by Keir & Lawson, in "Cases in Constitutional Law" (5th Edn., p. 11) :

> The judges seem to have in their minds an ideal Constitution, comprising those fundamental rules to common law which seem essential to the liberties of the subject and the proper government of the country. These rules cannot be repealed but by direct and unequivocal enactment. In the absence of express words or necessary intendment, statutes will be applied subject to them. They do not override the statute, but are treated, as it were, as implied terms of the statute. Here may be found many of those fundamental rights of man which are directly and absolutely safeguarded in the American Constitution or the Declaration des droits de l'homme.

185. In the passage quoted above, rules of natural justice, which are impliedly read into statutes from the nature of functions imposed upon statutory authorities or bodies, are placed on the same footing as "fundamental rights of men which are directly and absolutely safeguarded" by written Constitutions. There is, however, a distinction between these two types of basic rights. The implied rules of natural justice do not, as has been repeatedly pointed out by us, override the express terms of a statute. They are only implied because the functions which the statute imposes are presumed to be meant to be exercised in accordance with these rules. Hence they are treated as though they were part of enacted law. This Court has repeatedly applied this principle [see : e.g. State of Orissa v. Dr.

(Miss) Binapani Dei ((1967) 2 SCR 625 : AIR 1967 SC 1269 : (1967) 2 LLJ 266)].

186. The principles of natural justice which are so implied must always hang, if one may so put it, on pegs of statutory provisions or necessarily follow from them. They can also be said sometimes to be implied as necessary parts of the protection of equality and equal protection of laws conferred by Article 14 of the Constitution where one of the pillars of Dicey's principles of the rule of law is found embodies. Sometimes they may be implied and read into legislation dealing with rights protected by Article 19 of the Constitution. They could, at times, be so implied because restrictions on rights conferred by Article 19 of the Constitution have to be reasonable. Statutory provisions creating certain types of functions may become unreasonable, and, therefore, void unless rules of natural justice were impliedly annexed to them. And, the well-known method of construction is : "ut res magis valeat quam pereat" - to prefer the construction which upholds rather than the one which indvalidates. Thus, rules of natural justice, even when they are read into statutory provisions, have no independent existence. They are annexed to statutory duties or fundamental rights so long as they are not expressly excluded. Their express exclusion by statute may, when the enforcement of fundamental right is not suspended, affect the validity of a statute. But, that is so because of the requirements of Article 14 and 19 of the Constitution and not because they are outside the Constitution altogether.

187. It is also very difficult for me to understand what is meant by such "common law" rights as could coexist and compete with constitutional provisions or take their place when the constitutional provisions become unenforceable or temporarily inoperative. The whole concept of such alleged common law is based on an utter misconception of what "common law" means. The origin of common law in England is to be found in the work done by the king's judges, who, through their judicial pronouncements, gave to the people of that country a law common to the whole country in the place of the peculiar or conflicting local customs. Let me quote here from a recent book by Prof. George W. Keeton on "English Law - The Judicial Contribution" (at pp. 68-69), about what judges appointed by Henry the II of Anjou did :

> It is in his reign that something recognisable as a common law beings to emerge. It is an amalgam of Anglo-Saxon and Danish customs and Narmon laws governing military tenures, both of which are about to be transformed by several mighty agencies - the ever-expanding body of original writs, of which Glanville wrote; the assizes which Henry introduced; and finally, by the activities of his judges, whether at Westminster or on Circuit. It is significant that although for some centuries to come, English law was to remain remarkably rich in local customs, we no longer hear, after Henry's reign, of the laws of Mercia, Wessex and Northumbira, but of a Common Law of England that is to say, the law of the king's courts, about which treatises of the calibre of Practon and Fleta would be written almost exactly a century later, and as the concluding words of Pollock and Maitland's great work remind us, they and their judicial colleagues were buildings, not for England alone but 'for kingless common wealths on the other shore of the Atlantic Ocean - and now, one can perhaps add, for many other commonwealths, too. This we owe ultimately, not to a Norman conqueror, nor even to a distinguished line of Saxon kings, but to a bowlegged and unprepossessing prince of Anjou, of restless energy and great constancy of purpose who built, perhaps, a good deal better that even he knew.

188. Such were the origins of the common law in England. It is true that common law did try to dig its tentacles into constitutional law as well. Chief Justice Coke not only denied to King James the

first the powers to administer justice directly and personally, but he went so far as to claim for the king's courts the power to proclaim an Act of Parliament invalid, in Dr. Bonham's case ((1610) 8 Co Rep 118), if it sought to violate a principle of natural law. Such claims, however, were soon abandoned by common law courts.

189. It is interesting to recall that, after his dismissal, by King James the first, in 1616, Sir. Edward Coke entered politics and became a Member of the House of Commons in Liskeard. He led a group which resisted Royal claims. He was the principal advocate of the Petition of Rights which Parliament compelled a reluctant King of England to accept in 1628. Courts of justice, unable to withstand Royal onslaughts on their authority, joined hands with Parliament and laid down some of the rules which, according to Dicey, gave the rule of law of England. Thus, the judge made fundamental rights, which Parliament would not disturb, out of innate respect for them, existed, legally speaking, because Parliament, representing the people, wanted them. They could not compete with or obstruct the legal authority of Parliament. Coke's doctrine, however, found expression in a Constitution which enabled judges to test the validity of even legislation with reference to fundamental rights. This is also one of the primary functions of Chapter III of our own Constitution. Another function of provisions of this chapter is to test the validity of the State's executive action.

190. So far as Article 21 of the Constitution is concerned, it is abundantly clear that is protects the lives and liberties of citizens primarily from legal unwarranted executive action. It secures rights to "procedure established by law". If that procedure is to be established by statute law, as it is meant to be, this particular protection could not, on the face of it, be intended to operate as a restriction upon legislative power to lay down procedure although other articles affecting legislation on personal freedom might. Article 21 was only meant, on the face of it, to keep the exercise of executive power in ordering deprivations of life or liberty, within the bounds of power prescribed by procedure by legislation.

191. The meaning of the expression "procedure established by law" came in for discussion at considerable length, by this Court, in A. K. Gopalan's case. The majority of the learned Judges clearly held there that it furnishes the guarantee of "lex", which is equated with statute law only, and not of "jus" or a judicial concept of what procedural law ought really to be. The whole idea, in using this expression, taken deliberately from the Japanese Constitution on the advice, amongst others, of Mr. Justice Felix Frankfurter of the American Supreme Court, was to exclude judicial interference with executive action in dealing with lives and liberties of citizens and others living in our country on any ground other than that it is contrary to procedure actually prescribed by law, which, according to the majority view in Gopalan's case, meant only statute law. The majority view was based on the reasons, amongst others, that, according to well established canons of statutory construction, the express terms of "lex" (assuming, of course, that the "lex" is otherwise valid), prescribing procedure, will exclude 'jus" or judicial notions of "due process" or what the procedure ought to be.

192. Appeals to concepts of "jus" or a just procedure were made in Gopalan's case, as implied by Article 21 in an attempted application of "jus" for testing the validity of statutory provisions. Although, no such question of validity of the procedure established by the Act in ordering actual deprivations of personal liberty has arisen before us, yet, the argument before us is that we should allow use of notions of "jus" and the doctrine of ultra vires by the various High Courts in judging the correctness of applications of the established procedure by executive authorities to each case at a time when the Presidential Order of June 27, 1975 precludes the use of Article 21 by courts for

enforcing a right to personal liberty. Therefore, the question which arises here is whether "jus", held by this Court, in Gopalan's case, to have been deliberately excluded from the purview of "procedure established by law", can be introduced by courts, through a backdoor, as though it was an independent right guaranteed by Chapter III or by any other part of the Constitution. I am quite unable to accede to the suggestion that this could be done.

193. We have been referred to the following passage in R. C. Cooper v. Union of India ((1970) 3 SCR 530, 578 : (1970)1 SCC 482) , to substantiate the submission that the decision of this Court in Gopalan's case, on the question mentioned above, no longer holds that field [SCC p. 290, para 55] :

> We have found it necessary to examine the rationale of the two lines of authority and determine whether there is anything in the Constitution which justifies this apparently inconsistent development of the law. In our judgment, the assumption in A. K. Gopalan's case that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need by considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct. We hold that the validity 'of law' which authorises deprivation of property and 'a law' which authorises compulsory acquisition of property for a public purpose must be adjudged by the application of the same tests. A citizen may claim in an appropriate case that the law authorising compulsory acquisition of property imposes fetters upon his right to hold property which are not reasonable restrictions in the interests of the general public.

194. It seems to me that Gopalan's case was merely cited, in Cooper's case for illustrating a line of reasoning which was held to be incorrect in determining the validity of "law" for the acquisition of property solely with reference to the provisions of Article 31. The question under consideration in that case was whether Articles 19(1)(f) and 31(2) are mutually exclusive. Even if, on the strength of what was held in Cooper's case, we hold that the effects of deprivation upon rights outside Article 21 have also to be considered in deciding upon the validity of "lex", and that the line of reasoning in Gopalan's case, that the validity of law relating to preventive detention must be judged solely with reference to the provisions of Article 21 of the Constitution, is incorrect, in view of the opinion of the majority of learned Judges of this Court in Cooper's case, it seems to me that this is hardly relevant in considering whether any claims based on natural law or common law can be enforced. There is no challenge before us based on Article 19 to any provision of the Act. Moreover, now that the enforcement of Article 19 is also suspended, the question whether a law dealing with preventive detention may directly or indirectly infringe other rights contained in Article 19 of the Constitution is not relevant at all here for this additional reason.

195. Mr. Shanti Bhushan, appearing for some of the detenus seems to have seriously misunderstood the meaning of the Majority as well as minority views of Judges of this Court in His Holiness Kesavananda Bharati Sripadagalavaru v. State of Kerala (1973 Supp SCR 1, 918 : (1973) 4 SCC 225, 944), When he submitted that, as the majority view there was not that natural rights do not exist, these rights could be enforced in place of the suspended guaranteed fundamental rights. One learned in place after another in that case emphatically rejected the submission that any theory of natural rights could impliedly limit powers of constitutional amendment contained in Article 368 of Constitution. In doing so, none of us held that any natural rights could impliedly become legally enforceable rights.

196. Dwivedi, J., Kesavananda Bharati's case said about what could be characterised as a far more "unruly horse" than public policy (at p. 918) [SS p. 944, paras 36-38] :

> Natural law has been a sort of religion with many political and constitutional thinkers. But is has never believed in a single Godhead. It has a perpetually growing pantheon.

Look at the pantheon, and you will observe there : 'State of Nature', 'Nature of Man', 'Reason', 'God'.'Equality', 'Liberty', 'Property', 'Lassez Faire', 'Sovereignty', 'Democracy', 'Civilised Decency', 'Fundamental Conceptions of Justice' and even 'War'.

The religion of natural law has it illustrious Priestly Heads such as Chrysippus, Cicero, Seneca, St. Thomas Acquinas, Grotius, Hobbes, Locke, Paine, Hamilton, Jefferson and Triestschke. The pantheon is not a heaven of peace. Its gods are locked in constant internecine conflict.

Natural law has been a highly subjective and fighting faith. Its bewildering variety of mutually warring gods had provoked Kelson to remark :

> Outstanding representatives of the natural law doctrine have proclaimed in the name of justice or natural law principles which not only contradict one another, but are in direct opposition to may positive legal order. There is not positive law that is not in conflict with one or the other of these principles; and it is not possible to ascertain which of them has a better claim to be recognised than any other. All these principles represent the highly subjective value judgments of their various authors about what they consider to be just or natural.

197. If the concepts of natural law are too conflicting to make them a secure foundation for any alleged "right", sought to be derived from it, until it is accepted and recognised by a positive law, notions of what common law is and what it means, if anything, in this country, are not less hazy and unsettled.

198. Mr. Setalvad, in his Hamly Memorial Lectures on "Common Law in India", treated the whole body of general or common statute law and constitutional law of this country as though they represented a codification of the common law of England. If this view is correct, common law could not be found outside the written Constitution and statute law although English common law could perhaps be used to explain and interpret our statutory provisions where it was possible to do so due to some uncertainty.

199. Sometimes, judges have spoken of the principles of "justice, equity, and good conscience" (see : Satish Chandra Chakravarti v. Ram Doyal De (AIR 1921 Cal 1 : ILR 48 Cal 388, 407-410, 425, 426); Waghela Rajsanji v. Sheikh Masludin (14 IA 89,96); and Baboo v. Smt. Subanshi (AIR 1942 Nag 99 : ILR 1942 Nag 650)) as sources of "common law" in this country. One with some knowledge of development of law in England will distinguish the two broad streams of law there : one supposed to be derived from the customs of the people, but, actually based on judicial concepts of what custom is or should properly be; and, another flowing from the court of the Chancellor, the "Keeper of the King's Conscience", who used to be approached when plain demands of justice failed to be met or caught in the meshes of common law, or, were actually defeated by some statute law which was being misused. The two streams, one of common law and another of equity, were "mixed" or "fused" by statute as a result of the Judicature Acts in England at the end of the last

century in the sense that they became parts of one body of law administered by the same courts, although they ar still classified separately due to their separate origins. In Stroud's Judicial Dictionary, we find (see : Vol. I, 4th Edn., p. 517) :

> The common law of England is that body of law which has been judicially evolved from the general custom of the realm.

200. Here, all that I wish to indicate is that neither rights supposed to be recognised by some natural law nor those assumed to exist in some part of common law could serve as substitutes for those conferred by Part III of the Constitution. They could not be, on any principle of law or justice or reason, virtually added to Part III as complete replacements for rights whose enforcement is suspended, and then be enforced, through constitutionally provided machinery, as the unseen appendages of the Constitution or as a separate group of rights outside the Constitution meant for the emergency which suspends but does not resuscitate in a new form certain rights.

201. A submission of Dr. Ghatate, appearing for Mr. Advani, was that we should keep in mind the Universal Declaration of Human Rights in interpreting the Constitution. He relied on Article 51 of the Constitution, the relevance of which for the cases before us is not at all evidence to me. He also relied on the principle recognised by British courts that International Law is part of the law of the land. Similarly, it was urged, it is part of our law too by reason of Article 372 of the Constitution. He seemed to imply that we should read the universal declaration of human rights into our Constitution as India was one of the signatories to it. These submissions appear to me to amount to nothing more than appeals to weave certain ethical rules and principles into the fabric of our Constitution which is the paramount law of this country and provides the final test of validity and enforceability of rules and rights through courts. To advance such arguments is to forget that our Constitution itself embodies those rules and rights. It also governs the conditions of their operation and suspension. Nothing which conflicts with the provisions of the Constitution could be enforced here under any disguise.

202. Emergency provisions in our Constitution are, after all, a recognition and extension of the individual's natural law right of self-defence, which has its expression in positive laws, to the State, the legal organisation through which society or the people in its collective aspect, functions for the protection of the common interests of all. Such provisions or their equivalents exist in the Constitutions of even the most advanced democratic countries of the world. No lawyer can seriously question the correctness, in Public International Law, of the proposition that the operation and effects of such provisions are matters which are enquirely the domestic concern of legally sovereign States and can brook no outside interference.

203. Subba Rao, C.J., speaking for five learned Judge of this Court, in I.C. Golaknath v. State of Punjab ((1967) 2 SCR 762, 789 : AIR 1967 SC 1643) said (at p. 789) :

> Now, what are the fundamental rights ? They are embodied in Part III of the Constitution and they may be classified thus : (i) right to equality, (ii) right to freedom, (iii) right against exploitation, (iv) right to freedom of religion, (v) cultural and educational rights, (vi) right to property, and (vii) right to constitutional remedies. They are the rights of the people preserved by our Constitution."Fundamental rights" are the modern name for what have been traditionally known as "natural rights". As one author puts : "They are moral rights which every human being everywhere at all times ought to have simply because of

> the fact that in contradistinction with other beings, he is rational and moral". They are the primordial rights necessary for the development of human personality. They are the rights which enable a man to chalk out his own life in the manner he likes best. Our Constitution, in addition to the well-known fundamental rights also included the rights of the minorities, untouchables and other backward communities, in such rights.

204. I do not know of any statement by this Court of the relation between natural rights and fundamental constitutional rights which conflicts with what is stated above.

205. Hidayatullah, J., in Golaknath's case observed (at. p. 877) :

> What I have said does not mean that fundamental rights are not subject to change or modification. In the most inalienable of such rights a distinction must be made between possession of a right and its exercise. The first is fixed and the latter controlled by justice and necessity. Take for example Article 21 :
>
> No person shall be deprived of his life or personal liberty except according to procedure established by law.

Of all the rights, the right to one's life is the most valuable. This article of the Constitution, therefore makes the right fundamental. But the inalienable right is curtailed by a murderer's conduct as viewed under law. The deprivation, when it takes place, is not of the right which was immutable but of the continued exercise of the right.

206. The contents of Article 21 were considered at some length and given a wide connotation by this Court in Gopalan's case. Patanjali Sastri, J. held at pages 195-196.

It was further submitted that Article 19 declared the substantive rights of personal liberty while Article 21 provided the procedural safeguard against their deprivation. This view of the correlation between the two articles has found favour with some of the judges in the High courts which have had occasion to consider the constitutional validity of the impugned Act. It is, however, to be observed that Article 19 confers the rights therein specified only on the citizens of India, while Article 21 extends the protection of life and personal liberty to all persons-citizens and non-citizens alike. Thus, the two articles do not operate in a conterminous filed, and this is one reason for rejecting the correlation suggested. Again, if Article 21 is to be understood as providing only procedural safeguards, where is the substantive right to personal liberty of non-citizens to be found in the Constitution ? Are they denied such right altogether ? If they are to have no right of personal liberty, why is the procedural safeguard in Article 21 extended to them ? And where is that most fundamental right of all, the right to life, provided for in the Constitution ? The truth is that Article 21, like its American prototype in the Fifth and Fourteenth Amendments of the Constitution of the United States, presents an example of the fusion of procedural and substantive rights in the same provision. The right to live, though the most fundamental of all, is also one of the most difficult to define and its protection generally takes the form of a declaration that no person shall be deprived of it save by due process of law or by authority of law.'Process' or 'procedure' in this context connotes both the act and the manner of proceeding to take away a man's life or personal liberty. And the first and essential step in a procedure established by law for such deprivation must be a law made by a competent legislature authorising such deprivation.

Mahajan, J. also observed at pages 229-240 :

> Article 21, in my opinion, lays down substantive law as giving protection to life and liberty inasmuch as it says that they cannot be deprived except according to the procedure established by law; in other words, it means that before a person can be deprived of his life or liberty as a condition precedent there should exist some substantive law conferring authority for doing so and the law should further provide for a mode of procedure for such deprivation. This article gives complete immunity against the exercise of despotic power by the Executive. It further gives immunity against invalid laws which contravene the Constitution. It gives also further guarantee that in its true concept there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty. It negatives the idea of fantastic, arbitrary and oppressive forms of proceedings. The principles therefore underlying Article 21 have been kept in view in drafting Article 22.

Das, J. said at page 295 :

> If personal liberty as such is guaranteed by any of the sub-clause of Article 19(1) then why has it also been protected by Article 21 ? The answer suggested by learned Counsel for the petitioner is that personal liberty as a substantive right is protected by Article 19(1) and Article 21 gives only an additional protection by prescribing the procedure according to which that right may be taken away. I am unable to accept this contention. If this argument were correct then it would follow that our Constitution does not guarantee to any person, citizen or non-citizen, the freedom of his life as a substantive right at all, for the substantive right to life does not fall within any of the sub-clauses of clause (1) of Article 19.

He also said at pp. 306-307 :

> Article 21, as the marginal note states, guarantees to every person 'protection of life and personal liberty. As I read it, it defines the substantive fundamental right to which protection is given and does not purport to prescribe any particular procedure at all. That a person shall not be deprived of his life or personal liberty except according to procedure Constitution. The avowed object of the article, as I apprehend it, is to define the ambit of the right to life and personal liberty which is to be protected as a fundamental right. The right to life and personal liberty protected by Article 21 is not an absolute right but is a qualified right-a right circumscribed by the possibility or risk of being lost according to procedure established by law.

207. It will thus be seen that not only all steps leading up to the deprivation of personal liberty but also the substantive right to personal freedom has been held, by implication, to be covered by Article 21 of the Constitution.

208. In Kharak Singh v. State of U.P., ((1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329) the wide import of personal liberty, guaranteed by Article 21, was considered. By a majority of 4 against 2 learned Judges of this Court, it was held that the term "personal liberty", as used in Article 21, is a compendious one and includes all varieties of rights to exercise of personal freedom, other than those dealt with separately by Article 19, which could fall under a broad concept of freedom of person. It was held to include freedom from surveillance, from physical torture, and

from all kinds of harassment of the person which may interfere with his liberty.

209. Thus, even if Article 21 is not the sole repository of all personal freedom, it will be clear, from a reading of Gopalan's case and Kharak Singh's case, that all aspects of freedom of person are meant to be covered by Articles 19 and 21 and 22 and the Constitution. If the enforcement of these rights by courts is suspended during the emergency an inquiry by a court into the question whether any of them is violated by an illegal deprivation of it by executive authorities of the State seems futile.

210. For the reasons indicated above I hold as follows.

211. Firstly, fundamental rights are basic aspects of rights selected from what may previously have been natural or common law rights. These basic aspects of rights are elevated to a new level of importance by the Constitution. Any other co-extensive rights, outside the Constitution, are necessarily excluded by their recognition as or merger with fundamental rights.

212. Secondly, the object of making certain general aspects of rights fundamental is to guarantee them against illegal invasions of these rights by executive, or judicial organs of the State. This necessarily means that these safeguards can also be legally removed under appropriate constitutional or statutory provisions, although their suspension does not, by itself, take away the illegalities or their legal consequences.

213. Thirdly, Article 21 of the Constitution has to be interpreted comprehensively enough to include, together with Article 19, practically all aspects of personal freedom. It embraces both procedural and substantive rights. Article 22 merely makes it clear that deprivations of liberty by means of laws regulating preventive detention would be included in "procedure established by law" and indicates what that procedure should be. In what sense, it could be viewed as, substantially, an elaboration of what is found in Article 21, although it also goes beyond it inasmuch as it imposes limits on ordinary legislative power.

214. Fourthly, taken by itself, Article 21 of the Constitution is primarily a protection against illegal deprivations by the executive action of the state's agents of officials, although, read with other articles, it could operate also as a protection against unjustifiable legislative action purporting to authorise deprivations of personal freedom.

215. Fifthly, the most important object of making certain basic rights fundamental by the Constitution is to make them enforceable against the State and its agencies through the courts.

216. Sixthly, if the protection of enforceability is validly suspended for the duration of an emergency, declared under constitutional provisions, the courts will have nothing before them to enforce so as to be able to afford any relief to a person who comes with a grievance before them.

B. POWER TO ISSUE WRITS OF HABEAS CORPUS AND OTHER POWERS OF HIGH COURTS UNDER ARTICLE 226 OF THE CONSTITUTION.

217. Reliance has been placed on behalf of the detenu on the following statement of the law found in Halsbury's Laws of England (Vol. 11, p. 27, paragraph 45). Where dealing with the jurisdiction to issue such writs in England it is said :

> The right to the writ is a right which exists at common law independently of any statute, though the right has been confirmed and regulated by statute. At common

> law the jurisdiction to award the writ was exercised by the Court of Queen's Bench, Chancery, and Common Pleas, and, in a case of privilege by the Court of Exchequer.

It is, therefore, submitted that the High Courts as well as this Court which have the same jurisdiction to issue writs of habeas corpus as English courts have to issue such writs at common law.

218. The argument seems to me to be based on several misconceptions.

219. Firstly, there are no courts of the King or Queen here to issue writs of habeas corpus by reason of any "prerogative" of the British Monarch. The nature of the writ of habeas corpus is given in the same volume of Halsbury's Laws of England, dealing with Crown proceedings, at page 24, as follows :

> 40. The prerogative writ of habeas corpus. - The writ of habeas corpus and subjiciendum, which is commonly known as the writ of habeas corpus, is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. It is a prerogative writ by which the Queen has a right to inquire into the causes for which any of her subjects are deprived of their liberty. By it the High Court and the judges of that Court, at the instance of a subject aggrieved, command the production of that subject and inquire into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released. Release on habeas corpus is not, however, an acquittal, nor may the writ be used as a means of appeal.

220. It will be seen that the common law power of issuing the writ of habeas corpus is possessed by only certain courts which could issue "prerogative" writs. It is only to indicate the origin and nature of the writ that the habeas corpus is known here as a "prerogative" writ. The power to issue it is of the same nature as a "prerogative" power inasmuch as the power so long as at it is not suspended, may carry with it an undefined residue of discretionary power. Strictly speaking, it is a constitutional writ. The power to issue it is conferred upon courts in this country exclusively by our Constitution. All the powers of our courts flow from the Constitution which is the source of their jurisdiction. If any provision of the Constitution authorises the suspension of the right to obtain relief in any type of cases, the power of courts is thereby curtailed even though a general jurisdiction to afford the relief in other cases may be there. If they cannot issue writs of habeas corpus to enforce a right to personal freedom against executive authorities during the emergency, the original nature of this writ-issuing power comparable to a "prerogative" power, cannot help the detenu.

221. Secondly, as I have already indicated, whatever could be formerly even said to be governed by a common law prerogative power becomes merged in the Constitution as soon as the Constitution takes it over and regulates that subject. This is a well recognised principle of law. I will only cite Attorney-General v. De Keyser's Royal Hotel Limited (1920 AC 508, 526), where Lord Dunedin, in answer to a claim of the Crown based on prerogative, said (at page 526) :

> Nonetheless, it is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules. On this point I think the observation of the learned Master of the Rolls is unanswerable. He says : "What use could there be in imposing limitations, if the Crown could at its

pleasure disregard them and fall back on prerogative ? ".

222. Thirdly, if there is no enforceable right either arising under habeas the Constitution or otherwise, it is useless to appeal to any general power of the court to issue a writ of habeas corpus. The jurisdiction to issue an order of release, on a habeas corpus petition, is only exercisable after due enquiry into the court for a writ of habeas corpus is that no enquiry can take place, beyond finding out that the cause is one covered by the prohibition, mere possession of some general power will not assist the detenu.

223. If the right to enforce personal freedom through a writ of habeas corpus is suspended, it cannot be said that the enforcement can be restored by resorting to "any other purpose". That other purpose could not embrace defeating the effect of suspension of the enforcement of a constitutional guarantee. To hold that would be to make a mockery of the Constitution.

224. Therefore, I am unable to hold that anything of the nature of a writ of habeas corpus or any power of a High Court under Article 226 could come to the aid of a detenu when the right to enforce a claim to personal freedom, sought to be protected by the Constitution, is suspended.

C. THE OBJECTS OF THE MAINTENANCE OF INTERNAL SECURITY ACT ('THE ACT') AND THE AMENDMENTS OF IT

225. As this Court has recently held, in Haradhan Saha v. State of West Bengal ((1975) 1 SCR 778 : (1955) 3 SCC 198 : 1974 SCC (Cri) 816), preventive detention is to be differentiated from punitive detention. Nevertheless, it is evident, whether detention is preventive or punitive, it necessarily results in the imposition of constraints, which, from the point of view of justice to the detenu, should not be inflicted or continue without fair and adequate and careful scrutiny into its necessity. This Court pointed out that Article 22 of the Constitution was designed to guarantee these requirements of fairness and justice which are satisfied by the provisions of the Act. It said in Haradhan Saha (at p. 784) : [SCC p. 205 : SCC (CRI) p. 823, para 20]

> Constitution has conferred rights under Article 19 and also adopted preventive detention to prevent the greater evil of elements imperilling the security, the safety of a State and the welfare of the Nation. It is not possible to think that a person who is detained will yet be free to move or assemble or form associations or union or have the right to reside in any part of India or have the freedom of speech or expression.

226. Provision for preventive detention, in itself, is a departure from ordinary norms. It is generally resorted to either in times of war or apprehended internal disorders and disturbances of a serious nature. Its object is to prevent a greater danger to national security and integrity than any claim which could be based upon a right, moral or legal, to individual liberty. It has been aptly described as 'jurisdiction of suspicion". (See Khudiram Das v. State of West Bengal ((1975) 2 SCR 832, 842 : (1975)2 SCC 81 : 1975 SCC (Cri) 435); State of Madras v. V. G. Raw (AIR 1952 SC 196, 200 : 1952 SCR 597 : 1952 Cri LJ 966); R. v. Halliday (1917 AC 260, 275)). It enables executive authorities to proceed on bare suspicion, which has to give rise or a "satisfaction", as the condition precedent to passing a valid detention order, laid down as follows in Section 3 of the Act :

> (3)(a) If satisfied with respect of any person (including a foreigner) that with a view to preventing him from acting in any manner prejudicial to -
>
> (i) the defence of India, the relations of India with foreign powers, or the security of

India, or

(ii) the security of the State or the maintenance of public order, or

(iii) the maintenance of supplies and services essential to the community, or

(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India, it is necessary so to do, make an order directing that such person be detained.

227. The satisfaction, as held consistently by a whole line of authorities of this Court, is a "subjective" one. In other words, it is not possible to prescribe objective standards for reaching that satisfaction. Although the position in law, as declared repeatedly by this Court, has been very clear and categorical that the satisfaction has to be the subjective satisfaction of the detaining authorities, yet the requirements for supply of grounds to the detenu, as provided in section 8 of the Act, in actual practice, opened up a means of applying a kind of objective test by courts upon close scrutiny of these grounds. The result has been, according to the Attorney-General, that the subjective satisfaction of the detaining authorities has tended to be substituted by the subjective satisfaction of courts, on the objective data provided by the ground, as to the need to detain for purposes of the Act. The question thus arose : Did this practice not frustrate the purpose of the Act ?

228. The position of the detenu has generally evoked the sympathy of lawyers and law courts. They cherish a tradition as zealous protectors of personal liberty. They are engaged in pointing out, day in and day out, the essentials of fair trial. They are used to acting strictly on the rules of evidence contained in the Indian Evidence Act, the possibility of indefinite incarceration, without anything like a trial, not unnaturally, seems abhorrent to those with such traditions and habits of thought and action.

229. There is an aspect which perhaps tends to be overlooked in considering matters which are generally placed for weighment on the golden scales of the sensitive judicial balance. It is that we are living in a world of such strain and stress, satirised in a recent fictional depiction of the coming future, if not of a present already enveloping us, in Mr. Alvin Toffler's "Future Shock", with such fastchanging conditions of life dominated by technological revolutions as well as recurring economic, social, and political crises, with resulting obliterations of traditional values, that masses of people suffer from psychological disturbances due to inability to adjust themselves to these changes and crises. An example of such maladjustment is provided by what happened to a very great and gifted nation within living memory. The great destruction, the inhuman butchery, and the acute suffering and misery which many very civilised parts of the world had to pass through, because some psychologically disturbed people led by Adolf Hitler, were not prevented in time from misleading and misguiding the German nation, is still fresh in our minds. Indeed the whole world suffered, and felt the effects of the unchecked aberrant Nazi movement in Germany and the havoc it unleashed when it acquired a hold over the minds and feelings of the German people with all the vast powers of modern science at their disposal. With such recent examples before them, it was not surprising that our Constitution-makers quite farsightedly, provided not only for preventive detention in our Constitution but also introduced emergency provisions of a drastic nature in it. These seem to be inescapable concomitants of conditions necessary to ensure for the mass of the people of a backward country, a life of that discipline without which the country's security, integrity, independence, and pace of progress towards the objectives set before us by the Constitution will not

be safe.

230. I do not know whether it was a too liberal application of the principle that court must lean in favour of the liberty of the citizen, which is, strictly speaking, only a principle of interpretation for cases of doubt or difficulty, or the carelessness with which detentions were ordered by subordinate officers in the districts, or the inefficiency in drafting of the grounds of detention, which were not infrequently found to be vague and defective, the results of the practice developed by courts was that detenus did, in quite a number of cases, obtain from High Courts, and perhaps even from this Court, orders of release on habeas corpus petitions on grounds on which validity of criminal trials would certainly not be affected.

231. In Prabhu Dayal Deodher v. District Magistrate, Kamrup (AIR 1974 SC 183 : (1974) 1 SCC 103 : 1974 SCC (Cri) 18), I ventured, with great respect, in my minority opinion, to suggest that the objects of the Act may be frustrated if courts interfere even before the machinery of redress under the Act through Advisory Boards, where questions relating to vagueness or irrelevance or even sufficiency of grounds could be more effectively thrashed out than in proceedings under Article 32 or 226 of the Constitution, had been allowed to complete its full course of operation. In some cases, facts were investigated on exchange of affidavits only so as to arrive at a conclusion that some of the facts, upon which detention orders were passed, did not exist at all. In other cases, it was held that even if a single non-existent or vague ground crept into the grounds for detention, the detention order itself was vitiated as it indicated either the effects of extraneous matter or carelessness or non-application of mind in making the order. Courts could not separate what has been improperly considered from what was properly taken into account. Hence detentions were held to be vitiated by such defects. In some cases, the fact that some matter too remote in time from the detention order was taken into consideration, in ordering the detention, was held to be enough to invalidate the detention. Thus, grounds supplied always operated as an objective test for determining the question whether a nexus could reasonably exist between the grounds, given and the detention order or whether some infirmities had crept in. The reasonableness of the detention became the justiciable issue really decided. With great respect, I doubt whether this could be said to be the object of preventive detention provisions authorised by the Constitution and embodied in the Act. In any case, it was the satisfaction of the court by an application of a kind of objective test more stringently than the principle of criminal procedure, that a defective charge could be amended and would not vitiate a trial without proof of incurable prejudice to the accused, which became, for all practical purposes, the test of the correctness of detention orders.

232. I have ventured to indicate the background which seems to me to have probably necessitated certain amendments in the Act in addition to the reasons which led to the proclamation of emergency, the effects of which are considered a little later below. We are not concerned here with the wisdom of the policy underlying the amendments. It is, however, necessary to understand the mischief aimed at so as to be able to correctly determine the meaning of the changes made.

233. The Central Act 39 of 1975 which actually came into effect after the emergency added Section 16A to the Act, two sub-sections of which have been the subject-matter of arguments before us. They read as follows :

> (2) The case of every person (including a foreigner) against whom an order of detention was made under this Act on or after the 25th day of June, 1975, but before the commencement of this section, shall, unless such person is sooner released from detention, be viewed within fifteen days from such commencement by the

appropriate Government for the purpose of determining whether the detention of such person under this Act is necessary for dealing effectively with the emergency in respect of which the Proclamations referred to in sub-section (1) have been issued (hereafter in this section referred to as the emergency) and if, on such review, the appropriate Government is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government may make a declaration to that effect and communicate a copy of the declaration to the person concerned.

(3) When making an order of detention under this act against any person (including a foreigner) after the commencement of this section, the Central Government or the State Government or, as the case may be, the officer making the order of detention shall consider whether the detention of such person under this Act is necessary for dealing effectively with the emergency and if, on such consideration, the Central Government or the State Government or, as the case may be, the officer is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government or officer may make a declaration to that effect and communicate a copy of the declaration to the person concerned :

Provided that where such declaration in made by an officer, it shall be reviewed by the State Government to which such officer is subordinate within fifteen days from the date of making of the declaration and such declaration shall cease to have effect unless it is confirmed by the State Government, after such review, within the said period of fifteen days.

234. Act No. 14 of 1976, which received the Presidential assent on January 25, 1976, added Section 16A(9) which runs as follows :

16A. (9) Notwithstanding anything contained in any other law or any rule having the force of law, -

(a) the grounds on which an order of detention is made or purported to be made under Section 3 against any person in respect of whom a declaration is made under sub-section (2) or sub-section (3) and any information or materials on which such grounds or a declaration under sub-section (2) or a declaration or confirmation under sub-section (3) or the non-revocation under sub-section (4) of a declaration are based, shall be treated as confidential and shall be deemed to refer to matters of State and to be against the public interest to disclose and save as otherwise provided in this Act, no one shall communicate or disclose any such ground, information or material or any document containing such ground, information or material;

(b) no person against whom an order of detention is made or purported to be made under Section 3 shall be entitled to the communication or disclosure of any such ground, information or material as is referred to in clause (a) or the production to him of any document containing such ground, information or material.

This section and Section 18 of the act are the only provisions whose validity is challenged before us.

235. It appears to me that the object of the above mentioned amendments was to affect the manner in which jurisdiction of courts in considering claims for reliefs by detenus on petitions for writs of

habeas corpus was being exercised so that the only available means that had been developed for such cases by the courts, that is to say, the scrutiny of grounds supplied under Section 8 of the Act, may be removed from the judicial armour for the duration of the emergency. It may be mentioned here that Article 22(5) and 22(6) of the Constitution provided as follows :

> 22. (5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.
>
> 22. (6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

236. The first contention, that Section 16A(9) affects the jurisdiction of High Courts under Article 226, which an order under Article 359(1) could not do, appears to me to be untenable. I am unable to see how a Presidential Order which prevents a claim for the enforcement of a fundamental right from being advanced in a court, during the existence of an emergency, could possibly be said not to be intended to affect the exercise of jurisdiction of courts at all.

237. The second argument, that Section 16A(9) amounts to a general legislative declaration in place of judicial decisions which courts had themselves to give after considering, on the facts of each case, whether Article 22(6) could be applied, also does not seem to me to be acceptable. The result of Section 16A(9), if valid, would be to leave the presumption of correctness of an order under Section 3 of the Act, good on the face of it, untouched by any investigation relating to its correctness. Now, if this be the object and effect of the amendment, it could not be said to go beyond making it impossible for detenus to rebut a presumption of legality and validity which an order under Section 3 of the Act, if prima facie good, would raise in any event. The same result could have been achieved by enacting that a detention order under Section 3, prima facie good, will operate as "conclusive proof" that the requirements of Section 3 have been fulfilled. But, as the giving of grounds is not entirely dispensed with under the Act even as it now exists, this may have left the question in doubt whether courts call upon the detaining authorities to produce the grounds. Enactment of a rule of conclusive proof is a well established form of enactments determining substantive rights in the form of procedural provisions.

238. In any case, so far as the rights of a detenu to obtain relief are hampered, the question raised touches the enforcement of the fundamental right to personal freedom. Its effect upon the powers of the court under Article 226 is, as I have already indicated, covered by the language of Article 359(1) of the Constitution. It is not necessary for me to consider the validity of such a provision if it was to be applied at a time not covered by the emergency, or whether it should be read down for the purposes of a suit for damages where the issue is whether the detention was ordered by a particular officer out of "malice in fact" and for reasons completely outside the purview of the Act itself. That sort of inquiry is not open, during the emergency, in proceedings under Article 226.

239. On the view I take for reasons which will be still clearer after a consideration of the remaining questions discussed below, I think that, even the issue that the detention order is vitiated by "malice in fact" will not be justiciable in habeas corpus proceedings during the emergency although it may be in an ordinary suit which is not filed for enforcing a fundamental right but for other reliefs. The

question of bona fides seems to be left open for decision by such suits on the language of Section 16 of the act itself which says :

> 16. No suit or other legal proceedings shall lie against the Central Government of a State Government, and no suit, prosecution or other legal proceedings shall lie against any person, for anything in good faith done or intended to be done in pursuance of this Act.

240. Section 16 of the Act seems to leave open a remedy by way of suit for damages for wrongful imprisonment in a possible case of what may be "malice in fact". In the cases before us, we are only concerned with habeas corpus proceedings under Article 226 of the Constitution where, in my opinion, malice in fact could not be investigated as it is bound to be an allegation subsidiary to a claim for the enforcement of a right to personal liberty, a fundamental right which cannot be enforced during the emergency.

241. In Mohan Chowdhury v. Chief Commissioner, Union Territory of Tripura ((1964) 3 SCR 442, 450 : AIR 1964 SC 173 : (1964) 1 Cri LJ 132), a Constitution Bench of this Court, after pointing out that Article 32(4) contemplated a suspension of the guaranteed right only as provided by the Constitution, said (at pp. 450-451) :

> The order of the President dated November 3, 1962, already set out, in terms, suspends the right of any person to move any court for the enforcement of the rights conferred by Articles 21 and 22 of the Constitution, during the period of emergency. Prima facie, therefore the petitioner's right to move this Court for a writ of habeas corpus, as he agency. But even then it has been contended on behalf of the petitioner that Article 359 does not authorise the suspension of the exercise of the right guaranteed under Article 32 of the Constitution, and that, a in terms, the operation of Article 32 has not been suspended by the President. This contention is wholly unfounded. Unquestionably, the court's power to issue a writ in the nature of habeas corpus has not been touched by the President's Order, but the petitioner's right to move this Court for a writ of that kind been suspended by the Order of the President passed under Article 359(1). The President's Order does not suspend all the rights vested in a citizen to move this Court but only his right to enforce the provisions of Articles 21 and 22. Thus, a result of the President's Order aforesaid, the petitioner' right to move this court, but not this Court's power under Article 32, has been suspended during the operation of the emergency, with the result that the petitioner has no locus standi to enforce his right, if any, during the emergency.

242. It is true that the Presidential Order of 1975, like the Presidential Order of 1962, does not suspend the general power of this Court under Article 32 or the general powers of High Courts under Article 226, but the effect of taking away enforceability of the right of a detenu to personal freedom against executive authorities is to affect the locus standi in cases which are meant to be covered by the Presidential Order. Courts, even in habeas corpus proceedings, do not grant relief independently of rights of the person deprived of liberty. If the locus standi of detenu is suspended no one can claim, on his behalf, to get his right enforced. The result is to affect the powers of courts, even if this be an indirect result confined to a class of cases, but, as the general power to issue writs of habeas corpus is not suspended, this feature was, quite rightly, I respectfully think, pointed out by this Court in Mohan Chowdhury's case. It would not be correct to go further and read more into the passage cited above than seems intended to have been laid down there. The passage seems to me to

indicate quite explicitly, as the language of Article 359(1) itself shows, that the detenu's right to move the courts for the enforcement of his right to personal freedom, by proving an illegal deprivation of it by executive authorities of the State, is certainly not there for the duration of the emergency. And, to the extent that courts do not, and, indeed, cannot reasonably, act without giving the detenu some kind of a right or locus standi, their power to proceed with a habeas petition against executive authorities of the State is itself impaired. It may be that, in form and even in substance, a general power to issue writs of habeas corpus remains with courts. But that could only be invoked in cases falling entirely outside the purview of the Presidential Order and Article 359(1). That is how I, with great respect, understand the effect of Mohan Chowdhury's case.

243. It is possible that, if a case so patently gross and clear of a detention falling, on the face of the order of detention or the return made to a notice from the court, outside the provisions of the Act on the ground of personal malice of the detaining authority, or, some other ground utterly outside the Act, arises so that no further investigation is called for, it may be possible to contend that it is not protected by the Presidential Order of June 27, 1975, and by the provisions of Article 359(1) of the Constitution at all. If that could be patent, without any real investigation or inquiry at all, it may stand on the same footing as an illegal detention by a private individual. The mere presence of an official seal or signature on a detention order, in such a purely hypothetical case, may not be enough to convert it into a detention by the State or its agents or officers. That is the almost utterly inconceivable situation or type of case which could still be covered by the general power to issue writs of habeas corpus. There may, for example, be a case of a fabricated order of detention which, the alleged detaining officer, on receipt of notice, disclaims. It is admitted that Part III of the Constitution is only meant to protect citizens against illegal actions of organs of the State and not against wrongs done by individuals. The remedy by way of a writ of habeas corpus is more general. It lies even against illegal detentions by private persons although not under Article 32 which is confined to enforcement of fundamental rights (Vide : Shrimati Vidya Verma, through next friend R. V. S. Mani v. Dr. Shiv Narain Verma ((1955) 2 SCR 983 : AIR 1956 SC 108 : 1956 Cri LJ 283)). The attorney General also concedes that judicial proceedings for trial of accused persons would fall outside the interdict of the Presidential Order under Article 359(1). Therefore, it is unnecessary to consider hypothetical cases of illegal convictions where remedies under the ordinary law are not suspended.

244. Now, is it at all reasonably conceivable that a detention order would, on the face of it, state that it is not for one of the purposes for which it can be made under the Act or that it is made due to personal malice or animus of the officer making it ? Can we, for a moment, believe that a return made on behalf of the State, instead of adopting a detention order, made by an officer duly authorised to act, even if there be a technical flaw in it, admit that it falls outside the Act or was made mala fide and yet the State is keeping the petitioner in detention ? Can one reasonably conceive of a case in which, on a habeas corpus petition, a bare look at the detention order or on the return made, the Court could hold that the detention by a duly authorised officer, under a duly authenticated order, stands on the same footing as a detention by a private person ? I would not like to consider purely hypothetical, possibly even fantastically imaginary, cases lest we are asked to act, as we have practically been asked to, on the assumption that reality is stranger than fiction, and that because, according to the practice of determining validity of detention orders by the contents of grounds served, a number of detentions were found, in the past, to be vitiated, we should not presume that executive officers will act according to law.

245. Courts must presume that executive authorities are acting in conformity with both the spirit and the substance of the law : "Omnia praesumuntur rite ease acts", which means that all official acts are

presumed to have been rightly and regularly done. If the burden to displace that presumption is upon the detenu, he cannot, on a habeas corpus petition under Article 226 of the Constitution, ask the court to embark upon an inquiry, during the emergency, to allow him to rebut this presumption. To do so would, in my opinion, be plainly to countenance a violation of the Constitution.

246. A great deal of reliance was placed on behalf of the detenus, on the principles stated by the Privy Council in Eshugbayi Eleko v. Officer administering the Government of Nigeria (1931 AC 662, 670), where Lord Atkin said (at p. 670) :

> Their Lordships are satisfied that the opinion which has prevailed that the courts cannot investigate the whole of the necessary conditions is erroneous. The Governor acting under the ordinance acts solely under executive powers, and in no sense as a court. As the Executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the Executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the Executive. The analogy of the powers of the English Home Secretary to deport aliens was invoked in this case. The analogy seems very close. Their Lordships entertain no doubt that under the legislation in alien, the subject would have the right to question the validity of any detention under such order by proceedings in habeas corpus, and that it would be the duty of the courts to investigate the issue of alien or not.

247. The salutary general principle, enunciated above, is available, no doubt, to citizens of this country as well in normal times. But, it was certainly not meant to so operate as to make the Executive answerable for all its actions to the Judicature despite the special provisions for preventive detention in an Act intended to safeguard the security of the nation, and, much less, during an emergency, when the right to move courts for enforcing fundamental rights is itself suspended. Principles applicable when provisions, such as those which the Act contains, and a suspension of the right to move courts for fundamental rights, during an emergency, are operative, were thus indicated, in Liversidge v. Sir. John Anderson (1942 AC 206, 217, 219, 273), by Viscount Maugham (at. p. 219) :

> There can plainly be no presumption applicable to a regulation made under this extraordinary power that the liberty of the person in question will not be interfered with, and equally no presumption that the detention must not be made to depend (as the terms of the act indeed suggest) on the unchallengeable opinion of the secretary of state.

Following the ratio decidendi of Rex v. Secretary of State for Home Affairs, exparte Lees ((1941) 1 KB 72), the learned Law Lord said (at p. 217) :

> As I understand the judgment in the Lees case it negatived the idea that the court had any power to inquire into the grounds for the belief of the Secretary of State (his good faith not being impugned) or to consider whether there were grounds on which he could reasonably arrive at his belief.

In Liversidge's case, the court's power to inquire into the correctness of the belief of the Secretary of

State was itself held to be barred merely by the terms of a regulation made under a statute without even a constitutional suspension of the right to move courts such as the one we have before us.

248. In Liversidge's case Lord Wright explained Eshugbayi Eleko's case, cited before their Lordships, as follows (at p. 273) :

> The other matter for comment is the decision in Eshugbayi Eleko v. Officer Administering the Government of Nigeria where the government claimed to exercise certain powers, including deportation, against the appellant. The appellant applied for a writ of habeas corpus, on the ground that the ordinance relief on gave by express terms the powers it contained only against one who was a native chief, and who had been deposed, and where there was a native custom requiring him to leave the area, whereas actually not one of these facts was present in the case. It was held in effect that the powers given by the ordinance were limited to a case in which these facts existed. It was a question of the extent of the authority given by the ordinance. That depended on specific facts, capable of proof or disproof in a court of law, and unless these facts existed, there was no room for executive discretion. This authority has, in my opinion, no bearing in the present case, as I construe the powers and duties given by the regulation. There are also obvious differences between the ordinary administrative ordinance there in question and an emergency power created to meet the necessities of the war and limited in its operation to the period of the war. The powers cease with the emergency. But that period still continues and, it being assumed that the onus is on the respondents in this action of unlawful imprisonment, the onus is sufficiently discharged, in my opinion, by the fact of the order having been made by a competent authority within the ambit of the powers entrusted to him and being regular on its face.

249. Viscount Maugham, in Greene v. Secretary of State for Home Affairs (1942 AC 284,293), after referring to a very comprehensive opinion of Wilmot, C.J. on the nature of habeas corpus proceedings in common law, pointed out that a return, good on its face and with no affidavit in support of it, could not be disputed on the application for a writ. At common law, the "sacred" character of the return, as Wilmot, C.J. called it, even without a supporting affidavit, "could not be touched except by the consent of the parties", because the whole object of the writ was to enquire into the existence of a legally recognised cause of detention, in a summary fashion, and not into the truth of facts constituting the cause. By the Habeas Corpus Act of 1816, the powers of courts were extended so that it became possible to go behind the return in suitable cases other than those where a person was confined for certain excepted matters including criminal charges. In these excepted matters the return was an is still conclusive, so that English courts do not go behind them. In Greene's case, the rule of presumptive correctness of the return was applied to the return made on behalf of the Secretary of State to the extent of treating it as practically conclusive. It was held that the mere production of the Home secretary's order, the authenticity and good faith of which were not impugned, constituted a complete answer to an application for a writ of habeas corpus and that it was not necessary for the Home Secretary to file an affidavit. It is interesting to note that, in that case, which arose during the emergency following the war of 1939, the failure of the Advisory Committee to supply the correct reasons for his detention to the petitioner were not held to be sufficient to invalidate his incarceration. On the other hand, in this country, a violation of the obligation to supply grounds of detention has been consistently held to be sufficient to invalidate a detention before the changes in the Act and the Presidential Order of 1975.

250. By Section 7 of the Act 39 of 1975, Section 18 was added to the Act with effect from June 25, 1975. This provision reads :

> 18. No person (including a foreigner) detained under this Act shall have any right to personal liberty by virtue of natural law or common law, if any.

In view of what I have pointed out earlier, this provision was not necessary. It appears to have been added by way of abundant caution.

251. By Section 5 of the Amendment Act 14 of 1976 another amendment was made in Section 18, substituting, for the words "under this Act" used in Section 18, the words "in respect of whom an order is made of purported to have been made under Section 3", retrospectively from June 25, 1975.

252. These amendments are covered by Article 359(1A) of the Constitution, so that their validity is unassailable during the emergency on the ground of violation of any right conferred by Part III of the Constitution. Nevertheless, the validity of Section 18 of the Act, as it stands, was challenged on the ground, as I understand it, that, what is described as "the basic structure" of the Constitution was violated because, it was submitted, the rule of law, which is a apart of the "basic structure" was infringed by the amended provisions. As I have indicated below, I am unable to subscribe to the view that the theory of basic structure amounts to anything more than a mode of interpreting the Constitution. It cannot imply new tests outside the Constitution or be used to defeat constitutional provisions. I am unable to see any force in the attack on the validity of Section 18 of the Act on this ground.

253. The result of the amendments of the Act, together with the emergency provisions and the Presidential Order of June 27, 1975, in my opinion, is clearly that the jurisdiction of High Court is itself affected and they cannot go beyond looking at the prima facie validity of the return made. The production of a duly authenticated order, purporting to have been made by an officer competent to make it under Section 3 of the Act, is an absolute bar to proceeding further with the hearing of a habeas corpus petition.

D. THE PURPOSE AND MEANING OF EMERGENCY PROVISIONS, PARTICULARLY ARTICLE 359 OF OUR CONSTITUTION.

254. From the inception of our Constitution, it was evident that the framers of it meant to establish a secular democratic system of Government with certain objectives before it without which real democracy is a mirage. Hence, they provided us not only with an inspiring preamble to the Constitution and basic fundamental rights to citizens, but also with directive principles of State policy so as to indicate how not only a political, but, what is more important, social and economic democracy, with maximum practicable equality of status and opportunity, could be attained. They foresaw that it may be necessary, for preserving the system thus set up and for ensuring a rapid enough march towards the objectives placed before the people of India, to give the executive branch of government wide powers, in exceptional situations, so that it may deal with all kinds of emergencies effectively, and, thereby, safeguard the foundations of good government which lie in discipline and orderliness combined with speedy and substantial justice. The late Prime Minister Jawaharlal Nehru once said :

> You may define democracy in a hundred ways, but surely one of its definitions is self-discipline of the community. The more the self-discipline, the less the imposed

discipline.

255. Laws and law courts are only a part of a system of that imposed discipline which has to take its course when self-discipline fails. Conditions may supervene, in the life of a nation, in which the basic values we have stood for and struggled to attain, the security, integrity, and independence of the country, or the very conditions on which existence of law and order and of law courts depend, may be imperilled by forces operating from within or from outside the country. What these forces are, how they are operating, what information exists for the involvement of various individuals, wherever placed, could not possibly be disclosed publicly or become matters suitable for inquiry into or discussion in a court of law.

256. In Liversidge v. John Anderson the following passages from Rex v. Halliday (1917 AC 260, 269, 271), were cited by Lord Romer to justify principles adopted by four out of five of their Lordships in Liversidge's case in their judgments (1) per Lord Atkins (at p. 271) :

> However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or ensalvement.
>
> (2) per Lord Finlay, L.C. (at p. 269) :
>
> It seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a court of law.

After citing the two passages quoted above, Lord Romer observed in Liversidge's case (at p. 281) :

> I respectfully agree. I cannot believe that the legislature or the framers of the regulation ever intended to constitute the courts of this country the ultimate judges of the matters in question.

257. If, as indicated above, the opinion of the overwhelming majority of the Law Lords of England, in Liversidge's case, following the principles laid down earlier also in Rex v. Halliday exparte Zadig was that the jurisdiction of courts is itself ousted by a statutory rule vesting the power of detention on a subjective satisfaction, based possibly on nothing more than a detenu's descent from or relationship with nationals of a country with which England may be at war, and that the Secretary of State's order indicating that he was satisfied about one of these matters, on hearsay information which could not be divulged in courts in the interests of national safety and security, was enough, I do not think that either our Constitution in contemplating an ouster of jurisdiction of courts in such cases, or our Parliament, in enacting provisions which have that effect, was going beyond the limits of recognised democratic principles as they operate during emergencies. In fact, decisions on what restraints should be put and on which persons, during a national emergency, in the interests of national security, are matters of policy, as explained below, which are outside the sphere of judicial determination.

258. Situations of a kind which could not even be thought of in England are not beyond the range of possibility in Asian and African countries or even in continental Europe or in America judging from events of our own times. Indeed, we too have had our fill of grim tragedies, including the assassination of the father of the nation, which could rock the whole nation and propel it towards the brink of an unfathomable abyss and the irreparable disaster which anarchy involves.

259. Let me glance at the constitutional history of England from where we took the writ of habeas corpus.

260. Sir. Erskine May wrote (see : Constitutional History of England, Chapter XI) :

The writ of habeas corpus is unquestionably the first security of civil liberty. It brings to light the cause of every imprisonment, approves its lawfulness, or liberates the prisoner. It exacts obedience from the highest courts : Parliament itself submits to its authority. No right is more justly valued. It protects the subject from unfounded suspicious, from the aggressions of power, and from abuses in the administration of justice. Yet, this protective law, which gives every man security and confidence, in times of tranquillity, has been suspended, again and again, in periods of public danger or apprehension. Rarely, however, has this been suffered without jealousy, hesitation, and remonstrance, and whenever the perils of the State have been held sufficient to warrant this sacrifice of personal liberty, no minister or magistrate has been suffered to tamper with the law at his discretion. Parliament alone, convinced of the exigency of each occasion, has suspended, for a time, the right of individuals, in the interests of the State.

The first years after the Revolution were full of danger. A dethroned king, aided by foreign enemies, and a powerful body of English adherents, was threatening the new settlement of the Crown with war and treason. Hence, the liberties of Englishmen, so recently assured, were several times made to yield to the exigencies of the State. Again, on occasions of no less peril-the rebellion of 1715, the Jacobite conspiracy of 1722, and the invasion of the realm by the Pretender in 1745-the Habeas Corpus Act was suspended. Henceforth, for nearly half a century the law remained inviolate. During the American War, indeed, it had been necessary to empower the king to secure persons suspected of high treason, committed in North America, or on the high seas, or of the crime of piracy; but it was not until 1794 that the civil liberties of Englishmen at home were again to be suspended. The dangers and alarms of that dark period have already been recounted. Ministers, believing the state to be threatened by traitorous conspiracies, once more sought power to countermine treason by powers beyond the law.

Relying upon the report of a secret committee, Mr. Pitt moved for a bill to empower his Majesty to secure and detain persons suspected of conspiring against his person and Government. He justified this measure on the ground that whatever the temporary danger of placing such power in the hands of the Government, it was far less than the danger with which the Constitution and society were threatened. If ministers abused the power entrusted to them, they would be responsible for its abuse. It was vigorously opposed by Mr. Fox, Mr. Grey, Mr. Sheridan, and a small body of adherents. They denied the disaffection imputed to the people, ridiculed the revelations of the committee, and declared that no such dangers threatened the State as would justify the surrender of the chief safeguard of personal freedom. This measure would give ministers absolute power over every individual in the kingdom. It would empower them to arrest, on suspicion, any man whose opinions were obnoxious to them - the advocates of reform, even the members of the Parliamentary Opposition. Who would be safe, when conspiracies were everywhere suspected, and constitutional objects and language believed to be the mere cloak of sedition ? Let every man charged with treason be brought to justice; in the words of Sheridan, 'where there was guilt, let the broad axe fall, but whey surrender the liberties of the innocent ? '

The strongest opponents of the measure, while denying its present necessity, admitted that when danger is imminent, the liberty of the subject must be sacrificed to the paramount interests of the State. Ringleaders must be seized, outrages anticipated, plots disconcerted, and the dark haunts of

conspiracy filled with distrust and terror. And terrible indeed was the power now entrusted to the Executive. Though termed a suspension of the Habeas Corpus Act, it was, in truth, a suspension of Magna Carta, and of the cardinal principles of the common law. Every man had hitherto been free from imprisonment until charged with crime, by information upon oath, and entitled to a speedy trial and the judgment of his peers. But any subject could now be arrested in suspicion of treasonable practices, without specific charge or proof of guilt; his accusers were unknown, and in vain might he demand public accusation and trial. Spies and treacherous accomplices, however circumstantial in their narratives to Secretaries of State and law officers, shrank from the witness-box, and their victims rotted in goal. Whatever the judgment, temper, and good faith of the Executive, such a power was arbitrary, and could scarcely fail to be abused. Whatever the danger by which it was justified, never did the subject so much need the protection of the laws, as when Government and society were filled with suspicion and alarm.

261. It was not until 1801 that the Act was considered "no longer defensible on grounds of public danger" and Lord Thurlow announced that he could "not resister the impulse to deem men innocent until tried and convicted". It was urged in defence of a Bill indemnifying all those who may have misused or exceeded their powers during the period of suspension of the habeas corpus in England that unless it was passed, "those channels of information would be stopped, on which Government relied for guarding the public peace". Hence, a curtain was drawn to shield all whose acts could have been characterised as abuse or excess of power.

262. It is unnecessary to cite from Dicey or modern writers of British Constitutional Law, such as M/s. Wade and Phillips, to show how, in times of emergency, the ordinary functions of courts, and, in particular, powers of issuing writs of habeas corpus, have been curtailed. In such periods, legislative measures known as "suspension of the Habeas Corpus Act", followed by Acts of Indemnity, after periods of emergency are over, have been resorted to in England. But, during the first world war of 1914 and the last world war of 1939, it was not even necessary to suspend the Habeas Corpus Act in England. The courts themselves, on an interpretation of the relevant regulations under the Defence of Realm Act, abstained from judicial interference by denying themselves power to interfere.

263. In Halsbury's Laws of England (4th Edn. Vol. 8, para 871, page 624), we find the following statement about the Crown's common law prerogative power in an emergency :

> The Crown has the same power as a private individual of taking all measures which are absolutely and immediately necessary for the purpose of dealing with an invasion or other emergency. And as regards statutory powers of the Crown (see : Emergency Powers Act, 1920, section 1 : Emergency Powers Act, 1964, Section 1), we find (see para 984, page 627) :

If it appears to Her Majesty that events of a specified nature have occurred or are about to occur, Her Majesty may by proclamation declare that a state of emergency exists. These events are those of such a nature as to be calculated, by interfering with the supply and distribution of food, water, fuel or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life. No other proclamation at or before the end of that period.

* * * * * *##

Where a proclamation of emergency has been made, and so long as it remains in force the Crown

has power by order in council to make regulations for securing the essentials of life to the community.

264. In America also, the suspension of the right to writ of habeas corpus, during emergencies so as to temporarily remove the regular processes of law, is permissible by legislation (see : "Cooley's Constitutional Law", 4th Edn., Chapter 34 p. 360), but it is limited by (Article 1, Section 9, clause 2) the American Constitution to situations in which there may be a rebellion or an invasion (see : will is on "Constitutional Law of United States", 1936 Ed., p. 441 and p. 570). Even more drastic consequences flow from what is known in France as declaration of a "state of siege", and, in other countries, as a "suspension of constitutional guarantees".

265. Under our Constitution, it will be seen, from an analysis of emergency provisions, that there is no distinction between the effects of a declaration of emergency, under Article 352(1), whether the threat to the security of the state is from internal or external sources. Unlike some other countries, powers of Presidential declarations under Articles 352(1) and 359(1) of our Constitution are immune from challenge in courts even when the emergency is over.

266. Another noticeable feature of our Constitution is that, whereas the consequences given in Article 358, as a result of a proclamation under Article 352(1) are automatic, Presidential Orders under Article 359(1) may have differing consequences from emergency to emergency, depending upon the terms of the Presidential Orders involved. And the, Article 359(1A), made operative retrospectively by the Thirty-eighth Constitutional Amendment, of August 1, 1975, makes it clear that both the legislative and executive organs of the State, are freed for the duration of the emergency, from the limits imposed by Part III of the Constitution.

267. It is unnecessary to refer to the provisions of Articles 356 and 357 except to illustrate the extremely wide character of emergency powers of the Union Government which can, by recourse to these powers, made immune from judicial review, suspend the federal features of our Constitution which have, sometimes, been elevated to the basic level. These provisions enable the Union Government to supersede both the legislative and executive wings of Government in a State in the event of a failure of constitutional machinery in that State, and to administer it through any person or body of persons under Presidential directions with powers of the State Legislature "exercisable by or under the authority of Parliament". Article 360, applicable only to proclamations of financial emergencies, with their special consequences, indicates the very comprehensive character of the emergency provisions contained in Part XVIII of our Constitution. We are really directly concerned only with Articles 352 and 353 and 358 and 359 as they now stand. They are reproduced below :

> 352. (1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect.
>
> (2) A Proclamation issued under clause (1) -
>
> (a) may be revoked by a subsequent Proclamation;
>
> (b) shall be laid before each House of Parliament;
>
> (c) shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolution of both Houses of Parliament :

Provided that if any such Proclamation is issued at a time when the House of the People has been dissolved or the dissolution of the House of the People takes place during the period of two months referred to in sub-clause (c), and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(3) A Proclamation of Emergency declaring that the security of India or of any part of the territory thereof is threatened by war or by external aggression or by internal disturbance may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

(4) The power conferred on the President by this Article shall include the power to issue different Proclamations on different grounds, being war or external aggression or internal disturbance or imminent danger of war or external aggression or internal disturbance, whether or not there is a Proclamation already issued by the President under clause (1) and such Proclamation is in operation.

(5) Notwithstanding anything in this Constitution -

(a) the satisfaction of the President mentioned in clause (1) and clause (3) shall be final and conclusive and shall not be questioned in any court on any ground;

(b) subject top the provisions of clause (2), neither the Supreme Court nor any other court shall have jurisdiction to entertain any question, on any ground, regarding the validity of -

(i) a declaration made by Proclamation by the President to the effect stated in clause (1); or

(ii) the continued operation of such proclamation.

353. While a Proclamation of Emergency is in operation, then -

(a) notwithstanding anything in this Constitution, the executive power of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised;

(b) the power of Parliament to make laws with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or Officers and authorities of the Union as respects that matter, notwithstanding that it is one which is not enumerated in the Union List.

358. While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in part II to make any law or to take any executive action which the State would for the provisions contained in that Part be competent to make or to take, but any law

so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

359. (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by part III as may be mentioned in the order and all proceeding pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

> (1A) While an order made under clause (1) mentioning any of the rights conferred by Part III is in operation, nothing in that Part conferring those rights shall restrict the power of the State as defined in the said Part to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.
>
> (2) An order made as aforesaid may extend to the whole or any part of the territory of India.
>
> (3) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

268. Before dealing with relevant authorities on the meaning and effects of Articles 358 and 359 of the Constitution, I will indicate the special features and context of the Presidential Order of June 27, 1975, as compared with the Presidential Order of November 3, 1962, which was the subject-matter of earlier pronouncements of this Court on which considerable reliance has been placed on behalf of the detenus. In fact, the next two topics are so connected with the emergency provisions that there is bound to be a good deal of overlapping between what I have, for the sake of convenience only, tried to discuss under three heads. Different heads or names are not infrequently used only to indicate different aspects of what is really one connected subject-matter. Perhaps the last and concluding topic is wide enough to cover the scope of the whole discussion.

> E. THE EFFECT OF THE PRESIDENTIAL ORDERS AND PARTICULARLY THE ORDER OF JUNE 27, 1975, ON THE RIGHTS OF DETENUS.

269. The Presidential Order of November 3, 1962 was issued after the proclamation of emergency under Article 352(1) on October 26, 1962. That proclamation said :

> . . . . . a grave emergency exists whereby the security of India is threatened by external aggression.

On the other hand, the Presidential Order of June 27, 1975, with which we are concerned here was issued under a proclamation which declares "that a grave emergency exists whereby the security of India is threatened by internal disturbances".

270. There was also a Presidential proclamation of December 3, 1971, repeating the terms of the proclamation of October 26, 1962, as under :

> In exercise of the powers conferred by clause (1) of Article 352 of the Constitution, I, V. V. Giri, President of India, by this Proclamation declare that a grave emergency exists whereby the security of India is threatened by external aggression.

271. The Presidential Order of November 3, 1962, reads as follows :

> In exercise of the powers conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that the right of any person to move any court for the enforcement of the rights conferred by Article 21 and Article 22 of the Constitution shall remain suspended for the period during which the Proclamation of emergency issued under clause (1) of Article 352 thereof on the 26th October, 1962, is in force, if such person has been deprived of any such right under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder.

272. The Presidential Order of June 27, 1975, runs as follows :

> In exercise of the powers conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution and all proceedings pending in any court for the enforcement of the abovementioned rights shall remain suspended for the period during which the Proclamations of Emergency made under clause (1) of Article 352 of the Constitution on the 3rd December, 1971 and on the 25th June, 1975 are both in force.
>
> (2) This Order shall extend to the whole of the territory of India except the State of Jammu and Kashmir.
>
> (3) This Order shall be addition to and not in derogation of any order made before the date of this Order under clause (1) of Article 359 of the Constitution.

273. The striking differences in the terms of the two Presidential Orders set out above are :

> (1) The Presidential Order of 1962 did not specify Article 14 of the Constitution, but Article 14, guaranteeing equality before the law and equal protection of law to all persons in India, is mentioned in the 1975 order. To my mind, this does make some difference between the intentions behind and effects of the two Presidential Orders.
>
> (2) The Presidential Order of 1962 expressly hedges the suspension of specified fundamental rights with the condition, with regard to deprivations covered by Article 21 and 22 of the Constitution that, "if such person is deprived of such right under the Defence of India Act, 1962, or any rules or order made thereunder". In other words, on the terms of the 1962 Presidential Order, the courts were under a duty to see whether a deprivation satisfies these conditions or not. They could adjudicate upon the question whether a detention was under the Act or a rule made thereunder. On the other hand, the Presidential Order of 1975 unconditionally suspends the enforcement of the rights conferred upon "any person including a foreigner" to move any court for the enforcement of the rights conferred by Articles 14, 21 and 22 of the Constitution. The courts are, therefore, no longer obliged or able to test the validity of a detention by examining whether they conform to statutory requirements. They will have to be

content with compliance shown with forms of the law.

(3) Presidential Order of 1962 makes no mention of pending proceedings, by the 1975 order suspends all pending proceedings for the enforcement of the rights mentioned therein. This further clarifies and emphasizes that the intention behind the Presidential Order of 1975 was to actually affect the jurisdiction of courts in which proceedings were actually pending. The inference from this feature also is that all similar proceedings in future will, similarly, be affected.

274. The result is that I think that there can be no doubt whatsoever that the Presidential Order of June 27, 1975, was a part of an unmistakably expressed intention to suspend the ordinary processes of law in these cases where persons complain of infringement of their fundamental rights by the executive authorities of the State. The intention of the Parliament itself to bring about this result, so that the jurisdiction of courts under Article 226, in this particular type of cases, is itself affected for the duration of the emergency, seems clear enough from the provisions of Section 16A(9) of the Act, introduced by Act No. 14 of 1976, which received Presidential assent on January 25, 1976, making Section 16A(9) operative retrospectively from June 25, 1975.

275. The question before us is : What is the intention behind the Presidential Order of June 27, 1975 ? After assigning a correct meaning to it, we have to determine whether what was meant to be done lay within the scope of powers vested by Article 359 of the Constitution in the President. There is no doubt in my mind that the object of the Presidential Order of June 27, 1975, by suspending the enforcement of the specified rights, was to affect the powers of courts to afford relief to those the enforcement of whose rights was suspended. As I have already indicated, this was within the purview of Article 359(1) of the Constitution. Hence, the objection that the powers of the court under Article 226 may indirectly be affected is no answer to the direct suspension of rights which was bound to have its effect upon the manner in which jurisdiction is or could reasonably be exercised even if that jurisdiction cannot be itself suspended for all types of cases. It is enough if the ambit of the power to suspend under Article 359(1) is such as to make exercise of the jurisdiction to protect guaranteed fundamental rights not reasonably possible.

276. Section 16A(9) also appears to me, as held by My Lord the Chief Justice, to make it impossible for courts to investigate questions relating to the existence or absence of bona fides at least in proceedings under Article 226 of the Constitution. It is clear that the validity of Section 16A(9) cannot be challenged on the ground of any violation of Part III of the Constitution in view of the provisions of Article 359(1A).

277. No previous decision of this Court deals with a situation which results from the combined effect of a Presidential Order couched in the language of the order of June 27, 1975, and a statutory provision, such as Section 16A(9) of the Act, the validity of which cannot be challenged. Hence, strictly speaking earlier decisions are not applicable. I will, however, consider them under the next heading as considerable argument has taken place before us on the assumption that these cases do apply to such a situation.

F. THE RULE OF LAW AS FOUND IN OUR CONSTITUTION, AND HOW IT OPERATES DURING THE EMERGENCY.

278. As I have indicated earlier in this judgment, the term rule of law is not a magic wand which can be waved to dispel every difficulty. It is not an Alladin's lamp which can be scratched to invoke

a power which brings to any person in need whatever he or she may desire to have. It can only mean, for lawyers with their feet firmly planted in the realm of reality, what the law in a particular State or country is and what it enjoins. That law in England is the law made by Parliament. That is why Sir Ivor Jennings said (see : Law and the Constitution, III Edn.) that "in England supremacy of Parliament is the Constitution". And naturally the Constitution of a country and not something outside it contains the rule of law of that country. This means that the rule of law must differ in shades of meaning and emphasis from time to time and country to country. It could not be rigid, unchanging, and immutable like the proverbial laws of the Medes and Persians. Nevertheless, one has to understand clearly what it means in a particular context. It cannot be like some brooding omnipotence in the skies. Its meaning cannot be what anyone wants to make it. It has to be, for each particular situation, indicated by the courts which are there to tell the people what it means.

279. This Court has, in no unmistakable terms, indicated what the Constitution means and how the rule of law embedded in it works even during emergencies.

280. A statement of the rule of law by Jackson, J. in Youngstown Sheet & Tube Co. v. Sawyer (343 US 579, 655), quoted with approval by this Court, in Chief Settlement Commissioner, Rehabilitation Department, Punjab v. Om Parkash ((1968) 3 SCR 655, 661 : AIR 1969 SC 33) at page 661) :

> With all its defects, delays and inconveniences men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.

It was explained there :

> In our constitutional system, the central and most characteristic feature is the concept of the rule of law which means, in the present context, the authority of the law courts to test all administrative action by the standard or legality. The administrative or executive action that does not meet the standard will be set aside if the aggrieved person brings the appropriate action in the competent court. The rule of law rejects the conception of the dual State in which governmental action is placed in a privileged position of immunity from control of law. Such a notion is foreign to our basic constitutional concept.

281. This statement, no doubt, includes the concept of determination by courts of the question whether an impugned executive action is within the bounds of law. However, it presupposes : firstly, the existence of a fixed or identifiable rule of law which the Executive has to follow as distinguished from a purely policy decision open to it under the side terms of the statute conferring a discretionary power to act; and secondly, the power of the courts to test that action by reference to the rule. Even, in emergencies, provided the power of the court to so test the legality of some executive act is not curtailed, courts will apply the test of legality "if the person aggrieved brings the action in the competent court". But, if the locus standi of the person to move the court is gone and the competence of the court to enquire into the grievance is also impaired by inability to peruse the grounds of executive action or their relationship with the power to act, it is no use appealing to this particular concept of the rule of law set out above. It is just inapplicable to the situation which arises here. Such a situation is governed by the emergency provisions of the Constitution. These provisions contain the rule of law for such situations in our country.

282. In Mohd. Yaqub v. State of Jammu & Kashmir ((1968) 2 SCR 277, 234 : AIR 1968 SC 765 : 1968 Cri LJ 972), a seven Judge bench of this Court pointed out that whereas Article 358, by its own force, suspends the guarantees of Article 19, Article 359(1) has the effect of suspending the operation of specified fundamental rights (strictly speaking it is enforcement only which is suspended) so that these concepts cannot be used to test the legality of executive action. Now, much of what Dicey meant by the rule of law was certainly sought to be embodied in part III of our Constitution. If, however, the application of Articles 14, 19, 21 and 22 of the Constitution is suspended, it is impossible to say that there is a rule of law found there which is available for the courts to apply during the emergency to test the legality of executive action.

283. Makhan Singh v. State of Punjab ((1964) 4 SCR 797, 821-822 : AIR 1964 SC 381 : (1964) 1 Cri LJ 269), a seven Judge decision of this Court was sought to be made a foothold for several arguments on behalf of the detenus. It, however, seems to me to have laid down more propositions which demolish various contentions advanced on behalf of the detenus than those which could assist them. One main question considered in that case was whether Section 491(1)(b) of the code of Criminal Procedure could afford a statutory remedy, by an order or direction in the nature of a writ of habeas corpus, at a time when enforcement of the fundamental right to personal liberty was suspended by the Presidential Order of 1962 already set out above. The suggestion that a common law remedy by way of writ of habeas corpus exists, even after Section 491 was introduced in the Criminal Procedure Code in 1923, was negatived. The sweep of Article 359(1) of the Constitution, taking in the jurisdiction of "any Court", was held wide enough to cover any kind of relief claimed by a petitioner for the enforcement of a specified fundamental right. Inter alia, it was held (at pp. 821-822) :

> If the Article 359(1) and the Presidential Order issued under it govern the proceeding taken under Section 491(1)(b), the fact that the court can act suo motu will not make any difference to the legal position for the simple reason that if a party is precluded from claiming his release on the ground set out by him in his petition, the Court cannot, purporting to act suo motu, pass any order inconsistent with the provisions of Article 359(1) and the Presidential Order issued under it. Similarly, if the proceedings under Section 491(1)(b) are hit by Article 359(1) and the Presidential Order, the arguments based on the provisions of Article 372 as well as Articles 225 and 375 have no validity. The obvious and the necessary implication of the suspension of the right of the citizen to move any court for enforcing his specified fundamental rights is to suspend the jurisdiction of the court pro tanto in that behalf.

This is exactly the interpretation which I have adopted above of Mohan Chowdhury's case.

284. It was also held in Makhan Singh's case that, as no attack on the validity of the Defence of India Act of 1962 and the rules framed thereunder on the ground of violation of fundamental rights, was open during the emergency, no petition was maintainable on the ground of such alleged invalidity. It was held (at pp. 825-826) there :

> Therefore, our conclusion is that the proceedings taken on behalf of the appellants before the respective High Courts challenging their detention on the ground that the impugned Act and the Rules are void because they contravene Articles 14, 21 and 22, are incompetent for the reason that the fundamental rights which are alleged to have been contravened are specified in the Presidential Order and all citizens are precluded from moving any court for the enforcement of the said specified rights.

285. After having decided the questions actually calling for determination in that case, Gajendragadkar, J. speaking for the majority, expressed some views on the possible pleas which may still be open to petitioners in hypothetical cases despite the Presidential Order of 1962, set out above, passed under Article 359(1). He said (at page 828) :

> If in challenging the validity of his detention order, the detenu is pleading any right outside the rights specified in the order, his right to move any court in that behalf is not suspended, because it is outside Article 359(1) and consequently outside the Presidential Order itself. Let us take a case where a detenu has been detained in violation of the mandatory provisions of the Act. In such a case, it may be open to the detenu to contend that his detention is illegal for the reason that the mandatory provisions of the Act have been contravened. Such a plea is outside Article 359(1) and the right of the detenu to move for his release on such a ground cannot be affected by the Presidential Order.

Again, it was observed (at pages 828-829) :

> Take also a case where the detenu moves the court for a writ of habeas corpus on the ground that his detention has been ordered mala fide. It is hardly necessary to emphasise that the exercise of a power mala fide is wholly outside the scope of the Act conferring the power and can always be successfully challenged. It is true that a mere allegation that the detention is mala fide would not be enough; the detenu will have to prove the mala fide. But if the mala fides are alleged, the detenu cannot be precluded from substantiating his plea on the ground of the bar created by Article 359(1) and the Presidential Order. That is another kind of plea which is outside the preview of Article 359(1).

286. The two passages set out above, stating what may be the position in purely hypothetical case, are the mainstays of some of the arguments for the petitioners. But, none of the Counsel for the petitioners has stated how these observations are applicable to facts of the case of the particular petitioner for whom he appears. Assuming, however, that the hypothetical cases indicate good grounds on which a habeas corpus petition could be allowed even in an emergency, it was certainly not decided in Makhan Singh's case what the process could be for ascertaining that one of these grounds exist. If that process involves a consideration of evidence in support of a plea, such as that of mala fides, in proceedings under Article 226, the most important evidence would be grounds of detention. These grounds constituted the lever which could have been and was used in the past by courts to reach decisions on various pleas, such as the plea that the order was not passed after due application of mind to the facts of the detenu's case or that the satisfaction reached was not with regard to legally relevant grounds at all. No such means are available now. This difficulty was certainly not in the way at the time of the decision in Makhan Singh's case.

287. I am, therefore, of the opinion that pleas which involve any adduction of evidence would, at any rate, be entirely excluded by the combined effect of the terms of the Presidential Order of June 27, 1975, read with the amended provisions of Section 16A(9) of the Act. A perusal of S. Pratap Singh v. State of Punjab ((1964) 4 SCR 733 : AIR 1964 SC 72 : (1966) 1 LLJ 458), will show the kind of evidence which often become necessary to justify a plea of "malice in fact". Plea about vires of the detention order itself (e.g. whether it is based on irrelevant grounds or was not passed after due application of mind) often require investigation of questions of fact involving scrutiny of actual grounds of detention which is hit by the embargo against an assertion of a right to move for

enforcement of the right to personal freedom and prohibition against disclosure of grounds. So long as the executive authorities of the State purport to act under the Act, their preliminary objection against further hearing will prevail unless, of course, the officer purporting to detain had, in fact, not been invested at all with any authority to act in which case the detention would, in my opinion, be on the same footing as one by a private person who has no legal authority whatsoever to detain. But, such a defect has to be apparent either on the face of the order or admitted in the return. Moreover, it can be cured by an adoption of the order by the State.

288. Detentions which not only do not but could not possibly have any apparent, ostensible, or purported executive authority of the State whatsoever to back them, could be equated with those by private persons. The suspension of enforcement of specified fundamental rights operates only to protect infringements of rights by the State and its authorised agents, acting or purporting to act, in official capacities which they could and do hold. A claim to an order or release from a patently illegal detention, which is not by the State or on its behalf, could be enforced even during the current emergency. But, there is no such case before us. All the cases before us are, as far as I know, of detentions by duly empowered officials under, prima facie, good orders. The possibility, however, of so unlikely a hypothetical case where there is a lack of legal power to act, which could be easily removed by the executive authorities of the State concerned themselves, whenever they desire to do so, is only mentioned to illustrate my view that the test of legality, applied by courts, is not entirely abrogated in and abandoned in the current emergency. But, it can be only one which should be applicable without going into facts lying behind the return. The presumption of validity of a duly authenticated order of an officer authorised to pass it is conclusive in habeas corpus proceedings during the current emergency.

289. State of Madhya Pradesh v. Thakur Bharat Singh ((1967) 2 SCR 454 : AIR 1967 SC 1170), was another decision of the Constitution Bench of this Court relied upon strongly on behalf of detenus. In that case, an order prohibiting a petitioner from residing in a specified area under Section 3(1)(b) of the Madhya Pradesh Public Security Act, 1959, which was found to be void, because the provision infringed Article 19 of the Constitution, was held to be challengeable during an emergency despite the provisions of Article 358 of the Constitution. The ground of the decision was that, although, the empowering provisions could not have been challenged if it was contained in an enactment made during the emergency, yet, as the provision was made by an Act passed at a time when Article 19 was operative, the invalidity of the provision could be demonstrated despite the existence of the emergency. I do not think that there is any such case before us. It seems to me to be possible to distinguish the case on the ground that it was a case of patent voidness of the order passed so that the principle of legality, which is not suspended, could be affirmed even apart from enforcement of a specified fundamental right. I think it was placed on such a footing by Shah, J. speaking for this Court.

290. State of Maharashtra v. Prabhakar Pandurang Sangzgiri ((1966) 1 SCR 702 : AIR 1966 SC 424 : 1966 Cri LJ 311), another decision of the Constitution Bench of this Court, was also cited. There, an illegal illegal order prohibiting the sending out of jail by a detenu of a book on matters of scientific interest only, for publication, was quashed by a High Court, under Article 226 of the Constitution, despite the Presidential Order under Article 359 of the Constitution, on the ground that there was no condition at all in the Bombay Conditions of detention Order, 1951, authorising the Government of Maharashtra to prohibit the publication of a book of purely scientific interest just because the petitioner happened to be detained under the Defence of India Rules, 1962. The High Court's view was affirmed by this Court. This case has nothing to do with preventive detention. It is a case in which this Court held that an ultra vires order could be set aside. This could be done under

the residuary jurisdiction of the High Court, which could operate for "any other purpose". The mere existence of the emergency could not, it was held, suspend this power. The test applied was of bare illegality outside Article 19 of the Constitution.

291. In Dr. Ram Manohar Lohia v. State of Bihar ((1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608), this Court did, in a petition under Article 32 of the Constitution, apply the test of a satisfaction required on relevant grounds, by Rule 30, sub-rule 1, Defence of India Rules, 1962, as a condition precedent to detention, because the grounds of detention were mentioned in the detention order itself so that they could be used to determine whether the detention order fell within the purposes of the Act. The writ petition was allowed. The alleged satisfaction of the District Magistrate, who was the detaining authority, was found, on the grounds given for detention, to fall outside Rule 30. It was held that the Presidential Order under Article 359 was not intended to condone violations of the Defence of India Act or the rules made thereunder and did not authorise ultra vires or mala fide detentions. It was pointed out here that satisfaction about the need to detain in the interests of "law and order" was not the same thing as one in the interests of "public order". In this case, a well-known distinction between "public order" and "law and order" was drawn by Hidayatullah, J. in the following terms (p. 746) :

> It will thus appear that just as "public order" in the rulings of the Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see than an act may affect law and order but no public order just as an act may affect public order but not security of the State. By using the expression "maintenance of law and order" and District Magistrate was widening his own field of action and was adding a clause to the Defence of India Rules.

292. I take the decision of this Court in Dr. Lohia's case to mean that, if the order, on the face of it, is bad and does not satisfy the requirements of the law authorising detention, the detenu may be released. Sarkar, J. pointed out there (p. 719) :

> The satisfaction of the Government which justifies the order under the rule is a subjective satisfaction. A court cannot enquire whether grounds existed which would have created that satisfaction on which alone the order could have been made in the mind of a reasonable person. If that is so-and that indeed is what the respondent State contends - it seems to me that when an order is on the face of it not in terms of the rule, a court cannot equally enter into an investigation whether the order of detention was in fact, that is to say, irrespective of what is stated in it, in terms of the rule. In other words, in such a case the State cannot be heard to say or prove that the order was in fact made, for example, to prevent acts prejudicial to public order which would bring it within the rule though the order does not say so. To allow that to be done would be to uphold a detention without a proper order.

293. The case was also decided on a consideration of evidence on the ground that there was an area of enquiry opened up by the grounds given for entry by the court. I do not know how any decision could have been given in Dr. Lohia's case if grounds of detention were not found to be bad on the very face of the order stating those grounds, or, if there was no door left open for judicial scrutiny

due to a provision such as Section 16A(9) of the Act before us. Thus, the law considered and applied in Dr. Lohia's case was different from the law we have to apply under a different set of circumstances as explained above.

294. In K. Anandan Nambiar v. Chief Secretary, Government of Madras ((1966) 2 SCR 406 : AIR 1966 SC 657 : 1966 Cri LJ 586), a writ petition under Article 32 of the Constitution by a member of Parliament during the currency of an emergency and a Presidential Order, was dismissed although his locus standi to maintain the petition was affirmed on the following ground (p. 412) :

> The petitioners contend that the relevant rule under which the impugned orders of detention have been passed, is invalid on grounds other than those based on Articles 14, 19, 21 and 22, and if that plea is well-founded, the last clause of the Presidential Order is not satisfied and the bar created by it suspending the citizens' fundamental rights under Article 14, 21 and 22 cannot be pressed into service.

295. Apparently, the view adopted in Nambiar's case was that to question the validity of the provision under which the detention order is made could not be equated with an allegation of infringement of procedure established by law. Moreover, this decision was also in a different context with a different set of applicable provisions. None of the cases before us involves the assertion that the power under which the detention order purports to be made itself did not exist in the eye of law.

296. In Durgadas Shirali v. Union of India ((1966) 2 SCR 573 : AIR 1966 SC 1078 : 1966 Cri LJ 812), a habeas corpus petition against a detention order under rule 30 of the Defence of India Rules, 1962, was again dismissed. But, it was held that Article 358 and the Presidential Order under Article 359(1) did not debar the petitioner from assailing his detention on the ground of mala fides or on the ground that any of the grounds mentioned in the order of detention is irrelevant. This case is also distinguishable on the ground that the context, from the point of view of the applicable law, was different.

297. In Jai Lal v. State of West Bengal ((1966) Supp SCR 464 : AIR 1967 SC 483N : 1967 Cri LJ 520), this Court, after taking evidence by affidavits into account and considering the pleas of mala fides, rejected the petitioner's case although the petitioner was held, on the strength of earlier decisions of this Court, entitled to raise the pleas of mala fides despite the proclamation of emergency and the Presidential Order. Again, the context and the applicable law there were different.

298. We, however, see that, despite the proclamation of emergency and a Presidential Order under Article 359(1), this Court has held that High Courts, in exercise of their supervisory jurisdiction, could entertain habeas corpus petitions and enforce the principle of legality against the detaining authorities. No doubt, the executive and the legislative organs of the State were fully aware of the nature and effect of the decisions of this Court. It is, therefore, not surprising that, by means of a differently phrased Presidential Order of June 27, 1975, and the amendments in the Act, introducing rather drastic provisions of Section 16A of the Act, the intention has been made clear that preventive detention should be a matter controlled exclusively by the executive departments of the State.

299. It was contended by Mr. Tarkunde that the rule of law under our Constitution is embodied in the principle of separation of powers. It is very difficult for me to see the bearing of any such doctrine on a pure and simple question of determination of the meaning of constitutional and

statutory provisions couched in words which leave few doubts unresolved. However, as arguments based on this doctrine were advanced, I will deal with the manner in which, I think, laws relating to preventive detention fit in with the extent to which our Constitution recognises the doctrine.

300. In Rai Sahib Ram Jawaya Kapur v. State of Punjab ((1955) 2 SCR 225 : AIR 1955 SC 549), Mukherjea, C.J. speaking for this Court, said (pp. 235-236) :

> The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts of branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumptions, by one organ or part of the State, of functions that essentially belong to another. The Executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the Legislature.

He further added (p. 236) :

> Our Constitution, though federal in its structure, is modelled on the British parliamentary system where the Executive is deemed to have the primary responsibility for the formulation of governmental policy and it transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State.

301. If an order of preventive detention is not quasi-judicial, as it cannot be because of the impossibility of applying any objective standards to the need for it in a particular case, there could be no question of violating any principle of separation of powers by placing preventive detention exclusively within the control of executive authorities of the State for the duration of the emergency. That seems to me to be the effect of the emergency provisions of the Constitution and the amendments of the Act already dealt with by me.

302. Commenting upon Liversidge's case in "The Law Quarterly Review" (1942) (Vol. 58, p. 2), the celebrated jurist and authority on English constitutional history and law, Sir William Holdsworth, supporting the majority decision there, opined :

> The question turns not, as Lord Atkin says, upon whether the common law or the statute law has postulated a 'reasonable' clause for a decision or an action, but upon the question whether or not the decision or the action to be taken on a reasonable cause raises a justiciable issue. Clearly the question whether a person is of hostile origin or associations so that it is necessary to exercise control over him, raises, not a justiciable, but a political or administrative issue.

He added :

> On principle this distinction seems to me to be clearly right. If the issue is justiciable, if, that is, it raises an issue within the legal competence of the court to try, the court can decide on the facts proved before it whether a cause or a suspicion is reasonable, for it knows the law as to what amounts in the circumstances to a cause or a suspicion which is reasonable. If, on the other hand, the issue is not justiciable, if, that is, it turns, not on a knowledge of the law as to what amounts in the circumstances to a reasonable cause or suspicions, but on political or administrative

> considerations, it can have no knowledge of the weight to be attached to facts adduced to prove the reasonableness or unreasonableness of the cause or suspicion .... for it has neither the knowledge nor the means of acquiring the knowledge necessary to adjudicate upon the weight to be attached to any evidence which might be given as to the existence of circumstances of suspicion or as to the reasonableness of belief. Since, therefore, it is impossible to apply an objective standard through the agency of the courts, the only possible standard to be applied is the subjective standard, so that the Secretary of State's statement that he had a reasonable cause for his belief must be conclusive.

302-A. If the meaning of the emergency provisions in our Constitution and the provisions of the Act is clearly that what lies in the executive field, as indicated above, should not be subjected to judicial scrutiny or judged by judicial standards of correctness, I am unable to see how the courts can arrogate unto themselves a power of judicial superintendence which they do not, under the law during the emergency, possess.

303. Dean Roscoe Pound, in the Green Foundation Lectures on "Justice According to Law" (Yale University Press, 1951) begins his answer to the question as to what justice is by a reference to Jesting Pilate, who would not stay for the answer because he knew that philosophers disagreed so much, in their answers, that there could be no completely satisfactory answer. He divides justice itself into three heads, according to the three types of bodies or authorities which could administer it, and discusses the advantages and disadvantages of each : Legislative, Executive, Judicial. He rejects "legislative justice", said to be most responsive to popular will, as too "uncertain, unequal, and capricious". He said that its history, even in modern times, was filled with "legislative lynchings", and that this kind of justice was too susceptible to "the influence of personal solicitation, lobbying, and even corruption", and subject to gusts of passion, prejudice, and partisanship. He thought that executive or administrative justice, which becomes inevitable in carrying out vast schemes of modern socialistic control and planning of economic, social, and cultural life of the people by the State was also, despite its own mechanisms of control against misuse of power, fraught with serious dangers indicated by him. Finally, dean Pound finds judicial justice, though not entirely immune from error - and, sometimes, grievous and costly error - to be superior to the other two types of justice despite its own inherent shortcomings as compared with executive or administrative justice for special types of cases.

304. Now, the question before us is not whether courts should apply the high standards of "judicial justice" to the facts of each individual case which are not before us for consideration at all. The question before us is purely one of the interpretation of laws as we find them. If, on a correct interpretation of legal provisions, we find that the jurisdiction of courts was itself meant to be ousted, for the duration of the emergency, to scrutinise the facts of reasons behind detention orders purporting to have been made under the Act, because the judicial process suffers from inherent limitations in dealing with cases of this type, we are bound, by the canons of "judicial justice" itself, to declare that this is what the laws mean.

305. It appears to me that it does not follow from a removal of the normal judicial superintendence, even over questions of vires of detention orders, which may require going into facts behind the returns, that there is no rule of law during the emergency or that the principles of ultra vires are not to be applied at all by any authority except when, on the face of the return itself, it is demonstrated in a court of law that the detention does not even purport to be in exercise of the executive power or authority or is patently outside the law authorising detention. It seems to me that the intention

behind emergency provisions and of the Act is that, although such executive action as is not susceptible to judicial appraisement, should not be subjected to it, yet, it should be honestly supervised and controlled by the hierarchy of executive authorities themselves. It enhances the powers and, therefore, the responsibilities of the Executive.

306. A maxim of justice is sometimes said to be : "Let the heavens fall but justice must be done" As applied to judicial justice, it means that justice must accord with the highest standards of objective, impartial, unruffled dictates of a clear judicial conscience working "without fear or favour, affection of rill-will". It does not mean that the object of "judicial justice" is either to make "the heavens fall" or that it should be oblivious to consequences of judicial verdicts on the fate of the nation. It fully recognises the legal validity of the principle adopted by the English House of Lords in both Zadig's case (supra) and Liversidge's case (supra) "salus populist supreme lex" (regard for the public welfare is the highest law). This is the very first maxim given in Broom's Legal Maxims under the first head, "Rules founded on public policy" (See : Broom's Legal Maxims", p. 1).

307. It is not my object to animadvert here at length on any weaknesses in our legal or judicial system. I would, however, like to point out that judicial justice can only be "justice according to law". It tends more often to accord with legal justice than moral justice. Not only are the fact-finding powers of courts limited by rules of evidence and procedure, but the process of fact-finding and adjudication can miss their objects due to the buying power of money over venal witnesses and the capacity of the wealthy to secure the best forensic talents in the country even if we do not take into account the liability of judges, like the rest of human beings, to err. Ends of justice can be frustrated by all kinds of abuses of the processes of courts.

308. The machinery of executive justice, though not hidebound by technical rules of evidence and procedure can also be and often is inordinately dilatory. Its wheels can be clogged by redtape and by corrupt clerical underlings if their palms are not greased by honest citizens. Even those in the upper echelons of the bureaucracy can be sometimes hopelessly unable to see the true objects of an administrative scheme or of the policy embodied in a statute. They tend to be more anxious to please their superiors than to do justice so that matters in which executive heads may not get interested are liable to be neglected for years and even forgotten, whereas others, in which they are interested receive speedy attention. They are not even aided by lawyers who, whatever else may be said about them, have undoubtedly imagination, courage, independence and devotion to their client's interests. In any case, executive justice lacks the appearance of detachment. Justiciable disputes between the State and the citizen, on principles of natural justice, require independent authorities for their resolution. It is for this reason that Article 226 of the Constitution places administrative action and inaction, even at the highest levels, under judicial superintendence, when it impinges on rights of persons, although this may have given rise to problems of its own either due to misuse by litigants of the powers of High Courts under Article 226 of the Constitution or want of clarity in the drafting of our statutes or the difficulties experienced by the executive officers of Government in understanding the laws or the manner in which their own duties are to be carried out.

309. Considerations, such as those mentioned above, arising out of alleged carelessness with which, according to the learned Counsel for the detenus, detentions are sometimes ordered, were placed before us so that we may not deny powers of rectification of apparent errors of detaining officers to High Courts. It was stated by one learned Counsel that a detention order was once issued against a person who was dead. Obviously, no detention order could be executed against a dead person and no writ petition could be moved on behalf of such a person. I have, however, no doubt, that the machinery of preventive detention is not so defective as to prevent executive authorities at the

highest levels from doing justice in appropriate cases where real injustice due to misrepresentations or misapprehensions of fact is brought to their notice. Not only are the highest executive authorities, under whose supervision the administration of preventive detention laws is expected to take place, better able that the High Courts, acting under Article 226 of the Constitution, to go into every question of fact and are in much better position to know all relevant facts, but their knowledge of the meaning of laws to be administered and the policies underlying them could not be less, even if they are not better, known to them than to the High Courts on such a matter as preventive detention. As already indicated, it raises essentially matters of policy. Courts cannot decide what individuals with what kind of associations and antecedents should be detained. In some cases, the associations and affiliations of individuals with groups or organisations may certainly be matters of common public knowledge. But, it is only the membership and associations of persons which may be matters of public knowledge. The nature of information, and the manner in which individuals or organisations concerned may do something, which may constitute a danger to the security of the State, are matters of appraisement of situations and policies on which information could certainly not be broad-cast.

310. I, therefore, think that a challenge to the validity of Section 16A(9) based either on the submission that grounds for detention do not call for secrecy or that the provision is an unwarranted invasion of judicial power even, in an emergency, is not well-founded. I will indicate below the safeguards which exist in the Act itself for obtaining redress on the executive side in cases of preventive detention. As was held by this Court in Ram Jawaya Kapur's case, there is no such strict separation of powers under our Constitution as one finds in the American Constitution. No particular provision of the Constitution could be pointed out in support of the proposition that preventive detention is a matter in which judicial superintendence must necessarily be preserved as a part of the doctrine of separation of powers.

311. Section 3 sub-section (3) of the Act shows that the detaining officer has to submit a report forthwith on a case of preventive detention, together with grounds of detention and particulars of the case, for the approval of the State Government. The detention order itself, unless approved by the State Government, lapses automatically after 12 days. In special cases, covered by Section 8 of the Act, the proviso to Section 3 sub-section (3) makes the initial order, subject to the approval of the State Government, operative for 22 days. In cases covered by Section 16A(2) and (3) of the Act, in which no grounds of detention are to be supplied to the detenu, the State Government has to review and confirm the order if the detention is to continue beyond 15 days. Section 14 of the Act provides for revocation of detention orders without prejudice to the provisions of Section 21 of the General Clause Act, 1897. The power of revocation may be exercised not only by the detaining officer concerned, but by the State Government or the Central Government also. Temporary release of persons detained is also provided for by Section 15 of the Act on the order of the appropriate Government so as to prevent undue hardship and to meet special contingencies. The provisions of Article 353(a) of the Constitution also enable the Union Government to issue directions to a State Government relating to the manner in which a State's executive power is to be exercised during the emergency. Means of redress, in cases such as those of mistaken identity or misapprehension of facts or detentions due to false and malicious reports circulated by enemies, are thus till open to a detenu by approaching executive authorities. There is no bar against that. What is not possible is to secure a release by an order of a court in habeas corpus proceedings after taking the court behind a duly authenticated prima facie good return.

312. An argument before us, to which I would like to advert here, was that, notwithstanding the emergency provisions, some undefined or even defined principles of rule of law, outside the

emergency provisions, can be enforced by the High Court in exercise of their powers under Article 226 of the Constitution because the rule of law has been held by this Court to be a part of the inviolable "basic structure" of the Constitution. It was submitted that, as this basic structure was outside even the powers of amendment of the Constitution under Article 368 of the Constitution, it could not be affected by emergency provisions or by provisions of the Act. We were asked to at least interpret the emergency provisions and the Act in such a way as to preserve what was represented to be the "rule of law" as a part of the basic structure of the Constitution.

313. It seems to me that the theory of a "basic structure" of the Constitution cannot be used to build into the Constitution an imaginary part which may be in conflict with constitutional provisions. The Constitution cannot have a base cut away from the superstructure. Indeed, as explained above, it seems to me that the emergency provisions could themselves be regarded as part of the basic structure of the Construction. At any rate, they are meant to safeguard the basis of all orderly government according to law.

314. Speaking for myself, I do not look upon the theory of a basic structure of the Constitution as anything more than a part of a well-recognised mode of construing a document. The Constitution, like any other document, has to be read and construed as a whole. This is the common principle which was applied, though in different ways and with differing results, both by judges taking the majority as well as minority views in Kesavananda Bharati's case. Some of the learned Judges though that, by an application of this rule, the scope of the power of amendment, contained in Article 368 of the Constitution, was limited by certain principles which, though not expressly laid down in Article 368, could be read into the word "amendment" as implied limitations upon powers under Article 368. On the other hand, other learned Judges (including myself) took the view that, considering the provisions of the Constitution as a whole, the powers of amendment of the Constitution in Article 368, which operated on all parts of the Constitution itself and embraced even the power of amending Article 368 of the Constitution, could not reasonably be so limited. The theory, therefore, was nothing more than a method of determining the intent behind the constitutional provisions. It could not and did not build and add a new part to the Constitution.

315. It was then urged that want of bona fides was expressly left open for determination by courts even in an emergency in Liversidge's case. It must not, however, be forgotten that Liversidge's case was not a decision upon a habeas corpus proceeding, but, it came to the House of Lords at an interlocutory stage of a suit for damages for false imprisonment when Liversidge was denied access to particulars of grounds of his detention. The question considered there was whether he could ask for them as a matter of right. The House of Lords denied him that right.

316. In Greene's case (supra), which was heard with Liversidge's case by the House of Lords, the decision was that the return made on behalf of the secretary of State could not be questioned. It is true that even in Greene's case, a theoretical exception was made for a case of want of bona fides. I call it "theoretical" because such a case is perhaps not easily conceivable in England. It also requires some explanation as to what could be meant by holding that a return is "conclusive", but the bona fides of the order can be challenged. The explanation seems to me to be that want of bona fides or "malice in fact" was placed on the same footing as fraud, which nullifies and invalidates the most solemn proceedings. It may, however, be pointed out that, in Greene's case, it was not held that mala fides or any other invalidating fact could be proved during the emergency in habeas corpus proceedings. An explanation of an almost formal exception for a case of want of bona fides could be that the reservation of such a plea was meant only for such proceedings in which "magic in fact" could reasonably be gone into and adjudicated upon. The position before us, however, is very clear.

Section 16A(9) imposes a bar which cannot be overcome in habeas corpus proceedings. In addition, a specific suspension or enforcement of the right to personal freedom against executive authorities places the presumption arising from a duly authenticated order of a legally authorised detaining officer on a higher footing than a merely ordinary rebuttable presumption for purposes of proceedings under Article 226 of the Constitution. These are, as already indicated, summary proceedings.

317. I may point out here that the term "mala fide" is often very loosely used. Even in England, the scope of malice is wide enough to include both "malice in law" and "malice in fact". Lord Haldane in Shearer v. Shields ((1914) AC 808), said :

> Between 'malice in fact' and 'malice in law' there is a broad distinction which is not peculiar to any system or jurisprudence. The person who inflicts a wrong or an injury upon any person in contravention of the law is not allowed to say that he did so with an innocent mind. He is taken to know the law and can only act within the law. He may, therefore, be guilty of 'malice in law', although, so far as the state of his mind was concerned he acted ignorantly, and in that sense innocently.'Malice in fact' is a different thing. It means an actual malicious intention on the part of the person who has done the wrongful act.

318. Now, applying the broad concepts of "malice in law", as stated above, it has often been argued before us, in cases of preventive detention, that the burden is upon the executive authorities of proving the strict legality and correctness of every step in the procedure adopted in a case of deprivation of personal liberty. To ask the executive authorities to satisfy such a requirement, in accordance with what has been called the principle in Eshugbayi Eleko's case (supra) would be, in my opinion, to nullify the effect of the suspension of the enforceability of the procedural protection to the right of personal freedom. To do so is really to make the Presidential Order under Article 359(1) of the Constitution ineffective. Therefore, no question of "malice in law" can arise in habeas corpus proceedings when such a protection is suspended. As regards the issue of "malice in fact", as I have already pointed out, it cannot be tried at all in a habeas corpus proceeding although it may be possible to try it in a regular suit the object of which is not to enforce a right to personal freedom but only to obtain damages for a wrong done which is not protected by the terms of Section 16 of the Act. The possibility of such a suit should be another deterrent against dishonest use of these powers by detaining officers.

319. Mr. Mayakrishnan, learned Counsel for one of the detenus, contended that state of emergency, resulting from the Presidential Order of June 27, 1975, cannot be equated with a situation in which martial law has been proclaimed. The argument seems to be that, if the jurisdiction of courts to enforce the right to personal freedom is affected, the resulting position would be no different from that which prevails when martial law is declared.

320. There is no provision in our Constitution for a declaration of martial law. Nevertheless, Article 34 of the Constitution recognises the possibility of martial law in this country. It provides :

> 34. Notwithstanding anything in the foregoing provisions of this Part, parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or

other act done under martial law in such area.

321. As there is no separate indication in the Constitution of conditions in which martial law could be "proclaimed", it could be urged that a Presidential Order under Article 359(1) has a similar effect and was intended to provide for situations in which martial law may have to be declared in any part of the country. But, a Presidential Order under Article 359(1) of the Constitution would, ordinarily have a wider range and effect throughout the country than the existence of martial law in any particular part of the country. The Presidential proclamations are meant generally to cover the country as a whole."Martial law" is generally of a locally restricted application. Another difference is that conditions in which what is called "martial law" may prevail result in taking over by military courts of powers even to try offences; and, the ordinary or civil courts will not interfere with this special jurisdiction under extraordinary conditions. Such a taking over by military courts is certainly outside the provisions of Article 359(1) of the Constitution taken by itself. It could perhaps fall under Presidential powers Articles 53 and 73 read with Article 355. Article 53(2) lays down :

> 53. (2) Without prejudice to the generality of the forgoing provision, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.

And. Article 355 provides :

355. It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution.

A similarity in results, however, between martial law and conditions resulting from a Presidential Order under Article 359(1) is that, if no provision is made by an Act of Indemnity, the civil liabilities of military or civil officers, acting mala fide and outside the law, are not removed ipso facto by either martial law or the proclamation of emergency.

322. In Halsbury's Laws of England (4th Edn. Vol. 8, para 982, page 625), an explanation of martial law, as it is known in British Constitutional Law, is given as follows :

> The Crown may not issue commissions in time of peace to try civilians by martial law but when a state of actual war, or of insurrection, riot or rebellion amounting to war exists, the Crown and its officers may use the amount of force necessary in the circumstances to restore order. This use of force is sometimes termed "martial law". When once state of actual war exists the civil courts have no authority to call in question the actions of the military authorities, but it is for the civil courts to decide, if their jurisdiction is invoked, whether a state of war exists which justifies the application of martial law. The powers, such as they are, of the military authorities cease and those of the civil courts resumed ipso facto with the termination of the state of war : and, in the absence of an Act of Indemnity, the civil courts may inquire into the legality of anything done during the state of war. Even if there is an Act of Indemnity couched in the usual terms, malicious acts will not be protected. Whether this power of using extraordinary measures is really a prerogative of the Crown, or whether it is merely an example of the common law right and duty of all, ruler and subject alike, to use the amount of force necessary to suppress disorder, is not quite free from doubt. It is, however, clear that so-called military courts set up under

> martial law are not really courts at all, and so an order of prohibition will not issue to restrain them. Probably the correct view to take of martial law itself is that it is no law at all.

323. It is not at all necessary for the purposes of the decision of cases before us to determine how proclamations of emergency are related to the more drastic conditions in which "martial law", if it is "law" at all, may come into existence due to the very necessities of a situation. It is evident that the emergency provisions of our Constitution are very comprehensive. They are intended not merely to deal with situations when actual outbreak of hostilities with another country has taken place and a war is going on but also when the country's peace, progress, security, and independence are threatened by dangers either internal or external or both. Whether there is a "grave emergency", falling within Article 352(1), is a matter entirely for the President to determine.

324. Attempts were made by some learned Counsel to paint very gloomy pictures of possible consequences if this Court held that no relief was open to petitioners against deprivation of their personal freedoms by executive officers in an emergency of indefinite duration, when a number of cases of serious misuse of their powers by the detaining officers were said to be in evidence. I do not think that it is either responsible advocacy or the performance of any patriotic or public duty to suggest that powers of preventive detention are being misused in the current emergency when our attention could not be drawn to the allegations in a single case even by way of illustration of the alleged misuse instead of drawing upon one's own imagination to conjure up phantoms. In fact, I asked some learned Counsel to indicate the alleged facts of any particular case before us to enable us to appreciate how the power of preventive detention had been misused. Mostly, the answers given were that the facts of the cases were not before us at this stage which is true. But, it is significant that no case of alleged "malice in fact" could be even brought to our notice.

324A. It seems to me that courts can safely act on the presumption that powers of preventive detention are not being abused. The theory that preventive detention serves a psycho-therapeutic purpose may not be correct. But, the constitutional duty of every government faced with threats of widespread disorder and chaos to meet it with appropriate steps cannot be denied. And, if one can refer to a matter of common knowledge, appearing from newspaper reports, a number of detenus arrested last year have already been released. This shows that the whole situation is periodically reviewed. Furthermore, we understand that the care and concern bestowed by the State authorities upon the welfare of detenus who are well-housed, well-fed, and well-treated, is almost maternal. Even parents have to take appropriate preventive action against those children who may threaten to burn down the house they live in.

325. If there are, under our Constitution, some supreme obligations or overriding powers or duties, vested in superior courts, as learned Counsel for the detenus seemed to be contending for, to enforce the claims of constitutionality, quite apart from the suspended powers and duties of courts of enforce fundamental rights, I am sure that the current emergency, justified not only by the rapid improvements due to it in the seriously dislocated national economy and discipline but also by the grave dangers of tomorrow, apparent to those who have the eyes to see them, averted by it, could not possibly provide the occasion for the discharge of such obligations towards the nation or the exercise of such powers, if any, in the courts set up by the Constitution. Where there are such great obligations and powers they must always be guided by the principle already indicated : "Salus populist supreme lex". Indeed, as I understand even the majority view in Golaknath's case, it was that, despite the invalidity of constitutional amendments of provisions containing fundamental rights, to give effect to the view would be contrary to this principle. The case for the detenus before

us, however, fails on preliminary hurdles. Despite strenuous efforts their learned Counsel were quite unable to show any constitutional invalidity, directly or indirectly, in any of the measures taken, whether legislative or executive, by or on behalf of the State.

326. The real question for determination by us relates only to the meaning and effect of the constitutional and statutory provisions indicated above which are applicable during the current emergency. A large number of other questions including even some quite remotely connected with the real question involved, were permitted by this Court to be argued because of the great concern and anxiety of this Court when problems relating to personal liberty are raised. On the interpretation of the relevant provisions adopted by me, the validity of detention orders purporting to be passed under the Act cannot be challenged in habeas corpus proceedings. Judicial proceedings in criminal courts, not meant for the enforcement of fundamental rights, are not, either at the initial or appellate or revisional stages, covered by the Presidential Order of 1975. Habeas corpus petitions are not maintainable in such cases on another ground. It is that the prisoner is deemed to be in proper custody under orders of a court.

327. My answer to the two questions set out in the beginning of this judgment, which I compressed into one, is as follows.

328. A prima facie valid detention order, that is to say, one duly authenticated and passed by an officer authorised to make it, recording a purported satisfaction to detain the petitioner under the Maintenance of Internal Security Act which is operative either before or after its confirmation by the Government, is a complete answer to a petition for a writ of habeas corpus. Once such an order is shown to exist in response to a notice for a writ of habeas corpus, the High Court cannot inquire into its validity or vires on the ground of either mala fides of any kind or of non-compliance with any provision of the Maintenance of Internal Security Act in habeas corpus proceedings. The preliminary objection of the State must be accepted in such a case.

329. The result is that the appeals before us are allowed and the judgment and order of the High Court in each case is set aside. The High court concerned will itself now pass an order on each petition in accordance with law as laid down by this Court and the provisions of Article 359(1) of the Constitution.

CHANDRACHUD, J. (concurring) -

During the last few years, many questions of far-reaching constitutional importance have engaged the attention of this Court but these appeals, perhaps, present problems of the gravest magnitude. They involve an adjustment between two conflicting considerations, the liberty of the individual on the hand and exigencies of the State on the other. This balancing of the most precious of human freedoms - the liberty of the subject - as against the most imperative of the State's obligations -the security of the State - gives rise to multidimensional problems quite beyond the scope and compass of each right considered separately and in isolation. Can the freedom of the individual be subordinated to the exigencies of the State and if so, to what extent ? The Constitution concedes to the Executive the power of preventive detention, but in the name of national security can that jurisdiction of suspicion be so exercised as to reduce the guarantee of personal liberty to a mere husk ? Detention without trial is a serious inroad on personal freedom but it bears the sanction of our Constitution. The Constitution Assembly composed of politicians, statesmen, lawyers and social workers who had attained a high status in their respective specialities and many of whom had experienced the travails of incarceration owing solely to their political beliefs, resolved to put

Article 22, clauses (3) to (7) into the Constitution, maybe as a necessary evil. But does that mean that, more as a rule than as an exception, any person can be detained without disclosing the grounds of detention to him or to the court which may be called upon to try his habeas corpus petition ? And can such grounds and the information on which the grounds are based be deemed by a rule of evidence to relate to the affairs of the State, therefore confidential and therefore privileged ? Blind, unquestioning obedience does not flourish on English soil, said Lord Simonds in Christie v. Leachinsky ((1947) AC 573,591). Will it flourish on Indian soil ? These broadly are the sensitive questions for decision and importantly, they arise in the wake of proclamations of emergency issued by the President.

331. Part XVIII of the Constitution, called "Emergency Provisions", consists of Articles 352 to 360. Article 352(1) provides that if the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by proclamation, make a declaration to that effect. A proclamation issued under clause (1) is required by clause (2)(b) to be laid before each House of Parliament and by reason of clause (2)(c), it ceases to operate at the expiration of two months unless, before the expiration of that period, it has been approved by resolutions of both Houses of Parliament. By clause (3) of Article 352 a proclamation of emergency may be made before the actual occurrence of war or of external aggression or internal disturbance, if the President is satisfied that there is imminent danger thereof. Clause (5)(a) makes the satisfaction of the President under clauses (1) and (3) final, conclusive and non-justiciable. By clause (5)(b), neither the Supreme Court nor any other court has jurisdiction, subject to the provisions of clause (2), to entertain any question on any ground regarding the validity of a proclamation issued under clause (1) or the continued operation thereof.

332. Article 358 provides that :

> While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

333. Article 359(1) empowers the President, while a proclamation of emergency is in operation, to declare by order that

..... the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

Clause (1A), which was inserted retrospectively in Article 359 by Section 7 of the Thirty-eighth Amendment act, 1975, provides :

> While an order made under clause (1) mentioning any of the rights conferred by Part III is in operation, nothing in that Part conferring those rights shall restrict the power of the State as defined in the said Part to make any law or to take any executive

> action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

Clause (3) of Article 359 requires that every order made under clause (1) shall as soon as may be after it is made, be laid before each House of Parliament.

334. Article 352 was resorted to for the first time when hostilities broke out with China. On October 26, 1962 the President issued a proclamation declaring that a grave emergency existed whereby the security of India was threatened by external aggression. This proclamation was immediately followed by the Defence of India Ordinance, 4 of 1962, which was later replaced by the defence of India Act, 1962. On November 3, 1962 the President issued an order under Article 359(1) of the Constitution, which was later amended by an order dated November 11, 1962 stating that the right of any person to move any court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution shall remain suspended for the period during which the proclamation of emergency issued under clause (1) of Article 352 thereof on the 26th October, 1962, is in force, if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder.

Article 14 was added to the order of November 3, 1962 by the amendment dated November 11, 1962. The emergency declared on October 26, 1962 was revoked by a proclamation dated January 10, 1968 issued under Article 352(2)(a) of the Constitution.

335. The Defence of India Act, 1962 was to remain in force during the period of operation of the proclamation of emergency issued on October 26, 1962 and for a period of six months thereafter. The Act of 1962 expired on July 10, 1968.

336. The Maintenance of Internal Security Act, 26 of 1971, (MISA), was brought into force on July 2, 1971 in the shadow of hostilities with Pakistan. Section 3(1) of that Act provides as follows :

> 3. (1) The Central Government or the State Government may, -
>
> (a) if satisfied with respect to any person (including a foreigner) that with a view to preventing him from acting in any manner prejudicial to -
>
> (i) the defence of India, the relations of India with foreign powers, or the security of India, or
>
> (ii) the security of the State or the maintenance of public order, or
>
> (iii) the maintenance of supplies and services essential to the community, or
>
> (b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India, it is necessary so to do make an order directing that such person be detained.

337. Section 8 of the Act requires that the grounds on which the order of detention is made shall be

communicated to the detenu within a certain period but that the authority making the order may not disclose facts which it considers to be against the public interest to disclose.

338. Consequent on the Pakistani aggression, the President issued a proclamation of emergency on December 3, 1971 on the ground that the security of India was threatened by external aggression. By an order dated December 5, 1971 issued under Article 359(1) of the Constitution, the right of 'foreigners' to move any court for the enforcement of rights conferred by articles 14, 21 and 22 was suspended.

339. In September 1974 the MISA was amended by Ordinance 11 of 1974 to include sub-section (c) in Section 3(1), by which the right to detain was given as against smugglers and offenders under the Foreign Exchange Regulation Act, 1947. On November 16, 1974 the President issued a declaration under Article 359(1) suspending the right of persons detained under Section 3(1) (c) of the MISA to move for enforcement of the rights conferred by Article 14, Article 21 and clauses (4), (5), (6) and (7) of Article 22 of the Constitution.

340. On June 25, 1975 the President issued a proclamation under Article 352(1) declaring that a grave emergency existed whereby the security of India was threatened by internal disturbance. On June 27, 1975 the President issued an order under Article 359(1) which reads as follows :

G.S.R. 361(E)-In exercise of powers conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution and all proceedings pending in any court for the enforcement of the abovementioned rights shall remain suspended for the period during which the proclamation of emergency made under clause (1) of Article 352 of the Constitution on the 3rd December, 1971 and on the 25th of June, 1975 are both in force.

The Order shall extend to the whole of the territory of India.

This Order shall be in addition to and not in derogation of any Order made before the date of this Order under clause (1) of Article 359 of the Constitution.

341. Various persons detained under Section 3(1) of the MISA filed petitions in different High Courts for the issue of the writ of habeas corpus. When those petitions came up for hearing the Government raised a preliminary objection to their maintainability on the ground that in asking for release by the issuance of a writ of habeas corpus, the detenus were in substance claiming that they had been deprived of their personal liberty in violation of the procedure established by law, which plea was available to them under Article 21 of the Constitution only. The right to move for enforcement of the right conferred by that article having been suspended by the Presidential Order dated June 27, 1975 the petitions, according to the Government, were liable to be dismissed at the threshold. The preliminary objection has been rejected for one reason or another by High Courts of Allahabad, Bombay, Delhi, Karnataka, Madhya Pradesh, Punjab and Rajasthan. Broadly, these High Courts have taken the view that despite the Presidential Order it is open to the detenus to challenge their detention on the ground that it is ultra vires, as for example, by showing that the order on the face of it is passed by an authority not empowered to pass it, or it is in excess of the power delegated to the authority, or that the power has been exercised in breach of the conditions prescribed in that behalf by the Act under which the order is passed, or that the order is not in strict conformity with the provisions of the Act. Some of these High Courts have further held that the

detenus can attack the order of detention on the ground that it is mala fide, as for example, by showing that the detaining authority did not apply its mind to the relevant considerations, or that the authority was influenced by irrelevant considerations, or that the authority was actuated by improper motives. Being aggrieved by the finding recorded by these High Courts on the preliminary point, the State Government and the Government of India have filed these appeals, some under certificates granted by the High Courts and some by special leave granted by this Court. The High Courts of Andhra Pradesh, Kerala and Madras have upheld the preliminary objection.

342. During the pendency of these appeals and while the hearing was in progress, the President issued an order dated January 8, 1976 under Article 359(1) declaring that the right to move any court for the enforcement of the rights conferred by Article 19 and the proceedings pending in any court for the enforcement of those rights shall remain suspended during the operation of the proclamations of emergency dated December 3, 1971 and June 25, 1975.

343. On behalf of the appellants, the appeals were argued by the learned Attorney-General and the learned Additional Solicitor-General. The learned Advocates-General of various States argued in support of their contentions. A string of counsel appeared on behalf of the respondents, amongst them being Shri Shanti Bhushan, Shri V. M. Tarkunde, Shri R. B. Jethmalani, Shri S. J. Sorabji, Shri A. B. Dewan, Shri C. K. Daphtary, Dr. N. M. Ghatate, Shri G. C. Dwivedi, Shri Santokh Singh, Shri Sharad Manohar, Shri Danial Latifi and Shri Mayakrishnan. The learned Advocate-General of Gujarat generally supported their submissions.

344. The learned Attorney-General contended that Article 21 is the sole repository of the right to life and personal liberty and if the right to move any court for the enforcement of that right is suspended by the Presidential Order issued under Article 359(1), the detenus have no locus standi to file the writ petitions and therefore their petitions must be dismissed without any further inquiry into the relevance of the material on which the grounds of detention are based or the relevance of the grounds or the bona fides of the detaining authority. If the MISA permits the non-disclosure of grounds and indeed prevents their disclosure, there is no question of inquiring into the reasons or grounds of detention and courts must accept at its face value the subjective satisfaction of the detaining authority as recorded in the order of detention."There is no half-way house" asserted the Attorney-General. But, not inconsistently with the basic submission that the detenus have no locus to file the petitions for habeas corpus, he conceded that the court may grant relief if the detention order is on the face of it bad, as for example, if it is passed by a person not authorised to pass it, or if it is passed for a purpose outside those mentioned in Section 3(1) of the MISA or if it does not bear any signature at all.

345. The learned Additional Solicitor-General indicated during the course of his argument the limits of judicial review in the event of the court rejecting the main submission of the Attorney-General. He contended that Section 16A(9) of MISA contains but a rule of evidence and is therefore not open to attack on the ground that it encroaches upon the jurisdiction of the high court under Article 226 of the constitution. Since section 16A(9) is not unconstitution. no court can ask for the production of the file relating to a detenu or ask for the disclosure of the grounds of detention. If such disclosure is not made, no adverse inference can be raised by holding that by reason of non-disclosure, the detenu's case stands unrebutted. The learned Additional Solicitor-General contended that there was no warrant for reading down Section 16A(9) so as to permit disclosure to the court, to the exclusion of the parties and if any inquiry is permissible at all into a habeas corpus petition, the inquiry must be limited to the following points : (i) Whether the order is made in exercise or purported exercise of power conferred by a law; (ii) If such law was pre-emergency law, is it a valid

law; (iii) Whether the authority which passed the order is duly empowered to do so by the law; (iv) Whether the person sought to be detained is the person named in the order of detention; (v) Whether the stated purpose of the detention is one that comes within the law; (vi) Have the procedural safeguards enacted by the law been followed; and (vii) When grounds are furnished (i.e. when Section 16A does not apply) do such grounds ex facie justify the apprehension of the detaining authority or is it vitiated by a logical non-sequitur ? Such an inquiry, according to the learned Counsel, can never extend to an objective appraisal of the material and the information for the purpose of testing the validity of the subjective satisfaction of the detaining authority.

346. The arguments advanced on behalf of the respondents covered a wide range but they may be summarized thus :

1. The object of Article 359(1) and the effect of an order issued under it is to remove restrains against the Legislature so that during the emergency, it is free to make laws in violation of the fundamental rights mentioned in the Presidential Order.

2. Under a Constitution which divides State functions into executive, legislative and judicial, the executive functions must be discharged consistently with the valid laws passed by the Legislature and the orders and decree passed by the Judiciary. The suspension of the right to enforce fundamental rights cannot confers any right on the Executive to flout the law by which it is bound as much in times of emergency as in time of piece. Since there is a valid law regulating preventive detention, namely, the MISA, every order of detention passed by the Executive must conform to the conditions prescribed by that law.

3. Article 359(1) may remove fetters imposed by Part III but it cannot remove those arising from the principle of rule of law or from the principle of the limited power of the Executive under the system of checks and balances based on separation of powers.

4. The obligation cast on the Executive to act in accordance with the law does not arise from any particular article of the Constitution but from the inherent compulsion arising from the principle of rule of law which is a central feature of our constitutional system and is a basic feature of the Constitution. The suspension of the right to enforce Article 21 does not automatically entail the suspension of the rule of law. Even during emergency, the rule of law is not and cannot be suspended.

5. The Presidential Order under Article 359(1) may bar the enforcement of fundamental rights mentioned in the order by a petition under Article 32 before the Supreme Court. But, the Presidential Order cannot bar the enforcement of rights other than fundamental rights by a petition filed under Article 226 in the High Court.

6. Common law rights as well as statutory rights to personal liberty can be enforced through writ petitions filed under Article 226, despite the Presidential Order issued under Article 359(1). Similarly, contractual rights, natural rights and non-fundamental constitutional rights like those under Articles 256, 265 and 361(3) of the Constitution, can be enforced under Article 226. Article 226 empowers the High Courts to issue writs and directions for the enforcement of fundamental rights, "and for any other purpose".

7. The essence of the inquiry in a habeas corpus petition is whether the detention is justified by law or is ultra vires the law. Such an inquiry is not shut out by the suspension of the right to enforce fundamental rights.

8. If the Presidential Order is construed as a bar to the maintainability of the writ petitions under Article 226 of the Constitution, that article shall have been amended without a proper and valid constitutional amendment.

9. Article 21 of the Constitution is not the sole repository of the right to life or personal liberty. There is no authority for the proposition that on the conferment of fundamental rights by Part II, the corresponding pre-existing rights merged with the fundamental rights and that with the suspension of fundamental rights, the corresponding pre-existing rights also got suspended.

10. Suspension of the right to enforce Article 21 cannot put a citizen in a worse position than in the pre-Constitution period. The pre-Constitution right of liberty was a right in rem and was totally dissimilar from the one created by Article 21. The pre-Constitution right was merely a right not to be detained, save under the authority of law.

11. Civil liberty or personal liberty is not a conglomeration of positive rights. It is a negative concept and constitutes an area of free action because no law exists curtailing it or authorising its curtailment.

12. Section 16A(9) of the MISA is unconstitutional as it encroaches upon the High Courts' powers under Article 226 of the Constitution by creating a presumption that the grounds on which the order of detention is made and any information or materials on which the grounds are based shall be treated as confidential and shall be deemed to refer to matters of State, so that it will be against the public interest to disclose the same.

13. Section 18 of MISA as amended by Act 39 of 1975 which came into force with effect from June 25, 1975 cannot affect the maintainability of the present petitions which were filed before the amendment.

14. The dismissal of writ petitions on the ground that such petitions are barred by reason of the Presidential Order issued under Article 359(1) would necessarily mean that during the emergency no person has any right to life or personal liberty; and

15. If the detenus are denied any forum for the redress of their grievances, it would be open to the Executive to whip the detenus, to starve them, to keep them in solitary confinement and even to shoot them, which would be a startling state of affairs in a country governed by a written Constitution having in it a chapter on Fundamental Rights. The Presidential Order cannot permit the reduction of Indian citizens into slaves.

The validity of the Thirty-eighth and Thirty-ninth Constitution (Amendment) Acts was not challenged by the respondents.

347. The key to these rival contentions can be found in the emergency provisions contained in

Chapter XVIII of the Constitution. The Presidential declaration of emergency is made final, conclusive and non-justiciable by clause (5) of Article 352, which was introduced by the Thirty-eighth Amendment retrospectively. But apart from the fact that the Constitution itself has given finality to declarations of emergency made by the President, it is difficult to see how a court of law can look at the declaration of emergency with any mental reservations. The facts and circumstances leading to the declaration of emergency are and can only be known to the Executive, particularly when an emergency can be declared, as provided in Article 352(3), before the actual occurrence of war, external aggression or internal disturbance, so long as the President is satisfied that there is imminent danger thereof. The actual occurrence of war or external aggression or internal disturbance can be there for anyone to see but the imminent danger of these occurrences depends at any given moment on the perception and evaluation of the national or international situation, regarding which the court of law can neither have full and truthful information nor the means to such information. Judge and jury alike may form their personal assessment of a political situation but whether the emergency should be declared or not is a matter of High State policy and questions of policy are impossibly to examine in courts of law. The High courts whose judgments are under appeal have, with the greatest respect, failed to perceive this limitation on the power of judicial review, though in fairness to them it must be stated that none of them has held that the declaration of emergency is open to judicial scrutiny. But at the back of one's mind is the facile distrust of executive declarations which recite threat to the security of the country, particularly by internal disturbance. The mind then weaves cobwebs of suspicion and the judge, without the means to knowledge of full facts, covertly weighs the pros and cons of the political situation and substitutes his personal opinion for the assessment of the Executive, which, by proximity and study, is better placed to decide whether the security of the country is threatened by an imminent danger of internal disturbance. A frank and unreserved acceptance of the proclamation of emergency, even in the teeth of one's own pre-disposition, is conducive to a more realistic appraisal of the emergency provisions.

348. A declaration of emergency produces far-reaching consequences. While it is in operation the executive power of the Union, by reason of Article 353, extends to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised. Secondly, the power of Parliament to make laws with respect to any matter includes, during emergency, the power to make laws conferring powers and imposing duties or authorising the conferring of powers and imposition of duties upon the Union or officers and authorities of the Union as respects that matter, notwithstanding that the matter is not enumerated in the Union List. Article 354 confers power on the President to direct that the provisions of Articles 268 to 279, which deal with distribution of revenues between the Union and the States, shall have effect subject to such exceptions or modifications as the President thinks fit, but not extending beyond the expiration of the financial year in which the proclamation ceases to operate. A proclamation of emergency automatically curtails the operation of Article 19. As provided in Article 358, while the proclamation is in operation nothing in Article 19 shall restrict the power of the State to make any law or to take any executive action which the State would but for the provisions contained in Part III be competent to make or to take. Any law so made ceases to have effect to the extent of the incompetency as soon as the proclamation ceases to operate.

349. Then comes Article 359 which is directly in point. It authorises the President to issue an order declaring the suspension of the right to move any court for the enforcement of such of the rights conferred by the Part III as the President may specify in his order. Clause (1A) which was introduced in Article 359 by the Thirty-eighth Amendment act retrospectively has, inter alia, transported the provisions of Article 358 into Article 359 during the operation of an order made by the President under Article 359(1). The orders issued by the President in the instant case under

Article 359(1) provide for the suspension of the right to move any court for the enforcement of the rights conferred by Articles 14, 19, 21 and clauses (4) to (7) of Article 22. Article 21 of the Constitution runs thus :

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

350. The principal question for decision in these appeals is whether, notwithstanding the fact that the order issued by the President under Article 359(1) suspends the right of every person to move any court for the enforcement of the right to personal liberty conferred by Article 21, it is open to a person detained under a law of preventive detention like the MISA to ask for his release by filing a petition in the High Court under Article 226 of the Constitution for the writ of habeas corpus.

351. The writ of habeas corpus is described by May in his 'constitutional History of England' (Ed 1912, Vol, II, p. 130 (Chapter XI) as the first security of civil liberty. Julius Stone in 'Social Dimensions of Law and Justice' (Ed. 1966, p. 203) calls it a picturesque writ with an extraordinary scope and flexibility of application. The Latin term "habeas corpus" means you must have the body' and a writ for securing the liberty of the person was called habeas corpus ad subjiciendum. The writ affords an effective means of immediate release from an unlawful or unjustifiable detention, whether in prison or in private custody. The writ is of highest constitutional importance being a remedy available to the lowliest subject against the most powerful government.

352. The liberty of the individual is the most cherished of human freedoms and even in face of the gravest emergencies, judges have played a historic role in guarding that freedom with zeal and jealousy, though within the bounds, the farthest bounds, of constitutional power. The world wide interest generated by the lively debate in Liversidge v. Sir John Anderson ((1942) AC 206; Lord Atkin, p. 244), has still not abated. And repeated citation has not blunted the edge of Lord Atkin's classic dissent where he said :

I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive-minded than the Executive ..... In this country, amid the clash of arms, the laws are not silent. Then may be changed, but they speak the same language in war as in peace ..... In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charges I.

353. Sir William Blackstone in his 'Commentaries on the Laws of England' (4th Ed., Vol. I, pp. 105 to 107) says that the preservation of personal liberty is of great importance to the public because if it were left in the power of even the highest person to imprison anyone arbitrarily there would soon be an end of all other rights and immunities.

To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to goal, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.

The learned commentator goes on to add :

> And yet, sometimes, when the State is in real danger, even this may be a necessary

> measure. But the happiness of our Constitution is, that it is not left to the executive power to determine when the danger of the State is so great, as to render this measure expedient; for it is the Parliament only, or legislative power, that, whenever it sees proper, can authorize the Crown, by suspending the Habeas Corpus Act for a short and limited time, to imprison suspected persons without giving any reason for so doing.

354. May in his 'Constitutional History of England'(Ed. 1912, p. 124, 130) says that during the course of the last century every institution was popularised and every public liberty was extended but long before that period Englishmen had enjoyed person liberty as their birthright. It was more prized and more jealously guarded than any other civil right.

The Star Chamber had fallen : the power of arbitrary imprisonment had been wrested from the Crown and Privy Council : liberty had been guarded by the Habeas Corpus Act .....

Speaking of the writ of habeas corpus May says that it protects the subject from unfounded suspicions, from the aggressions of power and from abuses in the administration of justice.

Yet this protective law, which gives every man security and confidence, in times of tranquillity, has been suspended, again and again, in periods of public danger or apprehension. Rarely, however, has this been suffered without jealousy, hesitation, and remonstrance; and whenever the perils of the State have been held sufficient to warrant this sacrifice of personal liberty, no minister or magistrate has been suffered to tamper with the law at his discretion. Parliament alone, convinced of the exigency of each occasion, has suspended, for a time, the rights of individuals, in the interests of the State.

355. Dicey in his Introduction to the Study of the Law of the Constitution (10th Edition) says that :

> During periods of political excitement the power or duty of the courts to issue a writ of habeas corpus, and thereby compel the speedy trial or release of persons charged with crime, has been found an inconvenient or dangerous limitation on the authority of the executive government. Hence has arisen the occasion for statutes which are popularly called Habeas Corpus Suspension Acts.

356. E.C.S. Wade and Godfrey Phillips observe in their Constitutional Law (8th Ed., Chapter 48, pp. 717, 718) that in times of grave national emergency, normal constitutional principles must if necessary give way to the overriding need to deal with the emergency. According to the learned authors :

> It has always been recognised that times of grave national emergency demand the grant of special powers to the Executive. At such times arbitrary arrest and imprisonment may be legalised by Act of Parliament. Modern war demands the abandonment of personal liberty in that the duty of compulsory national service necessarily takes away for the time being the right of the individual to choose his occupation.

The learned authors refer to the English practice of passing Habeas Corpus Suspension Acts in times of danger to the State. These Acts prevented the use of habeas corpus and as soon as the period of suspension was over anyone who for the time being had been denied the assistance of the writ could bring an action for false imprisonment. Suspension did not legalised illegal arrest, it merely

suspended a particular remedy and therefore, a practice grew under which at the close of the period of suspension an Indemnity Act would be passed in order to protect officials from the consequences of any illegal acts which they might have committed under cover of the suspension of the prerogative writ.

357. Thomas M. Cooley says in the "General Principles of Constitutional Law" (4th Ed., Chapter XXXIV, pp. 360-361) in the U.S.A. that though the right to the writ of habeas corpus by which the liberty of the citizens is protected against arbitrary arrests is not expressly declared in the American Constitution, it is recognised in Article I, Section 9, clause 2 which says that :

> The privileges of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

It would appear that in America something similar to the passing of acts of Indemnity has been done by making provisions in State Constitutions.

358. Thus, though the liberty of the individual is a highly prized freedom and though the writ of habeas corpus is a powerful weapon by which a common man can secure his liberty, there are times in the history of a nation when the liberty of the individual is required to be subordinated to the larger interests of the State. In times of grave disorders, brought about by external aggression or internal disturbance, the stability of political institutions becomes a sine qua non of the guarantee of all other rights and interests.

To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible. (Blackstone's Commentaries on the Laws of England, 4th Ed., Vol. III pp. 125-26)

The "clear and present danger test" evolved by Justice Holmes in Schenck v. United States ((1919) 249 US 47), may well be extended to cases like the present where there is a threat of external aggression. On the heels of American entry into the First World War on June 15, 1917, the Congress adopted the Espionage Act creating three new offences which went beyond the prohibition of spying and sabotage. It prescribed a punishment of a fine of 10,000 dollars and 20 years' imprisonment. A year later, the act was amended by what is popularly called the Sedition Act which rendered it illegal even to say anything to obstruct the sale of United States bonds or to say anything contemptuous regarding the form of government of the United States. A unanimous court upheld Schenck's conviction under the Act for propagating that compulsory service in the armed forces was "a monstrous wrong against humanity in the interest of Wall Street's chosen few"' The judgment was delivered in 1919 when the war was already over and Holmes, J. held that things that can be said in times of peace will not be endured during times of war and no court will regard them as protected by any constitutional right.

359. The emergency provisions were incorporated into our Constitution on the strength of experience gained in England and U.S.A. But the object of Article 359 is to confer wider powers on the President than the power merely to suspend the right to file a petition for the writ of habeas corpus. Article 359 aims at empowering the President to suspend the right to enforce all or any of the fundamental rights conferred by Part III. It is in order to achieve that object that Article 359 does not provide that the President may declare that the remedy by way of habeas corpus shall be suspended during emergency. Personal liberty is but one of the fundamental rights conferred by Part III and the writ of habeas corpus is peculiar to the enforcement of the right to personal liberty. It

must follow that the suspension of the right to enforce the right conferred by Article 21 means and implies the suspension of the right to file a habeas corpus petition or to take any other proceeding to enforce the right to personal liberty conferred by Article 21.

360. But then it is urged on behalf of the respondents that by their writ petitions, respondents did not seek to enforce the right to personal liberty conferred by Article 21 or possessed by them apart from it. They were really seeking a declaration that the order of detention was illegal for the reason that it did not comply with the requirements of the law under which it was passed. In support of this argument reliance is placed upon a passage in H.W.R. Wade's Administrative Law (3rd Ed., pp. 127, 128) to the effect that habeas corpus is a remedy not only for the enforcement of the right to personal liberty but is also a remedy for the enforcement of the principle of untra vires. This argument lacks substance and overlooks the realities of the situation. It may be open to a detenu by filing a petition for the writ of habeas corpus to contend that the order under which he is detained is ultra vires of the statute to which the order owes its existence. But one must have regard to the substance of the matter and not to mere form. The real and substantial relief which the detenu asks for by a writ of habeas corpus is that he should be freed from detention and the reason for the relief is that the order of detention is ultra vires. It is clear, apart from the form in which the relief may or may not be clothed, that the respondents though their writ petitions were moving the High Courts for enforcing their right to personal liberty. The history of the writ of habeas corpus which is succinctly narrated in the late Mr. M. C. Setalvad's 'The Common Law in India' (pp. 37-41 (Ed. 1960, Hamlyn Lectures)) shows that the writ of habeas corpus which was in its inception a purely procedural writ gradually developed into a constitutional remedy furnishing a most powerful safeguard for individual freedom. Mr. Setalvad quotes that the writ has been described as "the key that unlocks the door to freedom". Respondents were surely not interested in obtaining an academic declaration regarding the ultra vires character of their detention. They wanted the door to freedom to be opened by the key of the habeas corpus writ.

361. Equally untenable is the contention that Article 226 which occurs in Chapter V, Part VI of the Constitution is an entrenched provision and, therefore, under Article 368 no amendment can be made to Article 226 without ratification by the legislatures of not less than one-half of the States. It is true that Article 226 is an entrenched provision which cannot suffer an amendment except by following the procedure prescribed by the proviso to Article 368(2). But the Presidential Order is issued under the Constitution itself and if its true construction produces a certain result, it cannot be said that some other article of the Constitution stands thereby amended. Article 359(1) provides for the passing of an order by the President declaring that the right to move for the enforcement of fundamental rights mentioned in the order shall be suspended. That may, in effect, affect the jurisdiction of the High Courts to entertain a petition for the issuance of the write of habeas corpus. But that does not bring about any amendment of Article 226 within the meaning of Article 368, which speaks of amendments to the Constitution by the Parliament in the exercise of its constitutional power. Article 226 and Article 359(1) are parts of the same fundamental instrument and a certain interpretation of one of these articles cannot amount to an amendment of the other.

362. It is also not correct to say that any particular interpretation of Article 359(1) will mean the abolition of the jurisdiction and power of the Supreme Court under Article 32 and of the High Courts under Article 226 of the Constitution. The true implication of the Presidential Order is to take away the right of any person to move any court for the enforcement of the rights mentioned in the order. In strict legal theory the jurisdiction and powers of the Supreme Court and the High Courts remain the same as before since the Presidential Order merely takes away the locus standi of a person to move these courts for the enforcement of certain fundamental rights during the operation

of the proclamation of emergency. It is important to appreciate that the drive of Article 359(1) is not against the courts but is against individuals, the object of the article being to deprive the individual concerned of his normal right to move the Supreme Court or the High Court for the enforcement of the fundamental rights conferred by Part III of the Constitution. In Mohan Chowdhury v. Chief commissioner Union Territory of Tripura((1964) 3 SCR 442, 451 : AIR 1964 SC 173 : (1964) 1 Cri LJ 132), a Constitution Bench of this Court, dealing with an order issued by the President on November 3, 1962 under Article 359(1), observed :

> .... Unquestionably, the Court's power to issue a writ in the nature of habeas corpus has not been touched by the President's Order, but the petitioner's right to move this Court for a writ of that kind has been suspended by the order of the President passed under Article 359(1). The President's Order does not suspend all the rights vested in a citizen to move this Court but only his right to enforce the provisions of Articles 21 and 22. Thus as a result of the President's Order aforesaid, the petitioner's right to move this Court, but not this Court's power under Article 32 has been suspended during the operation of the emergency, with the result that the petitioner has no locus standi to enforce his right, if any, during the emergency.

363. According to the respondents, the limited object of Article 359(1) is to remove restrictions on the power of the Legislature so that during the operation of the emergency it would be free to make laws in violation of the fundamental rights specified in the Presidential Order. This argument loses sight of the distinction between the provisions of Article 358 and Article 359(1A) on the one hand and of Article 359(1) on the other. Article 358, of its own force, removes the restrictions on the power of the Legislature to make laws inconsistent with Article 19 and on the power of the Executive to take action under a law which may thus violate Article 19. Article 358 does not suspend any right which was available under Article 19 to any person prior to the proclamation of emergency. Under Article 359(1) the President is empowered to suspend the right of an individual to move any court for the enforcement of the rights conferred by Part III as may be mentioned in the order. Consequent upon such order, all proceedings pending in any court for the enforcement of the rights so mentioned remain suspended during the period that the proclamation is in force or such shorter period as the order may specify. Article 359(1) is thus wider in scope than Article 358. This distinction has an important bearing on the main point under consideration because it shows that it was not enough to provide that nothing in Article 19 shall restrict the power of the State to make any law or to take any executive action which the State would, but for the provisions contained in Part III, be competent to make or take. In order to effectuate the purposes of emergency, it was necessary further to provide that no person would have any right to move for the enforcement of his fundamental rights mentioned in the Presidential Order and that pending proceedings in that behalf shall remain suspended during the operation of the emergency. It seems elementary that a fundamental right can be enforced as much in regard to a law which takes away that right contrary to the provisions of the Constitution as against the Executive, if it acts contrary to the provisions of a law or without the authority of law. In view of the language of Article 359(1) and considering the distinction between it and the provisions of Article 358 there is no justification for restricting the operation of Article 359(1) as against laws made by the Legislature in violation of the fundamental rights.

364. Reliance was placed by the respondents on the decisions of this Court in Mohan Chowdhury v. Chief Commissioner, Union territory of Tripura (supra) and Makhan Singh v. State of Punjab ((1964) 4 SCR 797 : AIR 1964 SC 381 : (1964) 1 Cri LJ 269), in support of their contention that Article 359(1) operates in the legislative and not in the executive field. These decisions do not

support such a proposition. On the contrary, it is clear from the two decisions that the effect of the Presidential Order under Article 359(1) is to take away the locus standi of a person to move any court for the enforcement of his fundamental rights which are mentioned in the order. Neither of the two cases deals directly with the question whether the operation of Article 359(1) is restricted to the legislative field but, if at all, the ratio of those cases may be logically extended to cover executive acts also. During times of emergency, it is the Executive which commits encroachments on personal liberties and the object of Article 359(1) is to empower the President to suspend the right to move any court for the enforcement of a right to complain against the actions of the Executive, no less than against the laws passed by the Legislature, if either the one or the other contravenes any of the fundamental rights mentioned in the order.

365. This position was controverted by the respondents from several angles. It was contended that in a Constitution which divides State functions into executive, legislative and judicial, the executive functions must be discharged consistently with the laws passed by the Legislature and the orders and decrees passed by the Judiciary. The suspension of the right to enforce fundamental rights cannot confer any privilege on the Executive to flout the law by which it is bound as much in times of emergency as in times of peace. Therefore, the argument proceeds, there being a valid law regulating preventive detention, namely the MISA, every order of detention passed by the Executive must conform to the conditions prescribed by that law. The current of though underlying this argument was highlighted by a learned Counsel for the respondents by saying that it is strange that in the face of law passed by the Parliament, which in passing the law must assume that it will be obeyed, the Executive can flout the law with impunity by relying on the Presidential Order issued Article 359(1). Yet another point of view presented on this aspect of the case was that permitting the Executive to defy and disobey the law made by the Legislature is tantamount to destroying one of the important basic features of the Constitution that the Executive is bound by the laws made by the Legislature. Finally, it was urged that the preamble to the Constitution speaks of a Sovereign Democratic Republic and, therefore, the executive which is subordinate to the Legislature cannot act to the prejudice of the citizen save to the extent permitted by laws validly made by the Legislature which is the chosen representative of the people.

366. In view of the true scope and object of Article 359(1), which has already been dealt with above, these arguments have to be rejected. In the first place, it is difficult to appreciate the argument of 'basic feature' because we are not concerned to pronounce upon the validity of an amendment made to the Constitution by a parliamentary measure. We are concerned to understand the scope of Article 359(1) and what it implies. That article is as much a basic feature of the constitution as any other and it would be inappropriate to hold that because in normal times the constitution requires the Executive to obey the laws made by the Legislature, therefore Article 359(1) which is an emergency measure, must be construed consistently with that position. The argument of basic feature is wrong for yet another reason that Article 359(1) does not provide that the Executive is free to disobey the laws made by the Legislature. At the cost of repetition it must be said that what Article 359(1) achieves is merely the suspension of the right of an individual to move a court for the assertion of his fundamental rights which have been mentioned in the Presidential Order, even if such rights are contravened either by the Legislature or by the Executive. To permit a challenge in court of law to an order of detention, which is an executive action, on the ground that the order violates a fundamental right mentioned in the Presidential Order, is to permit the detenu to enforce a fundamental right during emergency in a manner plainly contrary to Article 359(1). The language of that Article, it is admitted on all hands, is clear and unambiguous.

367. The constitutional consequences of a proclamation of emergency are grave and far-reaching.

Legislatures can, during emergencies, make laws in violation of the seven freedoms guaranteed by Article 19; the President has the power to suspend the right to move for the enforcement of all or any of the fundamental rights mentioned in the order issued under Article 359(1) : the executive power of the Union extends during emergencies to giving directions to any State as to the manner in which the executive power thereof is to be exercised. This particular power conferred on the Union Executive is in total violation of the provisions of Article 162 of the Constitution and indeed of the federal structure which is one of the principal features of our Constitution; if any State Executive fails to comply with the directions given by the Union Executive under Article 353(a), the "President's rule" can be imposed on that State under Article 356, in which event the Parliament is entitled under Article 357(1) to confer on the President the power of the legislature of that state to make laws. The Parliament can even authorize the President to delegate such legislative power to any other authority. The democratic structure of the Constitution stands severely eroded in such a situation. Finally, Parliament acquires during emergencies the power to make laws on matters which are enumerated in the State List. If consequences so fundamentally subversive of the basic federal structure of the Constitution can ensue during emergencies, it is not as revolting as may appear at first sight that even if the Executive does not obey the mandate of the Legislature, the citizen is powerless to move any court for the protection of his fundamental rights, if these rights are mentioned in the Presidential Order.

368. A facet of the same argument was presented on behalf of the respondents with even greater force. It was urged that Article 359(1) may remove fetters imposed by Part III but it cannot every remove the fetters arising from the principle of rule of law or from the principle of the limited power of the Executive under a system of checks and balances based on separation of powers. The obligation cast on the Executive to act in accordance with law does not, according to the respondents, arise from any particular article of the Constitution but it arises from the inherent compulsion of the rule of law which is a central basic feature of our constitutional system. The suspension of the right to enforce Article 21 cannot automatically entail the suspension of the rule of law because, even during an emergency, the argument proceeds, the rule of law is not and cannot be suspended. The Executive has a limited authority under the Indian Constitution and it can act within the residual area as it pleases, so long as it does not act to the prejudice of the citizen. It is always incumbent on the Executive to justify its action on the basis of law and this according to the respondents, is the principle of legality or the rule of law.

369. The respondents' argument that all executive action which operates to the prejudice of a person must have the authority of law to support it is indisputably valid in normal situations. In the absence of a proclamation of emergency and in the absence of a Presidential Order under Article 359(1) of the kind that we have in the instant case, the Executive is under an obligation to obey the law and if it acts to be prejudice of anyone by disobeying the law, its action is liable to be challenged by an appropriate writ. That the rule of law must prevail in normal times is the rule of law under the Indian Constitution. But it is necessary to clear a misconception. Even though the compulsion to obey the law is compulsion of normal times, Article 358 takes in those cases only in which the Executive purports to act under the authority of a law. It does not envisage that Executive can act without the apparent authority of law. In order words, Article 358 enables the Legislature to make laws in violation of Article 19 and the Executive to act under these laws, despite the fact that the laws constitute an infringement of the fundamental rights conferred by Article 19.

370. The argument of the respondents that the Presidential Order under Article 359(1) cannot ever suspend the rule of law requires a close examination, particularly in view of some of the decisions of this Court which apparently support that contention.

371. In State of Madhya Pradesh v. Thakur Bharat Singh ((1967) 2 SCR 454 : AIR 1967 SC 1170), the State Government, on April 24, 1963 made an order under Section 3 of the Madhya Pradesh Public Security Act, 1959 directing that the respondent shall not be in any place in Raipur district, that he shall immediately proceed to and reside in a named town and that he shall report daily to a police station in that town. The order was challenged by the respondent by a writ petition under articles 226 and 227 of the Constitution on the ground that Section 3 infringed the fundamental rights guaranteed by Article 19(1)(d) and (e) or the Constitution. The respondent succeeded in the High Court which declared a part of the order invalid on the ground that Section 3(1)(b) of the Act was violative of Article 19(1)(d) of the Constitution. In appeal, it was contended in this Court on behalf of the State Government that so long as the state of emergency declared on October 20, 1962 was in force, the respondent could not move the High Court by a petition under Article 226 on the plea that by the impugned order his fundamental right guaranteed under Article 19(1)(d) was infringed. It was further contended on behalf of the State Government that even if Section 3(1)(b) was held to be void, Article 358 protected legislative as well as executive action taken after the proclamation of emergency and therefore the order passed by the Government after the emergency was declared could not be challenged as infringing Article 19. Describing this latter argument as involving "a grave fallacy", a Constitution Bench of this Court dismissed the State's appeal holding, that for acts done to the prejudice of the respondent after the declaration of emergency under Article 352, no immunity from the process of the court could be claimed under Article 358 of the Constitution since the order was not supported by any valid legislation. Shah J. who spoke on behalf of the Bench observed in his judgment that all executive action which operates to the prejudice of any person must have the authority of law to support it and that the terms of Article 358 do not detract from that rule. Article 358, according to this Court, did not purport to invest the State with arbitrary authority to take action to the prejudice of citizens and others but it merely provides that so long as the proclamation of emergency subsists, laws may be enacted and executive action may be taken in pursuance of lawful authority, which if the provisions of Article 19 were operative would have been invalid.

372. It is important to bear in mind that Bharat Singh's case was concerned with a pre-emergency law, though the impugned order was passed thereunder during the operation of emergency. The law having been passed in 1959, which was before the declaration of emergency, it had to comply with Article 19 and if it did not, it was void to the extent of the inconsistency. Since the law was held to be violative of Article 19 it could not claim any protection under Article 358. That article lifts restrictions on legislative power "while a Proclamation of Emergency is in operation", that is to say, it enables laws to be made during the emergency, even if they conflict with Article 19. The Executive is then free to act under those laws. But, if the law is void for the reason that having been made prior to the emergency it violates Article 19, or if there is no law at all under the purported authority of which the Executive has acted, the executive action is not protected by Article 358. Bharat Singh's case is distinguishable for the additional reason that it was only concerned with the effect of Article 358 and no question arose therein with regard to any executive action infringing a fundamental right mentioned in a Presidential Order issued under Article 359(1). I have already indicated the vital difference between Article 359(1). The latter bars the enforcement of any fundamental right mentioned in the Presidential Order, thereby rendering it incompetent for any person to complain of its violation, whether the violation is by the Legislature or by the Executive. In other words, Article 359(1) bars the remedy by depriving an aggrieved person of his locus to complain of the violation of such of his fundamental rights as are mentioned in the Presidential Order.

373. Respondents also relied in support of the same submission on the decisions of this Court in

District Collector of Hyderabad v. M/s. Ibrahim & Co.((1970) 3 SCR 498 : (1970) 1 SCC 386); Bennett Coleman & Co. v. Union of India ((1973) 2 SCR 757-773-775 : (1972) 2 SCC 788,806,808); and Shree Meenakshi Mills Ltd. v. Union of India ((1974) 2 SCR 398, 405, 406, 428 : (1974) 1 SCC 468, 475, 476, 499). These decisions are founded on the same principle as Bharat Singh's case and are distinguishable for the same reason. In Ibrahim's case, the existing licences of recognised dealers in sugar were cancelled by the State Government and a monopoly licence was given to a cooperative stores thereby preventing the dealers by a mere executive order from carrying on their business. A question arose in the appeal whether the order of the State Government cancelling the licences of the dealers was protected under Article 358 and 359 of the Constitution as the President had declared a state of emergency on October 20, 1962. This question was answered in the negative on the ground that the executive order which was immune from attack is only that order which the State was competent to make but for the provisions contained in Article 19. Since the executive action of the State Government was invalid apart from Article 19, it was not immune from attack merely because a proclamation of emergency was in operation. The important point of distinction is that in Ibrahim's case, the impugned order was not made under the authority reserved by the Defence of India Ordinance or the rules made thereunder but was issued merely in pursuance of the policy laid down by the Central Government in entrusting the distribution of sugar exclusively to cooperative societies. In Bennett Coleman Company's case the impugned Newsprint Control Policy was an emanation of the old policy which was enunciated prior to the proclamation of emergency. Relying on Ibrahim's case and Bharat Singh's case, this Court held that Article 358 does not authorise the taking of detrimental executive action during the emergency without any legislative authority or in purported exercise of power conferred by a pre-emergency law which was invalid when enacted. The decision in Bennett Coleman Company's case was followed in Meenakshi Mills' case where the executive action taken during the emergency did not have the authority of any valid law and the impugned orders having been made under a pre-emergency law were not immune from attack under Article 358.

374. Respondents relied on a passage in the judgment of Ramaswami, J. who spoke on behalf of the Court in Chief Settlement Commissioner, Rehabilitation Department, Punjab v. Om Parkash ((1968) 3 SCR 655, 660-661 : AIR 1969 SC 33), to the effect that whatever legislative power the executive administration possesses must be derived directly from the delegation of the legislature and exercised validly only within the limits prescribed. The Court emphatically rejected the notion of inherent or autonomous law-making power in the executive administration of the country and observed that the rule of law rejects the conception of the dual State in which governmental action is placed in a privileged position of immunity from control, by law on the ground that such a notion is foreign to our basic constitutional concepts. Respondents also relied upon the decision of the Privy Council in Eshugbayi Eleko v. Officer administering the Government of Nigeria ((1931) AC 662, 670) where Lord Atkin observed that in accordance with the British jurisprudence, no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. Our attention was repeatedly drawn to a further observation made by Lord Atkin that it is a tradition of British justice that judges should not shrink from deciding such issues in the face of the Executive. These observations have been considered by this Court in Makhan Singh's case where, speaking on behalf of the majority, Gajendragadkar, J. said that sentiments expressed by Lord Atkin were noble and eloquent but it was necessary to have regard to the provisions of our Constitution by which we are governed and which has itself made emergency provisions in order to enable the nation to meet the challenge of external aggression or internal disturbance. The principle enunciated in Eleko's case, howsoever lofty and stirring, has no relevance here because we have to consider the meaning and effect of Article 359(1)

which has no parallel in the English law. Eleko's principle is unquestionably supreme in times of peace and so is the validity of the observations made by Ramaswami, J. in Om Prakash's case. Both of those cases were concerned with a totally different problem, the problem of peace, not of war or internal disturbance.

375. The 'rule of law' argument like the 'basic feature' argument is intractable. Emergency provisions contained in Part XVIII of the Constitution which are designed to protect the security of the State are as important as any other provision of the Constitution. If the true construction and effect of Article 359(1) is as I have stated it to be, it is impossible to hold that such a construction violates the rule of law. The rule of law, during an emergency, is as one finds it in the provisions contained in Chapter XVIII of the Constitution. There cannot be a brooding and omnipotent rule of law drowning in its effervescence the emergency provisions of the Constitution.

376. The Advocate General of Gujarat had peculiar problems to voice, arising out of the fluid and uncertain political situation in his State. He was unable to appreciate how the executive Government of the State could defy a parliamentary mandate contained in the MISA, either as regards the procedural or the substantive part of that law. Whatever may be the requirements of emergency, he seemed to contend, the Gujarat Government could not, save at grave peril to its existence, defy the provisions of a law made by the Parliament. The anguish and embarrassment of the learned Advocate General is understandable, but the short answer to his contention is that, on the record, the Government of Gujarat has not been asked to flout the MISA and indeed no one can dispute the right of the State Government to ensure compliance with the laws of the land. Indeed, that is its plain and foremost duty. The important consideration is that in the event of the State Government coming to pass an order of detention in violation of MISA, the detenu will have no right to enforce his corresponding fundamental right if it is mentioned in the Presidential Order. The learned Advocate General built his argument as if, during emergencies, the executive is under an obligation to flout the laws of the land. Article 359(1) neither compels nor condones the breaches by the Executive of the laws made by the Legislature. Such condition is the function of an Act of Indemnity.

377. I must now take up for consideration a very important plank of the respondents' argument that Article 21 is not the sole repository of the right to life and personal liberty. This argument has been presented before us from aspects too numerous to mention and scores of instances have been cited to buttress it. This was to some extent inevitable because quite a few counsel argued the same point and each had his peculiar, favourite accent. I will try to compress the arguments without, I hope, sacrificing their thematic value.

378. The respondents' arguments may be put thus :

> 1. Article 21 is not the sole repository of the right to personal liberty because that right can be found in Articles 19(1) (s), 20 and 22 also. In view of the decision in the Bank Nationalisation case, ((1970) 3 SCR 530, 578 : (1970) 1 SCC 248, 289, 290) which overruled Gopalan's case ((1950) SCR 88 : AIR 1950 SC 27 : 51 Cri LJ 1383), these rights are not mutually exclusive and therefore the suspension of the right to enforce article 21 cannot affect the right conferred by Article 19, 20 and 22.
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> 2. Article 21 is not the sole repository of the right to personal liberty because, (i) an accused convicted of murder and sentenced to death can assert his right to life by challenging the conviction and sentence in appeal, in spite of the Presidential Order

under Article 359(1); (ii) if a person is wrongfully confined, he can ask for his personal liberty by prosecuting the offender in spite of the Presidential Order; and (iii) if a money-decree is passed against the government, the decree can be enforced even if the right to enforce the right to property is suspended by the Presidential Order.

3. Prior to the enactment of the Constitution statutory, contractual and common law rights were in existence and those rights can be taken away only by the Legislature. They cannot be affected by the Presidential Order. The pre-Constitution common law and statutory rights to personal liberty continued in force by reason of Article 372 of the Constitution, since those rights were not repugnant to any provision of the Constitution. If the fundamental right to personal liberty is suspended by the Presidential Order, the pre-Constitution laws will begin to operate by reason of the theory of eclipse. There is no authority for the proposition that on the conferment of fundamental rights by the Constitution, the corresponding pre-existing rights merged in the fundamental rights and that with the suspension of fundamental rights, the corresponding pre-existing rights also got suspended. Article 21 is different in content from the common law right to personal liberty which was available against private individuals also. Since Article 21 merely elevates the right of personal liberty to the status of a fundamental right, the pre-Constitution rights cannot be suspended by the Presidential Order. The object of Article 21 is to give and not to take. In fact, the very language of that article shows that instead of conferring the right to personal liberty, it assumed its existence in the first place and then proceeded by a negative provision to prohibit its deprivation. Examples of such pre-Constitution rights are : (i) rights available under the Indian Penal Code and the Criminal Procedure code; (ii) rights available under the law of torts, especially the right to sue for damages for false imprisonment; and (iii) the remedy of habeas corpus available under Section 419, Criminal Procedure Code, since the year 1923.

4. Non-fundamental constitutional rights like those arising under Articles 256, 265 and 361(3) or natural rights or contractual rights or the statutory rights to personal liberty are not affected by the Presidential Order. Statutory rights can only be taken away in terms of the statute and not by an executive fiat. By reason of Article 256, the executive power of every State must ensure compliance with the laws made by the Parliament. The executive power of the States must therefore comply with Sections 56 and 57 of the Criminal Procedure Code and a person aggrieved by the violation of those provisions can enforce his statutory rights to personal liberty in spite of the Presidential Order. By Article 265 no tax can be levied or collected except by authority of law. A person affected by the violation of this provision can enforce his right to property even if Article 19 is suspended. If a process happens to be issued against the Governor of a State in contravention of Article 361(3), the Governor can exercise his right to personal liberty despite the Presidential Order under Article 359(1). Similarly, in cases not covered by Section 16A of the MISA, if the Advisory Board opines that the detention is unjustified, the detenu can compel the Government to accept that opinion, in spite of the Presidential Order.

5. Even after the passing of a Presidential Order, Parliament may create new rights to personal liberty and such rights can be enforced in spite of the Presidential Order.

6. Civil liberty or personal liberty is not a conglomeration of positive rights. It operates in an area of free action and no law can possibly curtail it.

7. If a law affecting the fundamental right to personal liberty is void for want of legislative competence, it can be challenged in spite of the Presidential Order.

8. The suspension of the right to enforce personal liberty cannot confer a licence on executive officers to commit offences against the law of the land, and if they do so, they can be brought to book inspite of the Presidential Order.

379. I look at the question posed by the respondents from a different angle. The emergency provisions of the Constitution are designed to protect the security of the State and in order to achieve that purpose, various powers have been conferred on the Parliament and the President by Chapter XVIII of the Constitution. One of such powers is to be found in Article 359(1) under which the President, during the operation of the emergency, can issue an order suspending the right to move any court for the enforcement of all or any of the fundamental rights conferred by Part III. Proceedings commenced prior to the issuance of such an order, including proceedings taken prior to the declaration of the emergency itself, automatically remain suspended during the emergency or for such shorter period as the President may in his order specify. The object of empowering the President to issue an order under Article 359(1) suspending the enforcement of the right to personal liberty conferred by Part III of the Constitution cannot be to save all other rights to personal liberty except the one conferred by Part III, which to me seems totally devoid of meaning and purpose. There is nothing peculiar in the content of the right to personal liberty conferred by Part III so that the Constitution should provide only for the suspension of the right to enforce that particular kind of right, leaving all other rights to personal liberty intact and untouched. In times of emergencies the Executive, unquestionably though unfortunately, is constrained to take various forms of action in derogation of the rights of citizens and others, including the cherished right to personal liberty. The Constitution aims at protecting the Executive, during the operation of emergency, from attacks on the action taken by it in violation of the rights of individuals. Accordingly, in so far as the right to personal liberty, for example, is concerned one of the objects of the emergency provisions is to ensure that no proceeding will be taken or continued, to enforce that right against the Executive during the operation of the emergency. The Executive is then left free to devote its undiluted attention to meeting the threat to the security of the State. This purpose cannot ever be achieved by interpreting Article 359(1) to mean that every right to personal liberty shall be enforceable and every proceeding involving the enforcement of such right shall continue during the emergency, except to the extent to which the right is conferred by Part III of the Constitution. The existence of the right to personal liberty in the pre-Constitution period was surely known to the makers of the Constitution. The assumption underlying the respondents' argument is that in spite of that knowledge, the Constitution Assembly decided that all those rights will reign supreme in their pristine glory even during the emergency and what will remain in abeyance is only the enforcement of the right to personal liberty conferred by Part III. The right to personal liberty has no hallmark and therefore when the right is put in action it is impossible to identify whether the right is one given by the Constitution or is one which existed in the pre-Constitution era. If the argument of the respondents is correct, no action to enforce the right to personal liberty can all fall within the mischief of the Presidential Order even if it mentions Articles 19, 20, 21 and 22, because, every preliminary objection by the Government to a petition to enforce the right to personal liberty can be effectively answered by contending that what is being enforced is either the natural right to personal liberty or generally, the pre-Constitution right to personal liberty. The error of the respondents' argument lies in its assumption, and in regard to the argument of some of the counsel in its major

articulate premise, that the qualitative content of the non-constitutional or pre-constitutional right to personal liberty is different from the content of the right to personal liberty conferred by Part III of the Constitution. The right to personal liberty is the right of the individual to personal freedom, nothing more and nothing less. That right along with certain other rights was elevated to the status of a fundamental right in order that it may not be tinkered with and in order that a mere majority should not be able to trample over it. Article 359(1) enables the President to suspend the enforcement even of those rights which were sanctified by being lifted out of the common morass of human rights. If the enforcement of the fundamental rights can be suspended during an emergency, it is hard to accept that the right to enforce non-fundamental rights relating to the same subject-matter should remain alive.

380. Article 359(1) contains three important clauses : (1) The proclamation of emergency must be in operation at the time when the President issues his order; (2) The President must issue an order declaring the suspension of the right to move any court; and (3) The power of the President to declare such suspension can extend to such rights only as are conferred by Part III. If these three conditions are satisfied, no person can move any court for the enforcement of such of the rights conferred by Part III as are mentioned in the Presidential Order.

381. The first and foremost question to ask when a proceeding is filed to enforce a right as against the Government while a proclamation of emergency is in operation is, whether the right is mentioned in the Presidential Order and whether it is the kind of right conferred by Part III. Article 21, for example, confers the right to life and personal liberty. The power of the President therefore extends under Article 359(1) to the suspension of the right to move any court for the enforcement of the right to life and personal liberty. The President cannot suspend the enforcement of any right unless that right is included in Part III which confers fundamental rights. The President, in my opinion, would be acting within the strict bounds of his constitutional power if, instead of declaring the suspension of the right to enforce the right conferred by Article 21 he were to declare that "the right not to be deprived of life and personal liberty except according to procedure established by law" shall remain suspended during the emergency.

382. Article 359(1) does not really contemplate that while declaring the suspension of the right to move any court, the President must or should specify the article or the articles of the Constitution the enforcement of rights conferred by which shall be suspended. What Article 359(1) contemplates is that the President can declare the suspension of the right to move any court for the enforcement of the rights mentioned in Part III. The words "conferred by Part III" which occur in Article 359(1) are not intended to exclude or except from the purview of the Presidential Order, rights of the same variety of kind as are mentioned in Part III but which were in existence prior to the Constitution or can be said to be in existence in the post-Constitution era, apart from the Constitution. The emphasis of the article is on the right to suspend the enforcement of the kind of right mentioned in Part III and not on the fact that those rights are conferred by Part III. To put it differently, the words "conferred by Part III" are used only in order to identify the particular rights the enforcement of which can be suspended by the President and not in order to impose a limitation on the power of the President so as to put those rights which exist or which existed apart from the Constitution, beyond the reach of the Presidential Order. The respondents by their petitions are enforcing their right to personal liberty and that right is a right conferred by or mentioned in Part III of the Constitution. As I have said above, if instead of saying that the right to enforce the right conferred by Article 21 shall be suspended the President were to say that the right not to be deprived of life or personal liberty except according to procedure established by law will remain suspended, no argument of the kind made before us could reasonably have been made. The true effect of the Presidential Order, though

worded in the way it is, is the same as it would have been, had it been worded in the manner I have indicated.

383. It therefore does not make any difference whether any right to personal liberty was in existence prior to the enactment of the Constitution, either by way of a natural right, statutory right, common law right or a right available under the law of torts. Whatever may be the source of the right and whatever may be its jurisdiction, the right in essence and substance is the right to personal liberty. That right having been included in Part III, its enforcement will stand suspended if it is mentioned in the Presidential Order issued under Article 359(1).

384. The view which I have taken above as regards the scope and meaning of Article 359(1) affords in my opinion a complete answer to the contention of the respondents that since Article 21 is not the sole repository of the right to personal liberty, the suspension of the right to enforce the right conferred by that article cannot affect the right to enforce the right of personal liberty which existed apart from that article. I have held that on a true interpretation of the terms of the Presidential Order read with Article 359(1), what is suspended is the right to move for the enforcement of the right to personal liberty whether that right is conferred by the Constitution or exists apart from and independently of it. Otherwise, the Constitution has only done much ado about nothing.

385. All the same I would like, briefly, to deal with the argument of the respondents on its own merit, particularly the illustrations cited in support of that argument.

386. It is true that in view of the decision in the Bank Nationalisation case (supra), the right conferred by Article 21 and 19 cannot be treated as mutually exclusive. But the suspension of the right to enforce the right of personal liberty means the suspension of that right wherever it is found unless its content is totally different as from one article to another. The "right conferred by Article 21" is only a description of the right of personal liberty in order to facilitate its exact identification and such a description cannot limit the operation of the Presidential Order to those cases only where the right to personal liberty is claimed under Article 21.

387. The circumstance that the pre-Constitution rights continued in force after the enactment of the Constitution in view of Article 372 does not make any difference to this position because, even assuming that certain rights to personal liberty existed before the Constitution and continued thereafter as they were not repugnant to any provision of the Constitution, all rights to personal liberty having the same content as the right conferred by Article 21 would fall within the mischief of the Presidential Order.

388. The theory of 'eclipse' has no application to such cases because that theory applies only when a pre-Constitution law becomes devoid of legal force on the enactment of the Constitution by reason of its repugnancy to any provisions of the Constitution. Such laws are not void but they are under an eclipse so long as the repugnancy lasts. When the repugnancy is removed, the eclipse also is removed and the law becomes valid.

389. As regards the doctrine of 'merger' it is unnecessary to go to the length of saying that every prior right to personal liberty merged in the right to personal liberty conferred by Part III. Whether it merged or not, it cannot survive the declaration of suspension if the true effect of the Presidential Order is the suspension of the right to enforcement all and every right to personal liberty. In that view, it would also make no difference whether the right to personal liberty arises from a statute or from a contract or from a constitutional provision contained in some part other than Part III.

390. As regards the illustrations, it is neither proper nor possible to take each one of them separately and answer them. Hypothetical illustrations cannot establish a point and practical difficulties have to be solved as and when they arise. But some of the more important illustrations taken by the respondents' counsel seem to me to have a simple answer. For example, when an accused challenges his conviction for murder and the sentence of death imposed on him for that offence, his remedy by way of an appeal is not barred by the Presidential Order because he is only trying to get rid of a judgment which holds him guilty of murder. It is not he who moved the court for his personal liberty but it is the prosecution which dragged him to the court to prove the charge of murder against him. The accused only defends the charge of criminality whether it is in the trial Court or in a higher court. Similarly, if a person is wrongfully confined, the prosecution of the offender is not intended or calculated to secure the personal liberty of the victim. The court may in proper cases pass an order releasing the complainant from wrongful confinement but the true object of the prosecution is to punish the person who has committed an offence against the penal law of the land. As regards decretal rights against the Government, what the decree-holder enforces in execution is not his right to property. The original cause of action merges in the decree and therefore what is put into execution is the rights arising under the decree. The illustration regarding the issuance of a process against the Governor of a State need not be pursued seriously because such an event is hardly ever likely to happen and if it does, the gubernatorial rights may possibly withstand the Presidential Order under Article 359(1). As regards the flouting of the opinion of the Advisory Board by the Government, a writ of mandamus compelling the government to obey the mandate of the law may perhaps stand on a different footing as the very nature of such a proceeding is basically different. Lastly, it is unrealistic to believe that after the passing of the Presidential Order suspending the existing constitutional rights, Parliament would create new rights to personal liberty so as to nullify the effect of the Presidential Order. The easier way for the Parliament would be to disapprove of the proclamation of emergency when it is placed before it under Article 352(2)(b) of the Constitution or to disapprove of the Presidential Order issued under Article 359(1) when it is placed before it under Article 359(3) of the Constitution. But as I have said earlier, it is difficult to furnish a clear and cogent answer to hypothetical illustrations. In the absence of necessary facts one can only make an ad hoc answer, as I have attempted to do recording the possible issuance of a process against the Governor of a State. Actually, Article 361(3) speaks of a "process" for the arrest or imprisonment of a Governor issuing from any court. Fundamental rights can be exercised as against judicial orders but the circumstances in which such a process may come to be issued, if at all, may conceivably affect the decision of the question whether a Presidential Order issued under Article 359(1) can bar the remedy of an aggrieved Governor.

391. In so far as the illustrative cases go, I would like to add that Article 256 which was chosen by the respondents as the basis of an illustration does not seem to confer any right on any individual. That article appears in Part XI which deals with relations between the Union and the States. A failure to comply with Article 256 may attract serious consequences but no court is likely to entertain a grievance at the instance of a private party that Article 256 has not been complied with by a State Government. As regards the claim to personal liberty founded on a challenge to an order on the ground of excessive delegation, I prefer to express no firm opinion though the greater probability is that such a challenge may fail in face of a Presidential Order of the kind which has been passed in the instant case.

392. I have held above that the existence of common law rights prior of the Constitution will not curtail the operation of the Presidential Order by excepting those rights from the purview of the order. I may add that the decision of this Court in Dhirubha Devisingh Gohil v. State of Bombay ((1955) 1 SCR 691 : AIR 1955 SC 47) is an authority for the proposition that if any pre-

Constitution right has been elevated as a fundamental right by its incorporation in Part III, the pre-existing right and the fundamental right are to be considered as having been grouped together as fundamental rights "conferred" by the Constitution. The decision in Makhan Singh's case ((1964) 4 SCR 797, 818-819 : AIR 1964 SC 381 : (1964) 1 Cri LJ 269) also shows that once the right to obtain a direction in the nature of habeas corpus became in 1923 a statutory right to a remedy after the enactment of Section 491 of the code of Criminal Procedure, it was not open to any party to ask for a writ of habeas corpus as a matter of common law.

393. It was contended for the respondents that the High Courts have jurisdiction under Article 226 to issue writs and directions not only for the enforcement of fundamental rights but "for any other purpose" and since by their petitions they had really asserted their non-fundamental rights, the High Court had the jurisdiction to issue appropriate writs or directions upholding those rights in spite of the Presidential Order. This argument cannot be accepted because the entire claim of the respondents is that the orders of detention are in violation of the MISA, which in substance means that the respondents have been deprived of their personal liberty in violation of Article 21 of the Constitution. By that article, no person can be deprived of his life or personal liberty except according to procedure established by law. The grievance of the respondents is that they have been deprived of their personal liberty in violation of the procedure established or prescribed by the MISA. In substance therefore they are complaining of the violation of a fundamental right, which it is not open to them to do in view of the Presidential Order by which the right to move any court for the enforcement of the right conferred by Article 21 has been suspended.

394. This judgment, long as it is, will be incomplete without at least a brief discussion of some of the important decisions of this Court which were referred to during the course of arguments time and again. Before doing so, a prefatory observation seems called for. The Earl of Halsbury, L.C. said in Quinn v. Leatham ((1901) AC 495, 506) that the generality of the expressions which may be found in a judgment are not intended to be expositions of the whole law but are governed and qualified by the particular facts of the case in which such expressions are to be found. This Court in the State of Orissa v. Sudhansu Sekhar Misra ((1968) 2 SCR 154, 163 : AIR 1968 SC 647 : (1970) 1 LLJ 662), uttered the caution that it is not profitable task to extract a sentence here and there from a judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. Counsel have not done any such shearing but I though I might begin the study of cases with a self-admonition.

395. A decision of this Court on which the greatest reliance was placed by the respondents is Makhan Singh v. State of Punjab (supra). The appellants therein were detained under Rule 30(1)(b) of the Defence of India Rules made by the Central Government under Section 3 of the Defence of India Ordinance, 1962. They applied for their release to the Punjab and Bombay High Courts under Section 491(1)(b) of the code of Criminal Procedure, their contention being that certain sections of the Defence of India Act and Rule 30(1)(b) of the Defence of India Rules were unconstitutional since they contravened their fundamental rights under Articles 14, 21 and 22(4), (5) and (7) of the Constitution. The High Courts held that in view of the Presidential Order which was issued on November 3, 1962 under Article 359(1) of the Constitution, the petitions of habeas corpus filed by the appellants were barred. Being aggrieved by the orders dismissing their petitions, the detenus filed appeals in this court which were heard by a Constitution Bench consisting of seven Judges. The judgment of the majority was delivered by Gajendragadkar, J. Subba Rao, J. gave a dissenting judgment.

396. Both the majority and the minority judgments agree that the Presidential Order would take

away the right to move the Supreme Court under Article 32 and the High Court under Article 226 for the enforcement of the rights mentioned in the order. But while the majority took the view that the petition under Section 491 of the Criminal Procedure Code was also barred, Subba Rao, J. held that the petitioners' right to ask for relief by filing an application under Section 491 was not affected by the Presidential Order. This difference in the view of the majority and the minority is now of no consequence as Section 491 has ceased to be on the statute book after April 1, 1974 when the new Code of Criminal Procedure came into force.

397. The conclusion of the Court in Makhan Singh's case may be summed up thus :

1. Article 359 is reasonably capable of only one construction as its language is clear and unambiguous.

2. The suspension of Article 19 contemplated by Article 358 removes during the pendency of the emergency the fetters created on the legislative and executive powers by Article 19 and if the Legislatures make laws or the Executive commits acts which are inconsistent with the rights guaranteed by Article 19, their validity is not open to challenge either during the continuance of the emergency or even thereafter.

3. As soon as the proclamation ceases to operate, the legislative enactments passed and the executive actions taken during the course of the said emergency shall be inoperative to the extent to which they conflict with the rights guaranteed under Article 19 because as soon as the emergency is lifted, Article 19 which was suspended during the emergency is automatically revived and begins to operate.

4. Article 359, on the other hand, does not purport expressly to suspend any of the fundamental rights. What the Presidential Order purports to do by virtue of the power conferred on the President by Article 359(1) is to bar the remedy of the citizens to move any court for the enforcement of the specified rights.

5. The Presidential Order cannot widen the authority of the Legislatures or the Executive; it merely suspends the rights to move any court to claim a relief on the ground that the rights conferred by Part III have been contravened if the said rights are specified in the order. If at the expiration of the Presidential Order, parliament passes any legislation to protect executive action taken during the pendency of the Presidential Order and afford indemnity to the Executive in that behalf, the validity and the effect of such legislative action may have to be carefully scrutinised.

6. The words "the right to move any court" which occur in Article 359(1) refer to the right to move any court of competent jurisdiction including both the Supreme Court and the High Court.

7. In determining the question as to whether a particular proceeding falls within the mischief of the Presidential Order or not, what has to be examined is not so much the form which the proceeding has taken, or the words in which the relief is claimed, as the substance of the matter and whether before granting the relief claimed by the citizen, it would be necessary for the court to enquire into the question whether any of his specified fundamental rights have been contravened. If any relief cannot be

granted to the citizen without determining the question of the alleged infringement of the said specified fundamental rights, that is a proceeding which falls under Article 359(1) and would, therefore, be hit by the Presidential Order issued under the said article.

8. The right to ask for a writ in the nature of habeas corpus which could once have been treated as a matter of common law has become a statutory right after 1923, and after Section 491 was introduced in the Cr. P.C., it was not open to any citizen in India to claim the writ of habeas corpus on grounds recognised by common law apart from the provisions of Section 491(1) (b) itself.

9. Whether or not the proceedings taken under Section 419(1)(b) fall within the preview of the Presidential Order, must depend upon the construction of Article 359(1) and the order, and in dealing with this point, one must look at the substance of the matter and not its form.

10. It is true that there are two remedies upon to a party whose right of personal freedom has been infringed; he may move the court for a writ under Article 226(1) or Article 32(1) of the Constitution, or he may take a proceeding under Section 491(1)(b) of the code. But despite the fact that either of the two remedies can be adopted by a citizen who has been detained improperly or illegally, the right which he claims is the same if the remedy sought for is based on the ground that there has been a breach of his fundamental rights; and that is a right guaranteed to the citizen by the Constitution, and so, whatever is the form of the remedy adopted by the detenu, the right which he is seeking to enforce is the same. Therefore the prohibition contained in Article 359(1) and the Presidential Order will apply as much to proceedings under Section 491(1)(b) as to those under Article 226(1) and Article 32(1).

11. If the detenu is prohibited from asking for an order of release on account of the Presidential Order, it would not be open to him to claim a mere declaration either under Section 491 or under Article 32 or 226 that the detention is unconstitutional or void.

12. The right specified in Article 359(1) includes the relevant right, whether it is statutory, constitutional or constitutionally guaranteed.

398. After recording these conclusion the majority judgment proceeded to consider the question as to which are the pleas which are open to a person to take in challenging the legality or the propriety of his detention, either under Section 491(1)(b) or under Article 226(1). The conclusions of the Court on this question are as follows :

(a) If in challenging the validity of his detention order, the detenu is pleading any right outside the rights specified in the order, his right to move any court in that behalf is not suspended, because it is outside Article 359(1) and consequently outside the Presidential Order itself. Accordingly if a detenu is detained in violation of the mandatory provisions of the Act it would be open to him to contend that his detention is illegal. Such a plea is outside Article 359(1) and the right of the detenu to move for his release on such a ground cannot be affected by the Presidential Order.

(b) The exercise of a power mala fide is wholly outside the scope of the Act conferring the power and can always be successfully challenged.

(c) It is only in regard to that class of cases falling under Section 491(1)(b) where the legality of the detention is challenged on grounds which fall under Article 359(1) and the Presidential Order that the bar would operate. In all other cases falling under Section 491(1) the bar would be inapplicable and proceedings taken on behalf of the detenu will have to be tried in accordance with law.

(d) If a detenu contends that the operative provision of the law under which he is detained suffers from the vice of excessive delegation and is, therefore, invalid, the plea thus raised by the detenu cannot at the threshold be said to be barred by the Presidential Order. In terms, it is not a plea which is relatable to the fundamental rights specified in the said order. It is a plea which is independent of the said rights and its validity must be examined. (The Court, however, rejected the contention that the impugned provisions of the Act suffered from the vice of excessive delegation.)

399. No judgment can be read as if it is a statute. Though the judgment of the majority contains the conclusions set out in (a) to (d) above, I see no doubt that these conclusions owe their justification to the peculiar wording of the Presidential Order which was issued in that case. The order dated November 3, 1962, which was the subject-matter of Makhan Singh's case, has been set out at the beginning of this judgment. That order suspends the right of a person to enforce the rights conferred by Articles 14, 21 and 22 "if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder". The Presidential Order dated June 27, 1975 with which we are concerned in the instant case does not contain any clause similar to the one extracted above from the order dated November 3, 1962. The inclusion of that clause in the earlier order has a significant impact on the question under consideration because, under the earlier Presidential Order the right to move the court was taken away only if a person was deprived of his rights under the Defence of India Ordinance or under any rule or order made under the ordinance. A petition for habeas corpus filed during the operation of the Presidential Order dated November 3, 1962 was not barred at the threshold because the detenu was entitled to satisfy the court that though his detention purported to be under the defence of India Ordinance or the rules it was in fact not so. The detenu could establish this by satisfying the court that the detaining authority had no power to detain him, which could be shown by pointing out that the preconditions of the power to detain were not fulfilled. It was also open to the petitioner to establish that the order was vitiated by mala fides because a mala fide order has no existence in the eye of law and mala fides would take the order out of the statute.

400. The same state of affairs continued under the two subsequent Presidential Orders dated November 16, 1974 and December 23, 1974. all the three orders were conditional and were dependent for their application on the fulfillment of the condition that the person concerned was deprived of his rights under the Defence of India Ordinance or any rule or order made under it. The Presidential Order of June 27, 1975 makes a conscious and deliberate departure from the three earlier orders, the object obviously being to deprive the detenu of the argument that he has been detained under an order which only purports to have been passed under a particular Act but is in fact in derogation thereof, the terms of the act having not been complied with. The order of June 27, 1975 is not subject to any condition-precedent for its application and, therefore, there is no question of the detenu satisfying the court that any pre-condition of the power of detention has not been fulfilled. Some of the observations in Makhan Singh's case may appear to support the argument that

certain pleas which are referred to therein are outside the scope of Article 359(1) itself. With great respect, those observations really mean that the pleas are outside the Presidential Order. Article 359(1) is only an enabling provision and the validity of a plea cannot be tested with reference to that article. The right to move a court for the enforcement of the rights conferred by Part III is not taken away by Article 359(1). It is the Presidential Order passed in pursuance of the powers conferred by that article by which such a consequence can be brought about.

401. It would be useful in this connection to refer to the decision of this Court in Dr. Ram Manohar Lohia v. State of Bihar ((1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608). The appellant therein was also detained under rule 30(1)(b) of the Defence of India Rules, 1962, and he moved this Court under Article 32 of the Constitution for his release. The petition was argued on the basis that it was filed for the enforcement of the right to personal liberty under Article 21 and 22 of the Constitution. A preliminary objection was raised on behalf of the Government that the petition was barred by reason of the Presidential Order dated November 3, 1962, the same as in Makhan Singh's case. Sarkar, J. who shared the majority view repelled the preliminary objection by saying that the petition could have been dismissed at the threshold if the order of November 3, 1962 were to take away all rights to personal liberty under Articles 21 and 22. According to the learned Judge, the particular Presidential Order did not do so in that, it was a conditional order which deprived a person of his right to move a court for the enforcement of a right to personal liberty only if he was deprived of it by the defence of India Act or any rule or order made under it. "If he has not been so deprived, the order does not take away his right to move a court". This shows that if the first Presidential Order was unconditional like the order in the instant case, Dr. Lohia's petition would have been rejected by this Court at the threshold. The judgment of Hidayatullah, J. who on behalf of himself and Bachawat, J. concurred with the view of Sarkar, J., also shows that the conditional Presidential Order left an area of inquiry open as to whether the action was taken by a competent authority and was in accordance with the Defence of India Act and the rules made thereunder.

402. Yet another case arose under Rule 30(1)(b) of the Defence of India Rules, 1962 involving the interpretation of the first Presidential Order dated November 3, 1962. That case is K. Anandan Nambiar v. Chief Secretary, Government of Madras ((1966) 2 SCR 406 : AIR 1966 SC 657). Gajendragadkar, C.J. who delivered the judgment of the Constitution Bench referred to Makhan Singh's case and pointed out that the sweep of the Presidential Order dated November 3, 1962 was limited by its last clause and, therefore, it was open to the detenu to contend that the order of detention was contrary to the conditions prescribed in that behalf by the Defence of India Act or the rules made thereunder.

403. In State of Maharashtra v. Prabhakar Pandurang Sangzgiri ((1966) 1 SCR 702 : AIR 1966 SC 424) the respondent, who was detained under an order passed under Section 30(1)(b) of the Defence of India Rules, 1962, sought permission from the State Government for publishing a book which he had written while in jail. On the Government refusing the permission, he filed a petition under Article 226 of the Constitution for an appropriate direction and after that petition was allowed by the High Court, the Government of Maharashtra filed an appeal in this Court. Subba Rao. J. who delivered the judgment of the Bench, observed while dismissing the appeal that the President's Order dated November 3, 1962 was a conditional order and, therefore, if a person was deprived of his personal liberty not under the Act or a rule or order made thereunder but in contravention thereof, his right to move the court in that regard would not be suspended.

404. These judgments bring out clearly the ratio of Makhan Singh's case which arose out of the first Presidential Order dated November 3, 1962. The Presidential Order with which we are concerned in

the instant case is not subject to the pre-condition that the detenu should have been deprived of his rights under any particular Act and, therefore, there is no scope for the inquiry whether the order is consistent or in conformity with any particular Act. This important distinction has not been fully appreciated in some of the judgments under appeal.

405. The observations contained in the majority judgment in Makhan Singh's case that the exercise of a power mala fide is wholly outside the scope of the Act conferring the power and can always be successfully challenged at once raises the question whether in spite of the Presidential Order dated June 27, 1975 it is open to the respondents to show that the order of detention in any particular case is vitiated by mala fides. The proposition that a mala fide order has no existence in the eye of law is not peculiar to Makhan Singh's case but has been accepted in various decisions of this Court, two of them being Jaichand Lall Sethia v. State of West Bengal (1966 Supp SCR 464 : AIR 1967 SC 483) and Durgadas Shirali v. Union of India ((1966) 2 SCR 573 : AIR 1966 SC 1078). A mala fide exercise of power does not necessarily imply any moral turpitude and may only mean that the statutory power is exercised for purposes other than those for which the power was intended by law to be exercised. In view of the fact that an unconditional Presidential Order of the present kind affects the locus standi of the petitioner to move any court for the enforcement of any of his fundamental rights mentioned in the order it would not be open to him to show that the statutory power has been exercised for a purpose other than the one duly appointed under the law. So long as the statutory prescription can be seen on the face of the order to have been complied with, no further inquiry is permissible as to whether the order is vitiated by legal mala fides.

406. As regards mala fides in the sense of malice-in-fact, the same position must hold good because the Presidential Order operates as a blanket ban on any every judicial inquisition into the validity of the detention order. Makhan Singh's case as also Jaichand Lall Sethia's and Durgadas Shirali's arose under the Defence of India Rules, 1962 and the relevant Presidential Order which applied was the one dated November 3, 1962 which, as stated above, was a conditional order. If an any given case an order of detention appears on the very face of it to be actuated by an ulterior motive, the court would have jurisdiction to set it aside because no judicial inquiry of any sort is required to be undertaken in such a case. But short of such ex facie vitiation, any challenge to a detention Order on the ground of actual mala fides is also excluded under the Presidential Order dated June 27, 1975.

407. Section 16A(9) of the MISA which was introduced by the Third Amendment Ordinance, 16 of 1975, with effect from June 29, 1975 must make a significant difference to the question whether in spite of the Presidential Order, it is open to a detenu to challenge his detention on the ground of mala fides. Prior to the enactment of Section 16A(9), the detaining authority was under an obligation by reason of Section 8(1) of the MISA to communicate to the detenu the grounds of detention. The only exception was as stated in Section 8(2), that the detaining authority need not disclose facts which it considers to be against the public interest to disclose. Section 16A(1) provides that the provisions of Section 16A shall have effect during the period of operation of proclamation of emergency issued on December 3, 1971 and on June 25, 1975 or for a period of 12 months from June 25, 1975 whichever period is the shortest. By sub-section (2) of Section 16A, the case of every person against whom an order of detention was made under the MISA on or after June 25, 1975 but before the commencement of Section 16A on June 29, 1975 is required to be reviewed by the appropriate Government for the purpose of determining whether the detention of such person is necessary for dealing effectively with the emergency. If the answer be in the affirmative, the Government is required to make a declaration to that effect. By sub-section (3), whenever an order of detention is made under the Act after June 29, 1975 the officer making the order of detention or the appropriate Government its similarly required to consider whether the detention of the person is

necessary for dealing effectively with the emergency. If so, a declaration is required to be made to that effect. Sub-section (9) (a) of Section 16A provides that the grounds on which an order of detention is made against any person in respect of whom a declaration is made under sub-section (2) or sub-section (3) of Section 16A and any information or materials on which such grounds are based shall be treated as confidential and shall be deemed to refer to matters of State and to be against the public interest to disclose and save as otherwise provided in this Act, no one shall communicate or disclose and such grounds, information or material or any document containing such ground, information or material.

Clause (b) of Section 16A(9) provides that no person against whom an order of detention is made under sub-section (1) of Section 3 shall be entitled to the communication or disclosure of any such ground, information or material, as is referred to in clause (a) or the production to him of any document containing such ground, information or material.

408. I will deal with the constitutionality of Section 16A(9) later but on the assumption that it is valid, it is plain that not only is a detenu in regard to whom the necessary declaration is made not entitled to be furnished with the grounds of detention or the material or information on which the grounds are based, but neither the Government nor the officer passing the order of detention can communicated or disclose the grounds, material or information since they are deemed to refer to matters of State and against the public interest to disclose. In view of this cast-iron prohibition, it is difficult to see how, at least those detenu falling within sub-sections (2) and (3) of Section 16A can possibly establish, even prima facie, a charge of factual mala fides. It is the grounds of detention from which generally a plea of mala fides is spelt out and if the court has access to the grounds, the material and the information, it becomes possible to unravel the real motive of detention. In the absence of these aids, a charge of factual mala fides can only be a fling in the air and cannot hope of succeed. The observation in Makhan Singh's case, therefore, that the exercise of a power mala fide can always be successfully challenged would not apply to cases falling under sub-section (2) and (3) of Section 16A, by reason of the provisions contained in sub-section (9) of that section.

409. Turning to the constitutional validity of Section 16A(9), the contention of the respondents is that clause (a) of Section 16A(9) by which the grounds of detention and the information and materials on which the grounds are based shall be treated as confidential and shall be deemed to refer to matters of State and to be against the public interest to disclose is not a genuine rule of evidence but is designed to encroach upon the jurisdiction of the High Courts under Article 226 of the Constitution and is, therefore, void. It is urged that the amendment made by the Parliament in the exercise of its ordinary legislative power comes into direct conflict with the High Courts' jurisdiction under Article 226 because it would be impossible for any High Court to consider the validity of an order of detention when a petition for habeas corpus comes before it, if the law prohibits the disclosure of the grounds of detention and the necessary information or materials to the High Court.

410. It is a relevant consideration for examining the charge that the true purpose of Section 16A(9) is to encroach on the powers of the High Court under Article 226, that the operation of Section 16A itself is limited to the period during which the two proclamations of emergency dated December 3, 1971 and June 25, 1975 are in operation or for a period of 12 months from June 25, 1975 whichever period is the shortest. Following the proclamations of emergency, the President has issued orders under Article 359(1). By the order dated June 27, 1975 the very locus standi of the detenu to enforce any of his fundamental rights mentioned in the Presidential Order is taken away and consequently, there is no matter of substance into which the High Courts in the exercise of their writ

jurisdiction can legitimately inquire. The injunction contained in Section 16A(9) is from this point of view innocuous, for it purports to create a check on a power which for all practical purposes has but a formal existence. Section 16A(9) is in aid of the constitutional power conferred by Article 359(1) and further effectuates the purpose of the Presidential Order issued under that article. If so, it cannot be declared unconstitutional.

411. Quite apart from this position, I am unable to agree that the rule enunciated in Section 16A(9) is not a genuine rule of evidence. It is true that grounds of detention used to be disclosed before the emergency of Section 16A(9) but that does not mean that the grounds on which the order of detention is based or the information or materials on which the grounds are based are not or cannot be of a confidential nature. More likely than not, such grounds, material and information would be of a confidential nature relating to matters of State which would be against the public interest to disclose. Instead of leaving each individual matter to be judged under Section 123 of the Evidence Act by the head of the department concerned, who can give or withhold the permission as he thinks fit, Parliament would appear to have considered that since the grounds material and information in detention cases are of a confidential nature, it would be much more satisfactory to provide that they shall be deemed to refer to matters of State.

412. If Section 16A(9) is unconstitutional so would Section 123, 124 and 162 of the Evidence Act. Section 123 given the necessary discretion to the head of the department concerned. By reason of Section 124, the High Court cannot compel any public officer to disclose communications made to him in official confidence if the officer considers that the public interest would suffer by the disclosure. By Section 162, the High Court cannot inspect a document if it refers to matters of State. But these provisions do not constitute an invasion of the High Court's jurisdiction under Article 226. The writ jurisdiction of the High Court under that article has to be exercised consistently with the laws made by competent legislatures within the area of their legislative power. I do not think that it is open to any High Court to say that the law may be otherwise valid but since it interferes with the High Court's power to undertake the fullest enquiry into the matter before it, the law becomes unconstitutional. The principles of res judicata and estoppel, the conclusive presumptions of law and various provisions of substantive law deny a free play to courts in the exercise of their jurisdiction. These are not for that reason unconstitutional qua the High Court's jurisdiction under Article 226.

413. Counsel for the respondents cited the parallel of Section 14 of the Prevention Detention Act, 1950 which was truck down by this Court in A. K. Gopalan v. State (supra). Sub-section (1) of that section provided, in substance, that no court shall, except for certain purposes, allow any statement to be made or any evidence to be given before it of the substance of any communication of the grounds on which a detention order was made against any person or of any representation made by him. Sub-section (2) of Section 14 made it an offence for any person to disclose or publish without the previous authorization of the Government any contents or matter purporting to be contents of any communication or representation referred to in sub-section (1). The right to enforce Article 22 of the Constitution was not suspended by any Presidential Order when Gopalan's case was decided and therefore the court was entitled to fine whether that article was complied with. The limits of judicial review have to be co-extensive and commensurate with the right of an aggrieved person to complain of the invasion of his rights. Since in Gopalan's case, it was open to the detenu to contend that the grounds of detention did not bear any connection with the order of detention, the Court was entitled to examine the grounds in order to determine whether the plea of the detenu was well founded. As Section 14 debarred the court from examining the material which it was entitled under the Constitution to examine, it was declared ultra vires. (See pages 130-131, 217-218, 244, 285 and 333). In the instant case the Presidential Order deprives the respondents of their very locus standi

and therefore, Section 16A(9) cannot be said to shut out an inquiry which is otherwise within the jurisdiction of the High Court to make.

414. Reliance was also placed by the respondents on the decision of this Court in Mohd. Maqbool Damnoo v. State of Jammu and Kashmir ((1972) 2 SCR 1014 : (1972) 1 SCC 536 : 1972 SCC (Cri) 304) in which it was observed that the proviso to Section 8, which was inserted by the Jammu and Kashmir Preventive Detention (Amendment) Act, 1967, would have been unconstitutional if it had the same effect as Section 14 of the Preventive Detention Act was found to have in Gopalan's case. Damnoo's case did not involve any question of privilege at all and in face the relevant file was produced by the Government for the perusal of the High Court. The case also did not involve any question under Article 359(1) and the effect of a provision like Section 16A(9) was not even hypothetically considered by the court.

415. The view of the Bombay High Court that Section 16A(9) may be read down so as to enable the court to examine the forbidden material is impossible to sustain. What use can a court make of material which it cannot disclose to the detenu and how can it form a judicial opinion on matters not disclosed to a party before it ? The High Court, at the highest, could satisfy its curiosity by tasting the forbidden fruit but its secret scrutiny of the grounds and the file containing the relevant information and material cannot enter into its judicial verdict.

416. I am, therefore, of the opinion that the challenge made by the respondents to the constitutionality of Section 16A(9) must fail.

417. Section 18 need not detain me long because it merely declares that no person who is detained under the Act shall have any right to personal liberty by virtue of natural law or common law, if any. The 'natural law' theory was discarded in Kesavananda Bharati's case ((1973) Supp SCR 1 : (1973) 4 SCC 225) and likewise the common law theory was rejected in Makhan Singh's case (supra). The section only declares what was the true law prior to its enactment on June 25, 1975. The amendment of Section 18 by the substitution of the words "in respect of whom an order is made or purported to be made under Section 3" in place of the words "detained under this Act" does not render the section open to a challenge on the ground of excessive delegation. The words "purported to be made" have been inserted in order to obviate the challenge that the detention is not in strict conformity with the MISA. Such a challenge is even otherwise barred under the Presidential Order. The object of the added provision is not to encourage the passing of lawless orders of detention but to protect during emergency orders which may happen to be in less than absolute conformity with the MISA. The Executive is bound at all times to obey the mandate of the Legislature but the Presidential Order bars during a certain period the right to complain of any deviation from that rule.

418. In numerous cases detenus have been released by this Court and by the High Courts on the ground that there is no nexus between the grounds of detention and the object of the law under which the order of detention is made of that the acts complained of are too distant in point of time to raise an apprehension that the past conduct of the detenu is likely to project itself into the future or that the grounds are too vague for the formation even of subjective satisfaction or that irrelevant and extraneous considerations have materially influenced the mind of the detaining authority. On some few occasions detention orders have also been set aside on the ground of factual mala fides. An unconditional Presidential Order obliterates this jurisprudence by striking at the very root of the matter. Locus of the detenu is its chosen target and it deprives him of his legal capacity to move any court for the vindication of his rights to the extent that they are mentioned in the Presidential Order. In their passion for personal liberty courts had evolved, carefully and laboriously, a sort of

"detention jurisprudence" over the years with the sole object of ensuring that the Executive does not transcend its duty under the law. In legal theory that obligation still remains but its violation will now furnish no cause of action, at least to an extent, and to a significant extent. Amidst the clash of arms and conflict of ideologies, laws will now be silent but in times when the nation is believed to be going through great strains and stresses, it may be necessary to entrust sweeping powers to the State. And it is no small comfort that those powers are granted with the consent of the Parliament. The people of this country are entitled to expect when they go to the ballot-box that their chosen representatives will not willingly suffer an erosion of the rights of the people. And the Parliament, while arming the Executive with great and vast powers of Government, may feel fairly certain that such powers will be reasonably exercised. The periodical reviews of detention orders, the checks and counterchecks which the law provides and above all the lofty faith in democracy which ushered the birth of the nation will, I hope, eliminate all fear that great powers are capable of the greatest abuse. Ultimately, the object of depriving a few of their liberty for a temporary period has to be to give to many the perennial fruits of freedom.

419. I find it not so easy to summarize my conclusions in simple, straightforward sentences. The manysided issues arising before us do not admit of a monosyllabic answer 'yes', or 'no'. All the same, these broadly are my conclusions :

(1) The order issued by the President on June 27, 1975 under Article 359(1) of the Constitution does not suspend the fundamental principle that all executive action must have the authority of law to support it. Nor does the Presidential Order give to the Executive a charter to disobey the laws made by the Parliament, which is the supreme law-making authority.

(2) The aforesaid Presidential Order, however, deprives a person of his locus standi to move any court, be it the Supreme Court or the High Court, for the enforcement of his fundamental rights which are mentioned in the order. Such deprivation or suspension ensures during the period that the proclamation of emergency is in force or for such shorter period as may be specified in the order.

(3) The dominant purpose of the petitions filed by the respondents in the High Courts is to obtain an order of release from detention by enforcing the right to personal liberty. The purpose is not to obtain a mere declaration that the order of detention is ultra vires the Act under which it is passed. The former plea is barred by reason of the Presidential Order. The latter plea is also barred because regard must be had to the substance of the matter and not to the form in which the relief is asked for.

(4) The Presidential Order, dated June 27, 1975 bars any investigation or inquiry into the question whether the order of detention is vitiated by mala fides, factual or legal, or whether it is based on extraneous considerations or whether the detaining authority had reached his subjective satisfaction validly on proper and relevant material.

(5) Whether or not Article 21 of the Constitution is the sole repository of the right to personal liberty, in a petition filed in the High Court under Article 226 of the Constitution for the release of a person detained under the MISA, no relief by way of releasing the detenu can be granted because no person has the legal capacity to move any court to ask for such relief. The Presidential Order takes away such legal capacity by including Article 21 within it. The source of the right to personal liberty

is immaterial because the words "conferred by" which occur in Article 359(1) and in the Presidential Order are not words of limitation.

(6) The Presidential Order does not bring about any amendment of Article 226 and is not open to challenge on that ground.

(7) The Presidential Order neither bars the right of an accused to defend his personal liberty in the court of first instance or in a higher court, nor does it bar the execution of decrees passed against the Government, nor does it bar the grant of relief other or less than the release of the detenu from detention.

(8) Section 16A(9) of the MISA is not unconstitutional on the ground that it constitutes an encroachment on the writ jurisdiction of the High Court under Article 226. There is no warrant for reading down that section so as to allow the court to inspect the relevant files to the exclusion of all other parties.

(9) Section 18 of the MISA does not suffer from the vice of excessive delegation and is a valid piece of legislation.

420. And so we go back to 'The Zamora'((1916) 2 AC 77), Rex v. Halliday ((1917) AC 260, 271 : 86 LJKB 1119 : 33 TLR 336), Liversidge v. Anderson ((1942) AC 206), Greene v. Secretary of State ((1942) AC 284). A jurisdiction of suspicion is not a forum for objectivity :

> Those who are responsible for national security must be the sole judges of what the national security requires. However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement.

As a result, perhaps the only argument which the court can entertain is whether the authority which passed the order of detention is duly empowered to pass it, whether the detenu is properly identified and whether on the face of the order the stated purpose of detention is within the terms of law. These questions, in almost all cases, will have an obvious answer.

421. Counsel after counsel expressed the fear that during the emergency, the Executive may whip and strip and starve the detenu and if this be our judgment, even shoot him down. Such misdeeds have not tarnished the record of Free India and I have a diamond-bright, diamond-hard hope that such things will never come to pass.

BHAGWATI, J. (concurring) -

These appeals by special leave raise issues of gravest constitutional importance. They affect personal liberty which is one of our most cherished freedoms and impinge on the rule of law which is one of the great principles that lies at the core of constitutional democracy and gives content to it. Does a Presidential Order under Article 359, clause (1) specifying Article 21 silence the mandate of the law and take away personal liberty by making it unenforceable in a court of law, or does judicial scrutiny of legality of detention stand untouched and unimpaired, so that, despite such Presidential Order, a person who is illegally detained can seek his freedom by invoking the judicial process ? That is the agonizing question before the Court.

423. The facts giving rise to these appeals have been fully set out in the judgment of my Lord the Chief Justice and it is not necessary for me to reiterate them as nothing turns on the facts. None of the writ petitions out of which these appeals arise has in fact been finally disposed of on merits. Barring the writ petitions before the Rajasthan High Court and the Nagpur Bench of the Bombay High Court, where one additional question has been considered, the only question that has been decided in these writ petitions is as to their maintainability in view of the Presidential Order dated June 27, 1975 issued under Article 359, clause (1) of the Constitution. The High Courts of Allahabad, Madhya Pradesh, Andhra Pradesh, Delhi, Karnataka and Rajasthan and the Nagpur Bench of the Bombay High Court before whom these writ petitions were heard on the preliminary issue as to maintainability, took the view that the Presidential Order, dated June 27, 1975, did not wholly bar the maintainability of these petitions, but left open certain rounds of challenge which could yet be urged against the validity of the order of detention. These different High Courts were not agreed upon what were the grounds of challenge which were thus available to an applicant despite the Presidential Order dated June 27, 1975. There were differences of opinion amongst them, but for the purpose of the present appeals, it is not necessary to refer to those differences as they are not material. The Rajasthan High Court and the Nagpur Bench of the Bombay High Court also considered the interpretation and validity of Section 16A, sub-section (9) of the Maintenance of Internal Security Act, 1971 and while the Rajasthan High Court accepted the interpretation of that sub-section canvassed on behalf of the Government and upheld its validity even on that interpretation, the Nagpur Bench of the Bombay High Court held the sub-section to be valid by reading it down so as not to exclude the power of the High Court under Article 226 of the Constitution to call for the grounds, information and materials on which the order of detection was based. Since in the view of these High Courts, the writ petitions filed by the detenus were maintainable, though on certain limited grounds of challenge, each of the writ petitions was directed to be set down for hearing on merits. Thereupon each of the aggrieved State Governments obtained special leave to appeal against the decision of the concerned High Court and that is how the present appeals have come before this Court.

424. Two questions arise for consideration in these appeals. They have been formulated by the learned Attorney General appearing on behalf of the Union of India in the following terms :

> 1. Whether, in view of the Presidential Order dated June 27, 1975 under clause (1) of Article 359, any writ petition under Article 226 before a High Court for habeas corpus to enforce the right to personal liberty of a person detained under MISA on the ground that the order of detention or the continued detention is, for any reason, not under or in compliance with MISA is maintainable ?
>
> 2. If such a petition is maintainable, what is the scope or extent of judicial scrutiny, particularly, in view of the said Presidential Order mentioning, inter alia, clause (5) of Article 22 and also in view of sub-section (9) of Section 16A of MISA ?

So far as the second question is concerned, it may be pointed out straightway that the learned Attorney General with his usual candour conceded that if his first contention in regard to maintainability of a writ petition for habeas corpus is not accepted and the writ petition is held maintainable, the area of judicial scrutiny would remain the same as laid down in the decisions of this Court, subject only to the qualification that the grounds, information and materials, on which the order of detention is based, would not be available either to the detenu or to the High Court by reason of suspension of enforcement of the right conferred by clause (5) of Article 22 and the enactment of Section 16A, sub-section (9) of the Maintenance of Internal Security Act, 1971. The

only point which would therefore, require to be considered under the second question is in regard to the interpretation and validity of sub-section (9) of Section 16A.

425. Before we proceed to consider the first question which turns on the true interpretation and effect of the Presidential Order dated June 27, 1975, it would help to place the problem in its proper perspective if we first examine what is an emergency and how institutions and procedures different from those in normal times are necessary to combat it. It would be both profitable and necessary to embark upon this inquiry, because Article 359, clause (1) under which the Presidential Order dated June 27, 1975 has been issued is a consequential provision which comes into operation when a proclamation of emergency is issued by the President under Article 352. It is evident that a national emergency creates problems for a democracy no less than for other governments. A totalitarian government may handle such a situation without embarrassment. But the apparent necessities evoked by danger often conflict gravely with the postulates of constitutional democracy. The question arises - and that was a question posed by Abraham Lincoln on July 4, 1861 : can a democratic constitutional government beset by a national emergency be strong enough to maintain its own existence without at the same time being so strong as to subvert the liberties of the people it has been instituted to defend ? This question is answered affirmatively by the incontestable facts of history if we have regard to the experience of emergency governments of three larger modern democracies - the United States, Great Britain and France. There is no reason why the Indian experience should be otherwise, if the basic norms of constitutionalism in assumption of emergency powers are observed. What are these basic norms in a constitutional democracy and what is the purpose behind assumption of emergency powers are matters which I shall presently discuss. But before I do so, let me first consider what are the different types of emergency which may plague the government of a country.

426. There are three types of crisis in the life of a democratic nation, three well-defined threats to its existence both as nation and democracy. The first of these is war, particularly a war to repel invasion when "a State must convert its peacetime political and social order into a wartime fighting machine and overmatch the skill and efficiency of the enemy". There may be actual war or threat of war or preparations to meet imminent occurrence of war, all of which may create a crisis situation of the gravest order. The necessity of concentration of greater powers in the Government and of contraction of the normal political and social liberties cannot be disputed in such a case particularly when the people are faced with the grim horror of national enslavement. The second crisis is threat or presence of internal subversion calculated to disrupt the life of the country and jeopardize the existence of the constitutional government. Such activity may stem from a variety of causes. Perhaps the most common is disloyalty to the existing form of government, often accompanied by a desire to effect changes by violent means. Another cause may be strong disaffection with certain government policies. Communal demands for States within the federation on linguistic or religious lines may fall within this category. Or the presence of powerful lawless elements with perhaps no political motivation, but for various reasons beyond the scope of ordinary machinery of the law, may give rise to this problem. The third crisis, one recognised particularly in modern times as sanctioning emergency action by constitutional government, is breakdown or potential breakdown of the economy. It must be recognised that an economic crisis is as direct a threat to a nation's continuing constitutional existence as a war or internal subversion. These are three kinds of emergencies which may ordinarily imperil the existence of a constitutional democracy.

427. Now, it is obvious that the complex system of government of a constitutional democratic State is essentially designed to function under normal peaceful conditions and is often unequal to the exigencies of a national crisis. When there is an emergency arising out of a national crisis, a

constitutional democratic government has to be temporarily altered to whatever degree necessary to overcome the peril and restore normal conditions. This alteration invariably involves government of a stronger character. The government has to assume larger powers in order to meet the crisis situation and that means that the people would have fewer rights. There can be no doubt that crisis government means strong and arbitrary government and as pointed out by Cecil Carr in his article on "Crisis Legislation in Great Britain", published during the Second World War, "in the eternal dispute between government and liberty, crisis means more government and less liberty". In fact Scrutton, L.J., never a fulsome admirer of government departments, made the classic remark in his judgment in Ronnfeldt v. Phillips ((1918) 35 TLR 46) that war cannot be carried on according to the principles of Magna Carta and there must be some modification of the liberty of the subject in the interests of the State. The maxim salus populist supreme lex esto, that is public safety is the highest law of all, must prevail in times of crisis and the people must submit to temporary abdication of their constitutional liberties in order to enable the government to combat the crisis situation which might otherwise destroy the continued existence of the nation.

428. While dealing with the emergency powers which may be assumed by a constitutional democracy to deal effectively with a national crisis, it is necessary to refer to the celebrated writ of habeas corpus. It is the most renowned contribution of the English common law to the protection of human liberty. It is one of the most ancient writs known to the common law of England. It is a writ of immemorial antiquity "throwing its roots deep into the genius" of the common law. It is not necessary to trace the early history of this writ which is to be found in the decision of this Court in Kanu Sanyal v. District Magistrate, Darjeeling ((1973) 2 SCC 674 : 1973 SCC (Cri) 980). Suffice it to state that by the 17th century this writ had assumed great constitutional importance as a device for impugning the validity of arbitrary imprisonment by the Executive and by invoking it, a person unlawfully imprisoned could secure his release. As pointed out by Holdsworth in Vol. I of his "History of English Law", "its position as the most efficient protector of the liberty of the subject was unquestioned after the great Rebellion". It was for this reason that men began to assign as its direct ancestor the clauses of the Magna Carta which prohibited imprisonment without due process of law. This may not be strictly accurate, but there can be no doubt that, far more effective than any other remedy, this writ helped to vindicate the right of freedom guaranteed by the famous words of the Magna Carta. The decision in Darnel's case ((1627) 3 State Tr 1) was a setback in the struggle for liberty since it eroded to some extent the effectiveness of the writ by taking the view that a return that the arrest was "by the special command of the King" was a good and sufficient return to the writ, which meant that a lawful cause of imprisonment was shown. But the Petition of Right, 1927 overruled this decision by declaring such a case of imprisonment to be unlawful. In the same way, it was enacted in the Habeas Corpus Act, 1640 abolishing the Star Chamber that any person committed or imprisoned by order of the Star Chamber or similar bodies or by the command of the Kind or of the Council should have his habeas corpus. There were also various other defects which were revealed in course of time and with a view to remedying those defects and making the writ more efficient as an instrument of securing the liberty of the subject unlawfully detained, reforms were introduced by the Habeas Corpus Act, 1679, and when even these reforms were found insufficient, the Habeas Corpus Act, 1816 was enacted by which the benefit of the provisions of the Habeas Corpus Act, 1679 was made available in cases of civil detention and the judges were empowered to inquire into the truth of the facts set out in the return to the writ. The machinery of the writ was thus perfected by legislation and it became one of the most important safeguards of the liberty of the subject and, as pointed out by Lord Halsbury, L. C. in Cox v. Hakes ((1890) 15 AC 506 : 60 LJQB 89 : 6 TLR 465), it was throughout "been jealously maintained by courts of law as a check upon the illegal usurpation of power by the Executive at the cost of the liege".

429. Now, in the United States of America, the right to this important writ of habeas corpus by means of which the liberty of a citizen is protected against arbitrary arrest, is not expressly declared in the Constitution, but it is recognised in Article I, Placitum 9, clause (2) of the Constitution which declares that :

> The privilege of the writ of habeas corpus shall not be suspended, unless, when in cases of rebellion or invasion, the public safety may require it.

Cooley in his "General Principles of Constitutional Law in the U.S.A." points out :

The privilege of the writ consists in this : that, when one complains that he is unlawfully imprisoned or deprived of his liberty, he shall be brought without delay before the proper court or magistrate for an examination into the cause of his detention, and shall be discharged if the detention is found to be unwarranted. The suspension of the privilege consists in taking away this right to an immediate hearing and discharge, and in authorising arrests and detentions without regular process of law.

The suspension of the privilege of the writ does not legalise what is done while it continues : it merely suspends for the time being the remedy of the writ.

430. The decision of Chief Justice Taney in Exparte Merryman (17 Fed Cas 144 (CCD Md 1861) contains the leading American discussion of the suspension of the writ of habeas corpus in a temporary emergency. In the spring of 1861, the even of the American Civil War, President Lincoln was confronted by a state of open insurrection in the State of Maryland following the fall of Fort Sumter on April 15. Railroad communication to the northern United States had been severed by the Marylanders on April 20 and the Sixth Massachusetts Militia reached Washington only after fighting its way through the city of Baltimore. In these circumstances and under the increasing threat of secession, President Lincoln issued a proclamation on April 27 authorising General Winfield Scot to suspend the writ of habeas corpus "at any point on or in the vicinity of the military line which is now, or shall be used between the city of Philadelphia and the city of Washington". Another proclamation of July 2 extended this power to a similar area between Washington and New York. John Merryman who was a Marylander openly recruited a company of soldiers to serve in the Confederate Army and became their drill master and in consequence he was arrested by the army of Lincoln and held prisoner in Fort McHenry. He applied for a writ of habeas corpus and, despite the Presidential authorisation suspending the writ, the Supreme Court presided over by Chief Justice Taney granted the writ on the view that the power to suspend the privilege of the writ is a legislative power and the President cannot exercise it except as authorised by law. History tells us that President Lincoln declined to implement the order of the Supreme Court and this would have led to a major constitutional crisis, but the Congress hastened to resolve the controversy by enacting legislation authorising the President to suspend the privilege of the writ whenever in his judgment the public safety requires it. It would, therefore, be seen that even in United States of America, where personal liberty is regarded as one of the most prized possessions of man, the Congress has the power to suspend the writ of habeas corpus and this power has been exercised in the past, though very sparingly.

431. So also in Great Britain the writ of habeas corpus which, as May points out, "is unquestionably the first security of liberty" and which "protects the subject from unfounded suspicions, from aggressions of power" has been suspended, again and again, in periods of public danger or apprehension. Parliament, convinced of the exigencies of the situation, has on several occasions suspended, for the time being, the rights of individuals in the interests of the State. This of course

has had the effect of arming the Executive with arbitrary power of arrest by making it impossible for a person detained to secure his release even if his detention is illegal. It has resulted in great diminution in the security of personal freedom, for, suspension of habeas corpus is verily, in substance and effect, suspension of the right of personal liberty granted in Magna Carta. But it has been justified on the ground that whatever be the temporary danger of placing such power in the hands of the Government, it is far less than the danger with which the Constitution and the society are threatened, or to put it differently "when danger is imminent, the liberty of the subject must be sacrificed to the paramount interests of the State". Moreover, on each occasion when the writ of habeas corpus has been suspended, the suspension of the writ has invariably been followed by an Act of Indemnity in Order to protect officials concerned from the consequences of any incidental illegal acts which they might have committed under cover of suspension of the prerogative writ.

During the period of emergency, many illegalities might have been committed by the Executive in Order to deal with a crisis situation and all such illegalities have been retrospectively legalised by an Indemnity Act.

432. I may now turn to consider the emergency provisions under out Constitution. Unlike many of the older Constitutions, our Constitution speaks in detail on the subject of emergency in Part XVIII. That part consists of a fasciculus of articles from Article 352 to Article 360. Article 352 enacts that if the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by proclamation, make a declaration to that effect and such proclamation is required to be laid before each House of Parliament and approved by resolutions of both Houses before the expiration of two months. It is not necessary that there should be actual occurrence of war or external aggression or internal disturbance in order to justify a proclamation of emergency. It is enough if there is imminent danger of any such crisis. It will be seen that this article provides for emergencies of the first two types mentioned above. The third type of emergency threatening the financial stability of India or any part thereof is dealt with in Article 360 but we are not concerned with it and hence it is not necessary to consider the provisions of that article. So far as the emergencies of the first two types are concerned, the constitutional implications of a declaration of emergency under Article 352 are much wider than in the United States or Great Britain. These are provided for in the Constitution itself. In the first place, Article 250 provides that while a proclamation of emergency is in operation, Parliament shall have the power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List, which means that the federal structure based on separation of powers is put out of action for the time being. Secondly, Article 353 declares that during the time that proclamation of emergency is in force, the executive power of the Union of India shall extend to the giving of direction to any State as to the manner in which the executive power thereof is to be exercised and this provision also derogates from the federal principle which forms the basis of the Constitution. If there is non-compliance by any State with the directions given by the Union under Article 353, such non-compliance may attract the provisions of Article 356 and 'President's rule' may be imposed under that article and in such event, Parliament may, under Article 357, clause (1), confer on the President the power of the legislature of the State to make laws or to delegate such legislative power to any other authority. This not only contradicts the federal principle, but also strikes at the root of representative form of government. Then there are two articles, Article 358 and Article 359, which set out certain important consequences of proclamation of emergency and they read as follows :

358. While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the

State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate except as respects things done or omitted to be done before the law so ceases to have effect.

359. (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

> (1A) While an order made under clause (1) mentioning any of the rights conferred by Part III is in operation, nothing in that Part conferring those rights shall restrict the power of the State as defined in the said Part to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.
>
> (2) An order made as aforesaid may extend to the whole or any part of the territory of India.
>
> (3) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

It may be pointed out that clause (1A) did not form part of Article 359 when the Constitution was originally enacted but it was introduced with retrospective effect by the Constitution (Thirty-eight Amendment) Act, 1975. We are not directly concerned in these appeals with the interpretation of Article 358 and clause (1A) of Article 359, but in order to arrive at the proper meaning and effect of clause (1) of Article 359, it will be relevant and somewhat useful to compare and contrast the provisions of Article 358 and clause (1A) of Article 359 on the one hand and clause (1) of Article 359 on the other.

433. It would be convenient at this stage to set out the various steps taken by the Government of India from time to time in exercise of the emergency powers conferred under Part XVIII of the Constitution. When hostilities broke out with Pakistan in the beginning of December 1971, the President issued a proclamation of emergency dated December 3, 1971 in exercise of the powers conferred under clause (1) of Article 352 declaring that "a grave emergency exists whereby the security of India is threatened by external aggression". This was followed by two orders, one dated December 5, 1971 and the other dated December 23, 74, issued by the President under clause (1) of Article 359. It is not necessary to reproduce the terms of these two Presidential orders since they were subsequently rescinded by a Presidential Order dated December 25, 1975 issued under clause (1) of Article 359. Whilst the first proclamation of emergency dated December 3, 1971 based on threat of external aggression continued in force, the President issued another proclamation of emergency dated June 25, 1975 declaring that "a grave emergency exists whereby the security of India is threatened by internal disturbance". This proclamation of emergency was also issued in exercise of the powers conferred under Article 352, clause (1) and it was followed by a fresh Presidential Order dated June 27, 1975 under clause (1) of Article 359. The President, by this order

made under clause (1) of Article 359, declared that the right of any person, (including a foreigner) to move any court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution and all proceedings pending in any court for the enforcement of the abovementioned rights shall remain suspended for the period during which the Proclamation of Emergency made under clause (1) of Article 352 of the Constitution on the 3rd December, 1971 and on the 25th June, 1975 are both in force.

The writ petitions out of which the present appeals arise were filed after the issue of this Presidential Order and it was on the basis of this Presidential Order that it was contended on behalf of the State Governments and the Union of India that the writ petitions were not maintainable, since, by moving the writ petitions, the detenues sought enforcement of the right conferred by Article 21. This contention was substantially negatived by the High Courts and hence the present appeals were brought by the State Governments and the Union of India raising the same contention as to the maintainability of the writ petitions. It may be pointed out that whilst the present appeals were pending before this Court, the President issued another order dated January 8, 1976 under clause (1) of Article 359 suspending the enforcement of the rights conferred by Article 19. This Presidential Order is not material, but I have referred to it merely for the sake of completeness.

434. Now the orders of detention challenged by the detenues in the different writ petitions were all expressed to be made in exercise of the powers conferred by Section 3 of the Maintenance of Internal Security Act, 1971. The detenue challenged them on various ground, namely, the orders of detention were not in accordance with the provisions of the Act, they were not preceded by the requisite subjective satisfaction which constitutes the foundation for the making of a valid order of detention, they were actuated by malice in law or malice in face or they were outside the authority conferred by the Act. The substance of these grounds, according to the Union of India and the State Governments, was that, by these orders of detention the detenues were deprived of their personal liberty otherwise than in accordance with the procedure established by law. This constituted infraction of the fundamental right conferred by Article 21 and the writ petitions of the detenues were, therefore, clearly proceedings for enforcement of that fundamental rights. But by reason of the Presidential Order dated June 27, 1975 the right to move any court for enforcement of the fundamental right conferred by Article 21 was suspended during the period when the proclamations of emergency dated December 3, 1971 and June 25, 1975 were in force and, therefore, the detenues had no locus standi to file the writ petitions and the writ petitions were barred. The answer to this contention given on behalf of the detenues was - and here we are setting out only the broad general argument - that Article 21 merely defines an area of free action and does not confer any right and hence it is outside the scope and ambit of Article 359, clause (1) and consequently outside the Presidential Order itself. It was also urged on behalf of the detenues that it is a basic principle of the rule of law that no member of the Executive can interfere with the liberty of a person except in accordance with law. The principle of the rule of law was recognised and declared by the Judicial Committee of the Privy Council in Eshugbayi Eleko v. Officer Administering the Government of Nigeria ((1931) AC 662 : 1931 All ER 44) and it was uniformly administered by courts in India as the law of the land prior to the coming into force of the Constitution. It was consequently law in force in the territory of India immediately before the commencement of the Constitution and by reason of Article 372, it continued in force ever after the coming into force of the Constitution and since then it has been repeatedly recognised and adopted by this Court as part of Indian jurisprudence in several decided cases. Moreover, apart from being continued under Article 372 as law in force, this principle of the rule of law stems from the constitutional scheme itself which is based on the doctrine of distribution of powers amongst different bodies created by the Constitution. Under the constitutional scheme the Executive is a limited Executive and it is bound to act in

accordance with law and not go against it. This obligation of the Executive not to act to the detriment of a person without the authority of law can be enforced under Article 226 by issue of a writ "for any other purpose". When a detenu files a petition under Article 226 challenging the validity of the order of detention on the ground that it is not in accordance with the Act or is outside the authority conferred by the Act, he seeks to enforce this obligation against the State Government and the suspension of enforcement of fundamental right Article 21 does not affect the maintainability of his writ petition. The detenues also contended that in any event the right to personal liberty was a statutory right and the suspension of the fundamental right conferred by Article 21 did not carry with it suspension of the enforcement of this statutory right. The Union of India and the State Governments rejoined to this contention of the detenues by saying that Article 21 was the sole repository of the right of personal liberty and there was no common law or statutory right in a person not to be deprived of his personal liberty except in accordance with law, apart from that contained in Article 21 and, therefore, the writ petitions filed by the detenues were in substance and effect petitions for enforcement of the right conferred by Article 21 and hence they were not maintainable.

435. Before we proceed to consider these contentions which have been advanced before us, it is necessary to remind ourselves that the emergency provisions in part XVIII of the Constitution make no distinction whether the emergency is on account of threat to the security of India by war or external aggression or on account of threat to the security of India by internal disturbance. The same provisions are applicable alike in both situations of emergency, irrespective of the reason for which emergency has been declared. The legal consequences are the same and, therefore, whatever interpretation we place on Article 359, clause (1) in the present case which relates to declaration of emergency on account of internal disturbance would apply equally where the emergency is declared on account of war or external aggression by a hostile power. If we take the view that the Presidential Order under Article 359, clause (1) suspending enforcement of Article 21 does not bar the remedy of a detained person to seek his release on the ground that his detention is illegal, it would be open to a detained person to challenge the legality of his detention even when there is emergency on account of war or external aggression because, barring Article 359, there is no other provision in the Constitution which can even remotely be suggested as suspending or taking away the right to move the court in cases of illegal detention. The consequence would be that even in a perilous situation when the nation is engaged in mortal combat with an enemy, the courts would be free to examine the legality of detention and even if a detention has been made for efficient prosecution of the war or protecting the nation against enemy activities, it would be liable to be struck down by the courts if some procedural safeguard has been violated though it may be bona fide and through inadvertence. This would imperil national security and the Government of the day would be helpless to prevent it. The question is : whether such is the interpretation of Article 359, clause (1). Of course, if that is the only possible interpretation, we must give effect to it regardless of the consequence, leaving it to the constituent authority to amend the Constitution, if it so thinks fit. But we may ask ourselves : could the Constitution-makers have intended that even in times of war or external aggression, there should be no power in the President, as the head of the nation, to bar judicial scrutiny into legality of detention. It may be pointed out that even in the United States of America, the President has power under Article I, placitum 9, clause (2) of the United States Constitution to suspend the privilege of the writ of habeas corpus "when in cases of rebellion or invasion the public safety may require it". The British Parliament has also on several occasions in the past suspended the writ of habeas corpus by legislative enactment, though in limited classes of cases. The Constitution-makers were obviously aware that even in these countries which are essentially democratic in character and where the concept of constitutional government has had its

finest flowering, the power to exclude judicial review of legality of detention through the means of a writ of habeas corpus has been given to the supreme legislature or the head of the State and they must have realised that this was a necessary power in times of national peril occasioned by war or external aggression. Could the Constitution-makers have intended to omit to provide for conferment of this power on the head of the State in our Constitution ?

436. We must also disabuse our mind of any notion that the emergency declared by the proclamation dated June 25, 1975 is not genuine, or to borrow an adjective used by one of the lawyers appearing on behalf of the interveners, is 'phoney'. This emergency has been declared by the President in exercise of the powers conferred on him under Article 352, clause (1) and the validity of the proclamation dated June 25, 1975 declaring this emergency has not been assailed before us. Mr. Shanti Bhushan and the other learned Counsel appearing on behalf of the detenues in fact conceded before us that, for the purpose of the present appeals, we may proceed on the assumption that the declaration of emergency under the proclamation dated June 25, 1975 is valid. But if this emergency is taken as valid, we must equally presume that it is genuine and give full effect to it, without any hesitation or reservation.

437. With these prefatory observations I will now turn to examine clause (1) of Article 359 under which the Presidential Order has been issued. The language of this clause is clear and explicit and does not present any difficulty of construction. It says that where a proclamation of emergency is in operation, the President may by order suspend the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order. Any or all of the rights conferred by Part III can fine a place in the Presidential Order. Whilst the Presidential Order is in force, no one can move any court for the enforcement of any of the specified fundamental rights. I shall presently discuss whether Article 21 can be said to confer any right, but assuming it does - and, as will be evident shortly, that is my conclusion - the right to move any court for the enforcement of the fundamental right guaranteed by Article 21 may be suspended by specifying it in the Presidential Order. When that is done, no one can move any court, and any court would mean any court of competent jurisdiction, including the High Courts and the Supreme Court, for enforcement of the right conferred by Article 21. The words "the right to move any court for the enforcement" are wide enough "to include all claims made by citizens in any court of competent jurisdiction when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is, in substance, seeking to enforce any of the specified fundamental rights". [Vide Makhan Singh's case (supra)]. Therefore, there can be no doubt that in view of the Presidential Order which mentions Article 21, the detenues would have no locus standi to maintain their writ petitions, if it could be shown that the writ petitions were for enforcement of the right conferred by Article 21.

438. That should logically take me straight to a consideration of the question as to what is the scope and content of the right conferred by Article 21, for without defining it, it would not be possible to determine whether the right sought to be enforced by the detenues in their writ petitions is the right guaranteed under Article 21 or any other distinct right. But before I examine this question, it would be convenient first to deal with clause (1A) of Article 359 and ascertian its meaning and effect. Clause (1A) of Article 359 did not find a place in the Constitution when it was originally enacted, but it was inserted with retrospective effect by the Constitution (Thirty-eighth) Amendment Act, 1975. It provides that while an order made under clause (1) of Article 359 mentioning any of the rights conferred by Part III is in operation, nothing in that part conferring those rights shall restrict the power of the State to make any law or to take any executive action which the State would, but for the provisions contained in that part, be competent to make or to take. It will be noticed that the

language of clause (1A) of Article 359 is in the same terms as that of Article 358 and the decisions interpreting Article 358 would, therefore, afford considerable guidance in the interpretation of clause (1A) of Article 359. But before I turn to those decision, let me try to arrive at the proper meaning of that clause on a plain interpretation of its language.

439. In the first place, it is clear that clause (1A) of Article 359 is prospective in its operation, for it says that, while a Presidential Order is in operation, nothing in the articles mentioned in the Presidential Order shall restrict the power of the State to make any law or to take any executive action which the State would, but for the provisions contained in Part III, be competent to make or to take. This clause does not operate to validate a legislative provision or executive action which was invalid because of the constitutional inhibition before the proclamation of emergency. Secondly, it may be noted that the fundamental rights operate as restrictions on the power of the State, which includes the Executive as well as the Legislature. When a Presidential Order is issued under Article 359, clause (1), the fundamental right mentioned in the Presidential Order is suspended, so that the restriction on the power of the Executive or the Legislature imposed by the fundamental right is lifted while the Presidential Order is in operation and the Executive or the Legislature is free to make any law or to take any action which it would, but for the provisions contained in Part III, be competent to make or to take. The words "but for the provisions contained in that Part", that is, but for the fundamental rights, mean "if the fundamental rights were not there". The question which has, therefore, to be asked is : if the fundamental rights were not there in the Constitution, would the Executive or the Legislature be competent to make the impugned law or to take the impugned executive action ? If it could it would not be restricted from doing so by reason of the particular fundamental right mentioned in the Presidential Order. The Presidential Order would, therefore, have the effect of enlarging the power of Executive or the Legislature by freeing it from the restriction imposed by the fundamental right mentioned in the Presidential Order, but it would not enable the Legislature or the Executive to make any law or to take any executive action which it was not otherwise competent to make or to take. Now it is clear that, if the fundamental rights were not there in the Constitution, the Executive being limited by law would still be unable to take any action to the prejudice of a person except by authority of law and in conformity with or in accordance with law and, therefore, even if the Presidential Order mentions Article 21, clause (1A) of Article 359 would not enable the Executive to deprive a person of his personal liberty without sanction of law and except in conformity with or in accordance with law. If an order of detention is made by the Executive without the authority of law, it would be invalid and its invalidity would not be cured by clause (1A) of Article 359, because that clause does not protect executive action taken without lawful authority. An unlawful order of detention would not be protected from challenge under Article 21 by reason of clause (1A) of Article 359 and the detenu would be entitled to complain of such unlawful detention as being in violation of Article 21, except in so far as his right to move the court for that purpose may be held to have been taken away by clause (1) of Article 359.

440. This interpretation of clause (1A) of Article 359 is clearly supported by the decision of this court in State of Madhya Pradesh v. Thakur Bharat Singh ((1967) 2 SCR 454 : AIR 1967 SC 1170) and the subsequent decisions following it, which relate to the interpretation of the similarly worded Article 358. What happened in Bharat Singh's case was that whilst the proclamation of emergency dated October 20, 1962 was in operation, the State Government made an order under sub-section (1) of Section 3 of the Madhya Pradesh Public Security Act, 1959 directing that Bharat Singh shall not be in any place in Raipur district and shall immediately proceed to and reside in Jhabua. Bharat Singh challenged the validity of the order inter alia on the ground that sub-section (1) of Section 3 of the Act infringed the fundamental rights guaranteed under clause (d) and (e) of Article 19(1). The State Government sought to meet the challenge by pleading the bar of Article 358. But this Court

held that Article 358 had no application because sub-section (1) of Section 3 of the Act which was impugned in the petition was a pre-emergency legislation. This Court, speaking through Shah, J. observed (p. 459) :

> Article 358 which suspends the provisions of Article 19 during an emergency declared by the President under Article 352 is in terms prospective : after the proclamation of emergency nothing in Article 19 restricts the power of the State to make laws or to take any executive action which the State but for the provisions contained in Part III was competent to make or take. Article 358 however does not operate to validate a legislative provision which was invalid because of the constitutional inhibition before the proclamation of emergency.

This Court accordingly proceeded to consider the validity of Section 3, sub-section (1) of the Act and held that clause (b) of that sub-section was unconstitutional as it infringed the fundamental rights under clauses (d) and (e) of Article 19(1) and if it was void before the proclamation of emergency, "it was not revived by the proclamation". But on this view, another contention was put forward on behalf of the State Government and that was that Article 358 protects not only legislative but also executive action taken after the proclamation of emergency and, therefore, executive action taken by the State would not be liable to be challenged on the ground that it infringes the fundamental rights under Article 19, and consequently, the order of the State Government, though made under void law was protected against challenge under Article 19. This contention was also rejected by the Court in the following words (p. 459) :

> In our judgment, the argument involves a grave fallacy. All executive action which operates to the prejudice of any person must have authority of law to support it, and the terms of Article 358 do not detract from that rule. Article 358 does not purport to invest the State with arbitrary authority to take action to the prejudice of citizens and others : it merely provides that so long as the proclamation of emergency subsists laws may be enacted, and executive action may be taken in pursuance of lawful authority, which if the provisions of Article 19 were operative would have been invalid.

The view taken by the court was that it is only where executive action is taken in pursuance of lawful authority that it is immune from challenge under Article 19 and in such a case even if it conflicts with the fundamental rights guaranteed under that article, it would be valid. But where executive action is taken without lawful authority, as for example, where it is taken without the authority of any law at all or in pursuance of a law which is void, it is not protected from challenge under Article 19 by Article 358 and it would be void to the extent it violates Article 19.

441. The same view was taken by this Court in District Collector of Hyderabad v. M/s. Ibrahim & Co. ((1970) 3 SCR 498 : (1970) 1 SCC 386) where this Court said, without referring expressly to the decision in Bharat Singh's case that [SCC p. 390, para 10]

> . . . the executive order immune from attack is only that order which the State was competent, but for the provisions contained in Article 19, to make, and that executive action of the State Government, which is otherwise invalid, is not immune from attack merely because the proclamation of emergency is in operation when it is taken.

The reference here was to immunity from attack under Article 19 and it was held that executive action which was contrary to law and hence invalid, was not protected from attack under Article 19 by reason of Article 358. So also in Bennett Coleman & Co. v. Union of India ((1973) 2 SCR 757 : (1972) 2 SCC 788), this Court referred to the decisions in Bharat Singh's case and Ibrahim's case and observed :

> Executive action which is unconstitutional is not immune during proclamation of emergency. During the proclamation of emergency Article 19 is suspended. But it would not authorise the taking of detrimental executive action during the emergency affecting fundamental rights in Article 19 without any legislative authority or any purported exercise of power conferred by any pre-emergency law which was invalid when enacted.

This Court also said to the same effect in Shree Meenakshi Mills Ltd. v. Union of India ((1974) 2 SCR 398 : (1974) 1 SCC 468): [SCC p. 499, para 98]

> . . . if it can be shown that the executive action taken during the emergency has no authority of a valid law, its constitutionality can be challenged.

These observations clearly show that where executive action is taken without any legislative authority or in pursuance of a law which is void, it would not be protected by Article 358 from challenge under Article 19 and it would be unconstitutional to the extent to which it conflicts with that article.

442. If this be the interpretation of Article 358 as laid down in the decisions of this Court a fortiori a like interpretation must be placed on clause (1A) of Article 359, as both are closely similar in form as well as language. It must, therefore, be held that even though a Presidential Order issued under clause (1) of Article 359 mentions Article 21, where it is found that a detention has not been made in pursuance of lawful authority or in other words, the detention is without the authority of law, whether by reason of there being no law at all or by reason of the law which the detention is made being void, clause (1A) of Article 359 would not protect it from challenge under Article 21 and it would be in conflict with that article. The only question then would be whether the detenu would be entitled to challenge the validity of the detention as being in breach of Article 21, in view of clause (1) of Article 359 read with the Presidential Order mentioning Article 21.

443. Now, at the outset, a contention of a preliminary nature was advanced by Mr. Shanti Bhushan, learned Advocate appearing on behalf of some of the detenues, that clause (1) of Article 359 can have no operation in cases where a detenu seeks to enforce his right to personal liberty by challenging the legality of his detention. Mr. Shanti Bhushan contended, and in this contention he was strongly supported by Mr. Jethmalani, that personal liberty is not a conglomeration of positive rights but is merely a negative concept denoting an area of free action to the extent to which law does not curtail it or authorise its curtailment and such a negative right cannot by its very nature be the subject of conferment under Article 21. The argument of Counsel based on this contention was that when Article 359 clause (1) speaks of suspension of "the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order", it cannot include reference to the right of personal liberty in Article 21, because it cannot be said of such a right that it is conferred by Article 21. It was urged that Article 21 cannot therefore appropriately find a place in a Presidential Order under clause (1) of Article 359 and even if it is erroneously mentioned there; it can have no legal sequitur and cannot give rise to the consequences set out in

clause (1) of Article 359. This argument was ought to be supported by reference to two well-known textbooks on jurisprudence, one by Salmond and the other by Holland and the Declaration of the Rights of man and the Citizen adopted by the French National Assembly was also relied upon for this purpose. There is, however, no merit in this argument. The words 'rights conferred by Part III' cannot be read in isolation, nor can they be construed by reference to theoretical or doctrinaire considerations. They must be read in the content of the provisions enacted in Part III in order to determine what are the rights conferred by the provisions in that part. Part III is headed "Fundamental Rights" and it deals with fundamental rights under seven heads, namely, right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights, right to property and right to constitutional remedies. Article 19 to 22 occur under the heading "Right to Freedom" and what is enacted in Article 21 is a right, namely, the right to life and personal liberty. It is true that Article 21 is couched in negative language, but it is axiomatic that to confer a right it is not necessary to use any particular form of language. It is not uncommon in legislative practice to use negative language for conferring a right. That is often done for lending greater emphasis and strength to the legislative enactment. One instance may be found in Section 298, sub-section (1) of the Government of India Act, 1935 which provided that no subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India, though this provision was couched in negative language, the Judicial Committee of the Privy Council in Punjab Province v. Daulat Singh (73 IA 59 : AIR 1946 PC 66) construed it is conferring a right on every subject of His Majesty, domiciled in India.

444. Similarly, Article 14 also employs negative language and yet it was construed to confer a fundamental right on every person within the territory of India. S. R. Das, C.J. pointed out in Basheshar Nath v. Commissioner of Income Tax, Delhi & Rajasthan ((1959) Supp 1 SCR 528 : AIR 1959 SC 149 : ITR 90) that it is clear from the language of Article 14 that (p. 551) :

> The command of that article is directed to the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person within the territory of India is to enjoy.

445. Article 31, clause (1) is also couched in negative language : it is almost in the same form as Article 21. Speaking about Article 31, S. R. Das, J. observed in State of Bihar v. Maharajadhiraja Kameshwar Singh ((1952) SCR 889, 988 : AIR 1952 SC 252) (p. 988) :

> It confers a fundamental right in so far as it protects private property from State action. The only limitation put upon the State action is the requirement that the authority of law is prerequisite for the exercise of its power to deprive a person of his property. This confers some protection on the owner, in that, he will not be deprived of his property save by authority of law and this protection is the measure of the fundamental right. It is to emphasise this immunity from State action as a fundamental right that the clause has been worded in negative language .....

If Article 31(1), by giving a limited immunity from State action, confers a fundamental right, it should follow equally on a parity of reasoning that Article 21 also does so. In fact, this Court pointed out in so many terms in P. D. Shamdasani v. Central Bank of India Ltd. ((1952) SCR 391 : AIR 1952 SC 59) that clause (1) of Article 31 (p. 394) is a declaration of fundamental right of private property in the same negative form in which Article 21 declares the fundamental right to life

and liberty.

446. Then again in R. C. Cooper v. Union of India ((1970) 3 SCR 530 : (1970) 1 SCC 248) this Court in a majority judgment to which ten out of eleven judges were parties said : [SCC p. 289, para 52]

> . . . . it is necessary to bear in mind the enunciation of the guarantee of fundamental rights which has taken different forms. In some cases it is an express declaration of a guaranteed right : Articles 29(1), 30(1), 26, 25 and 32; in others to ensure protection of individual rights they take specific forms of restrictions on State action - legislative or executive - Articles 14, 15, 16, 20, 21, 22(1), 27 and 28; ..... the enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them; they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights.

This statement of the law establishes clearly and without doubt that Article 21 confers the fundamental right of personal liberty.

447. Let us, for a moment, consider what would be the consequences if Article 21 were construed as not conferring a right to personal liberty. Then there would be no fundamental right conferred by Article 21 and even if a person is deprived of his personal liberty otherwise than in accordance with the procedure established by law and there is infringement of Article 21 such person would not be entitled to move the Supreme Court for a writ of habeas corpus under Article 32, for that article is available only for enforcement of the rights conferred by Part III. That would be a starting consequence, as it would deprive the Supreme Court of wholesome jurisdiction to protect the personal liberty of an individual against illegal detention. Let it not be forgotten that the Supreme Court has exercised this jurisdiction in a large number of cases over the last 25 years and set many detenus at liberty where it found that they were illegally detained. All this exercise of jurisdiction in the past would be rendered illegal and void. Ever since the commencement of the Constitution, this Court has always regarded Article 21 as conferring the fundamental right of personal liberty which can be enforced in this Court by a petition under Article 32 and there is no justification for departing from this well-settled constructional position.

448. What then is the scope and ambit of this fundamental right conferred by Article 217. The first question that arises in this connection is : What is the meaning and content of the word 'personal liberty' in this article ? This question came up for consideration before a Bench of six judges of this Court in Kharak Singh's case (supra). The majority judges took the view (p. 347) that 'personal liberty' is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue.

The minority judges, however, disagreed with this view taken by the majority and explained their position in the following words (pp. 356-357) :

> No doubt the expression 'persona liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move

> freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty have many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned.

There can be no doubt that in view of the decision of this Court in R. C. Cooper's case (supra) the minority view must be regarded as correct and the majority view must be held to have been overruled. No attribute of personal liberty can be regarded as having been carved out of Article 21. That article protects all attributes of personal liberty against executive action which is not supported by law. It is not necessary for the purpose of the present appeals to decide what those attributes are or to identify or define them. It is enough to say that when a person is detained, there is deprivation of personal liberty within the meaning of Article 21.

449. Now Article 21 gives protection against deprivation of personal liberty but what is the nature and extent of this protection ? In the first place, it may be noted that this protection is only against State action and not against private individuals. Vide P. D. Shamdasani v. Central Bank of India Ltd. (supra) and Smt. Vidya Verma v. Dr. Shiv Narain ((1955) 2 SCR 983 : AIR 1956 SC 108 : 1956 Cri LJ 283). Secondly it is clear from the language of Article 21 that the protection it secures is a limited one. It says and I am quoting here only than part of the article which relates to personal liberty, that no one shall be deprived of his personal liberty except by the procedure prescribed by law. The meaning of the word 'law' as used in this article came to be considered by this Court in A. K. Gopalan's case (supra) and it was construed to mean 'enacted law' or 'State law'. Kania C.J. observed : "It is obvious that ..... law must mean enacted law", and to the same effect spoke Patanjali Sastri, J. when he said : "In my opinion 'law' in Article 21 means 'positive or State-made law'. So also Mukherjea, J. said that his conclusion was that "in Article 21 the word 'law' has been used in the sense of State-made law", and Das, J. too expressed the view that law in Article 21 must mean State-made law. The only safeguard enacted by Article 21, therefore, is that a person cannot be deprived of his personal liberty except according to procedure prescribed by 'State-made' law. If a law is made by the State prescribing the procedure for depriving a person of his personal liberty and deprivation is effected strictly in accordance with such procedure, the terms of Article 21 would be satisfied and there would be no infringement of the right guaranteed under that article.

450. Now, based on the phraseology "except according to procedure established by law" in Article 21, an argument was advanced on behalf of the detenues that it is only where procedure prescribed by law has not been followed in making the order of detention that Article 21 is attracted and the right conferred by that article is breached and not where an order of detention is made without there being any law at all or where there is a law, outside the authority conferred by it. It was urged that where an order of detention is challenged as mala fide or as having been made without the requisite subjective satisfaction, the challenge would not be on the ground of breach of the procedure prescribed by the Act but it would be on the ground that the order of detention is outside the authority of the Act and such challenge would not be covered by Article 21. This argument is, in my opinion, wholly unsustainable. It is clear on plain natural construction of its language that Article 21 imports two requirements : first, there must be a law authorising deprivation of personal liberty, and secondly such law must prescribe a procedure. The first requirement is indeed implicit in the phrase

"except according to procedure prescribed by law". When a law prescribes a procedure for depriving a personal of personal liberty, it must a fortiori authorise such deprivation. Article 21 thus provides both substantive as well as procedural safeguards. This was pointed out by Patanjali Sastri, J. in A. K. Gopalan v. State of Madras (supra) at page 195 of the report where the learned Judge said :

> If Article 21 is to be understood as providing only procedural safeguards, where is the substantive right to personal liberty of non-citizens to be found in the Constitution ? Are they denied such right altogether ? If they are to have no right of personal liberty, why is the procedural safeguard in Article 21 extended to them ? And where is that most fundamental right of all the right to life, provided for in the Constitution ? The truth is that Article 21, ... presents an example of the fusion of procedural and substantive rights in the same provision ..... the first and essential step in a procedure established by law for such deprivation must be a law made by a competent legislature authorising such deprivation.

Mahajan J. also pointed out in the same case at page 229 of the report :

> Article 21, in my opinion, lays down substantive law as giving protection to life and liberty inasmuch as it says that they cannot be deprived except according to the procedure established by law; in other words, it means that before a person can be deprived of his life or liberty as a condition precedent there should exist some substantive law conferring authority for doing so and the law should further provide for a mode of procedure for such deprivation.

S. R. Das, J. too spoke in the same strain when he negatived the argument that personal liberty as a substantive right is protected by Article 19(1) and Article 21 gives only an additional protection by prescribing the procedure according to which that right may be taken away.

It would, therefore, be seen that both the safeguards of Article 21, substantive as well as procedural, have to be complied with in order that there should be no infraction of the right conferred by that article. Where there is a law authorising deprivation of personal liberty, but a person is detained otherwise than in conformity with the procedure prescribed by such laws, it would clearly constitute violation of Article 21. And so also there would be breach of Article 21, if there is no law authorising deprivation of personal liberty and yet a person is detained, for then the substantive safeguard provided in the article would be violated. Therefore, when a detenu challenges an order of detention made against him on the ground that it is mala fide or is not preceded by the requisite subjective satisfaction, such challenge would fall within the terms of Article 21.

451. It is also necessary to point out two other ingredients of Article 21. The first is that there must not only be a law authorising deprivation of personal liberty, but there must also be a procedure prescribed by law, or in other words, law must prescribe a procedure. Vide observations of Fazal Ali, J. at page 169, Patanjali Sastri J. at page 205, Mahajan, J. at pages 229 and 230 and S. R. Das, J. at page 319 of the report in A. K. Gopalan's case (supra). Article 21, thus, operates not merely as a restriction on executive action against deprivation of personal liberty without authority of law, but it also enacts a check on the legislature by insisting that the law which authorises deprivation, must establish a procedure. What the procedure should be is not laid down in this article, but there must be some procedure and at the least, it must conform to the minimal requirements of Article 22. Secondly, 'law' within the meaning of Article 21 must be a valid law and not only must it be within the legislative competence of the legislature enacting it, but it must also not be repugnant to any of

the fundamental rights enumerated in Part III. Vide Shambhu Nath Sarkar v. State of West Bengal ((1974) 1 SCR 1 : (1973) 1 SCC 856 : 1973 SCC (Cri) 618) and Khudiram Das v. State of West Bengal ((1975) 2 SCR 832 : (1975) 2 SCC 81 : 1975 SCC (Cri) 435).

452. It was contended by Mr. Jethmalani on behalf of some of the detenues that when a Presidential Order suspends enforcement of the right conferred by Article 21, its effect is merely to suspend enforcement of the aforesaid two ingredients and, therefore, the only claims which a detenu is interdicted from enforcing, whilst the Presidential Order is in operation, are : (1) that the law authorising deprivation does not prescribe a procedure, and (2) that it does not impose reasonable restrictions on the freedom guaranteed under Article 19. This contention is plainly erroneous and does not need much argument to refute it. In the first place, the requirement that the law which authorises deprivation of personal liberty should not fall foul of Article 19, or for the matter of that, with any other fundamental right set out in Part III, is not a requirement of Article 21, but it is a requirement of Article 13. Secondly, the effect of suspension of enforcement of Article 21 by the Presidential Order is that no one can move any court for enforcement of the right conferred by Article 21, whilst the Presidential Order is in operation. The right conferred by Article 21 is the right not to be deprived of personal liberty except according to procedure prescribed by law. Therefore, when the Executive detains a person without there being any law at all authorising detention or if there is such law, otherwise than in accordance with its provisions, that would clearly be in violation of the right conferred by Article 21 and such violation would a fortiori be immune from challenge by reason of the Presidential Order. It must follow inevitably from this that when a detenu challenges an order of detention on the ground that it is male fide or is not in accordance with the provisions of the Act or it outside the authority conferred by the Act, he would be seeking to enforce the right of personal liberty conferred on him under Article 21 and that would be inhibited by the Presidential Order.

453. That takes me to a consideration of the concept of the rule of law on which so much reliance was placed on behalf of the detenues in order to save their writ petitions from the lethal effect of the Presidential Order. The contention on behalf of the detenues was that their writ petitions were for enforcement of the right of personal liberty based on the principle of the rule of law that the Executive cannot interfere with the liberty of a person except by authority of law and that was not within the inhibition of the Presidential Order. The question is : what is this principle of the rule of law and does it exist under our Constitution as a distinct and separate constitutional principle independently and apart from Article 21, so as to be capable of enforcement even when enforcement of Article 21 is suspended by the Presidential Order.

454. The Great Charter of Liberties of England, commonly known as the Magna Carta, was granted under the seal of King John in the meadow called Runnymede on June 15, 1215. This was followed within a couple of years by a revised version of the Charter which was issued in the name of Henry III in 1217 and ultimately with slight amendments, another Charter was reissued by Henry III in 1225 and that document has always been accepted as containing the authorised text of Magna Carta. Whenever reference is made to Magna Carta, it is to the Charter of 1225 which is also described as "9 Henry III (1225)". Magna Carta, according to Sir Ivor Jennings symbolises "what we should now call the rule of law, Government according to law or constitutional government" which means that all power should come from the law and that "no man, be he king or minister or private person is above the law". It recognised that "the liberties of England, which means the liberties of all free men ..... depended on the observance of law by King, lord and commoner alike", and "without law there is no liberty". Chapter XXIX contains the famous clause of the Magna Carta which provided that :

> No free man shall be taken, or imprisoned, or dispossessed, of his free tenement, or liberties, or free customs, or be outlawed, or exiled, or in any way destroyed; not will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land.

Thus, for the first time the great principle was enunciated - though even before, it was always part of the liberties of the subject - that no one shall be imprisoned or deprived of his liberty except by the authority of the law of the land. The power of the King to arrest a person or to deprive him of his liberty was circumscribed by law. That is why Bracton said about the middle of the 13th century.

> . . . the king himself ought not to be under man but under God and under the law, because the law makes the Kind. Therefore, let the Kind attribute to the law what the law attributes to the King, namely, lordships and power, for there is no king where will governs and not law.

Magna Carta was confirmed again by the successive kings on the insistence of Lords and commons and the rule of law embodied in Magna Carta governed the actions of the King vis-a-vis his subjects. But this great principle of liberty was placed in jeopardy in the 17th century when a claim was made by the King that he had a prerogative right to arrest and detain a subject and this prerogative right was necessary for the defence of the realm. When the King sought to raise moneys from the subjects without the sanction of the Parliament, it was resisted by Darnel and others and they were on that account committed to prison under the orders of the King. On the application of these persons, who were so imprisoned, a writ of habeas corpus was issued and the return made to it on behalf of the King was that they were imprisoned per specials mandate Domini Regis (Darnel's case ((1627) St Tr 1)). This return was considered sufficient and the writ was discharged. The effect of this decision was that the King needed no authority of law in order to deprive a subject of his personal liberty. But the Parliament was quick to nullify this decision by enacting the Petition of Right, 1628 and it reaffirmed the right to personal liberty in Section 3 of that Act and declared such a cause of imprisonment to be unlawful. The principle that the Executive cannot interfere with the liberty of a subject unless such interference is sanctioned by the authority of law was thus restored in its full vigour.

455. Blackstone in his Commentaries on the Laws of England, Vol. 1, 4th Ed., p. 105 stated the principle in these terms :

> . . . the law of England regards, asserts and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; for imprisonment or restraint, unless by due course of law ..... It cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again, the language of the Great Charter is, that no free man shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land.

Since then, the validity of this principle has never been doubted and the classical statement of it is to be found in the of quoted passage from the judgment of Lord Atkin in Eshugbayi Eleko v. Officer Administering the Government of Nigeria (supra) where the learned Law Lord said :

> The Governor acting under the ordinance acts solely under executive powers, and in

> no sense a court. As the Executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the Executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the Executive.

Since in this country prior to the commencement of the Constitution, we were administering British jurisprudence, this constitutional principle was equally applicable here. That was the direct result of the binding authority of the decision of the Privy Council in the aforementioned case. But quite apart from that, the courts in India uniformly accepted this constitutional principle as part of the law of the land. Vide Secretary of State for India v. Hari Bhanji ((1882) ILR 5 Mad 273) and Province of Bombay v. Khushaldas Advani ((1950) SCR 621 : AIR 1950 SC 222). Bose, J. in P. K. Tare v. Emperor (AIR 1943 Nag 26 : ILR 43 Nag 154 : 44 Cri LJ 345) quoted with approval the aforesaid passage from the judgment of Lord Atkin and pointed out that before the executive can claim power to override the rights of the subject "it must show that the legislature has empowered it to do so". The learned Judge also referred to the following passage from the dissenting judgment of Lord Atkin in Liversidge v. Anderson ((1942) AC 206 : (1941) 3 All ER 338) :

> It has always been one of the pillars of freedom, one of the principles of liberty for which, on recent authority, we are now fighting, that the judges are no respecter of persona and stand between the subject and any attempted encroachments on his liberty by the Executive; alert to see that any coercive action is justified in law and, pointing out that Lord Macmillan and Lord Wright also agreed with this principle, observed that these principles of liberty "to which Lord Atkin refers, apply as much to India as elsewhere". So also in Vimlabai Deshpande v. Emperor (AIR 1945 Nag 8 : ILR 1945 Nag 6) the same two passages, one from the judgment of Lord Atkin in Eshugbayi's case (supra) and the other from the judgment in Liversidge's case (supra) were referred to with approval by Bose and Sen, JJ.

456. It was also accepted by a Division Bench of the Calcutta High Court consisting of Malik and Remfry, JJ. in Jitendranath Ghosh v. Chief Secretary to the Government of Bengal (ILR 60 Cal 364, 377 : AIR 1932 Cal 753) that

> ..... in accordance with British jurisprudence, and with the jurisprudence of British India, no member of the Executive can interfere with the liberty or property of a British subject, or of a foreigner in our land, except on the condition that the can, and, if duly called upon, must support the legality of his action before a court of justice.

The Division Bench pointed out that the courts can, and in a proper case must, consider and determine the question whether there has been a fraud on an Act or an abuse of powers granted by the legislature; Eshugbayi Eleko's case.

457. Ammer Ali, A.C.J. and S. R. Das, J. also quoted with approval in In re Banwarilal Roy (48 CWN 766, 780) the aforesaid passage from the judgment of Lord Atkin in Eshugbayi Eleko's case (supra) and relied on the decision in Jitendranath Ghosh's case (supra) and particularly the observations from the judgment in that case which I have just reproduced. These observations clearly show that in our country, even in pre-Constitution days, the Executive was a limited

Executive, that is, an Executive limited by law and it could act only in accordance with law.

458. It would be seen from the above discussion that, even prior to the Constitution, the principle of rule of law that the Executive cannot act to the prejudice of a person without the authority of law was recognised as part of the law of the land and was uniformly administered by the courts. It was clearly 'law in force' and ordinarily, by reason of Article 372, it would have continued to subsist as a distinct and separate principle of law even after the commencement of the Constitution. But when the Constitution was enacted, some aspects of this principle of rule of law were expressly recognised and given constitutional embodiment in different article of the Constitution. Thereafter they did not remain in the realm of unwritten law. After 21 enacted one aspect of the principle of rule of law that the executive cannot deprive a person of his life or personal liberty without authority of law and added a requirement that the law which authorises such deprivation must prescribe a procedure. Another aspect of the principle of rule of law was enacted in clause (1) of Article 31, namely, that no one shall be deprived of his property save by authority of law. That is why it was pointed out by Shah, J. in R. C. Cooper's case (supra) that "clauses (1) and (2) of Article 31 subordinate the exercise of the power of the State to the basic concept of the rule of law". A third aspect was constitutionalised in various sub-clauses of clause (1) of Article 19 inhibiting executive action unsupported by law, which conflicted with the difference freedoms guaranteed in these sub-clauses. Then Article 265 recognised and enacted a yet fourth aspect, namely, that no tax shall be levied and collected without authority of law. Article 19, clause (1), Article 21, Article 31, clause (1) and Article 265 thus embody different aspects of the principle of rule of law. We are concerned in these appeals only with Article 21 and therefore, I shall confine my discussion only to that article.

459. Now, to my mind, it is clear that when this principle of rule of law that the Executive cannot deprive a person of his liberty except by authority of law, is recognised and embodied as a fundamental right and enacted as such in Article 21, it is difficult to comprehend how it could continue to have a distinct and separate existence, independently and apart from this article in which it has been given constitutional vesture. I fail to see how it could continue in force under Article 372 when it is expressly recognized and embodied as a fundamental right in Article 21 and finds a place in the express provisions of the Constitution. Once this principle is recognised and incorporated in the Constitution and forms part of it, it could not have any separate existence apart from the Constitution, unless it were also enacted as a statutory principle by some positive law of the State. This position indeed becomes incontrovertible when we notice that, while recognising and adopting this principle of rule of law as a fundamental right, the Constitution has defined its scope and ambit and imposed limitation on it in the shape of Article 359 clauses, (1) and (1A). When the Constitution-makers have clearly intended that this right should be subject to the limitation imposed by Article 359, clauses (1) and (1A), it would be contrary to all cannons of construction to hold that the same right continues to exist independently, but free from the limitation imposed by Article 359, clause (1) and (1A). Such a construction would defeat the object of the Constitution-makers in imposing the limitation under Article 359, clauses (1) and (1A) and make a mockery of that limitation. The consequence of such a construction would be that, even though a Presidential Order is issued under clause (1) and Article 359 suspending the right to move the court for enforcement of the right guaranteed under Article 21, the detenue would be entitled to ignore the Presidential Order and challenge the order of the detention on the ground that it is made otherwise than in accordance with law, which is precisely the thing which is sought to be interdicted by the Presidential Order. The Presidential Order would in such a case become meaningless and ineffectual. Can an interpretation be accepted which would reduce to futility Article 359, clause (1) in its application in relation to Article 21 ? could the Constitution-makers have intended such a meaning ? The only explanation which could be offered on behalf of the detenues was that the object of Article 359,

clause (1) is merely to prevent a person from moving the Supreme Court under Article 32 for enforcing the right of personal liberty and it is not intended to effect the enforcement of the right of personal liberty based on the rule of law by moving the High Court under Article 226. But this explanation is wholly unconvincing. It is difficult to understand why the Constitution-makers should have intended to bar only the right to move the Supreme Court under Article 32 in so far as the right of personal liberty is concerned. There would be no point in preventing a citizen from moving the Supreme Court directly under Article 32 for securing his release from illegal detention, while at the same time leaving it open to him to move the High Court for the same relief and then to come to the Supreme Court in appeal, if necessary. That would be wholly irrational and meaningless. Therefore, the only way in which meaning and effect can be given to the Presidential Order suspending the enforcement of the right of personal liberty guaranteed under Article 21 is by holding that the principle of rule of law, that the Executive cannot interfere with the personal liberty of any person except by authority of law, is enacted in Article 21 and it does not exist as a distinct and separate principle conferring a right of personal liberty, independently and apart from that article. Consequently, when the enforcement of the right of personal liberty conferred by Article 21 is suspended by a Presidential Order, the detenu cannot circumvent the Presidential Order and challenge the legality of his detention by falling back on the supposed right of personal liberty based on the principle of rule of law.

460. It was also said on behalf of the detenues that under our constitutional set-up, the Executive is bound to act in accordance with law and this obligation of the Executive arises from the very basis of the doctrine of distribution of powers amongst different bodies created by the Constitution as also from the terms of Article 73, 154 and 256 of the Constitution. This obligation, contended the detenues, could be enforced against the executive under Article 226 by issue of a writ "for any other purpose". Now, it is true that under our Constitution, the executive is a limited Executive and it is bound to act in accordance with law and cannot disobey it. If the Maintenance of Internal Security Act, 1971 says that the Executive shall be entitled to detain a person only on the fulfillment of certain conditions and according to a specified procedure, it cannot make an order of detention if the prescribed conditions are not fulfilled or the specified procedure is not followed. The executive is plainly and indubitably subordinated to the law and it cannot flout the mandate of the law but must act in accordance with it. The Judicial Committee of the Privy Council pointed out this constitutional position in Eastern Trust Company v. Mckenzie Mann & Co. Ltd. ((1915) AC 750 : 84 LJPC 152) in an appeal from the Supreme Court of Canada.

The non-existence of any right to bring the Crown into court .... does not give the Crown immunity from all law, or authorize the interference by the Crown with private rights at its own mere will ..... It is the duty of the Crown and of every branch of the Executive to abide by and obey the law.

This rule must naturally apply with equal force in our constitutional set-up and that was recognised by this Court in Rai Sabhi Ram Jawaya Kapur v. State of Punjab ((1955) 2 SCR 225 : AIR 1955 SC 549) where Mukherjea, J. speaking on behalf of the Court said (p. 236) :

In India, as in England, the Executive has to act subject to the control of the Legislature and proceeded to add (p. 239) :

> ..... the executive Government are bound to conform not only to the law of the land but also to the provisions of the Constitution .....

In Bharat Singh's case (supra) also, this Court pointed out (pp. 459-460) :

> Our federal structure is founded on certain fundamental principles : (1) the sovereignty of the people with limited Government authority, i.e. the Government must be conducted in accordance with the will of the majority of the people. The people govern themselves though their representatives, whereas the official agencies of the executive Government possess only such powers as have been conferred upon them by the people; (2) There is distribution of powers between the three organs of the State - legislative, executive and judicial - each organ having some check direct or indirect on the other; and (3) the rule of law which includes judicial review of arbitrary executive action.

The obligation of the Executive to act according to law and not to flout or disobey it is, therefore, unexceptionable and cannot be disputed. But this obligation, in so far as personal liberty is concerned, is expressly recognised and enacted as a constitutional provision inter alia in Article 21 and when the Constitution itself has provided that the enforcement of this obligation may be suspended by a Presidential Order it is difficult to see how the intention of the Constitution-makers can be allowed to be defeated by holding that this obligation exists independently of Article 21 and it can be enforced despite the limitation imposed by the Constitutional provision. The same reasoning which I have elaborated in the preceding paragraph would equally apply to repel the present argument.

461. Before I go to the decided cases, I must refer to one argument which strongly supports the view I am taking. It is almost conclusive. It is an argument for which I must express my indebtedness to Prof. P. K. Tripathi. In an article written on 'Judicial and Legislative Control over the Executive during Martial Law' and published in the Journal Section of All India Reporter, 1964, Vol. 51 at page 82 Prof. P. K. Tripathi has suggested that considerations of martial law may support the conclusion that a Presidential Order mentioning Article 21 takes away, wholly and completely, the right of an individual to obtain a writ of habeas corpus challenging the legality of his detention. I must of course hasten to make it clear that there is no martial law anywhere in the territory of India at present and I am referring to it only in order to buttress the conclusion otherwise reached by me. The concept of martial law is well known in the British and American jurisprudence. When a grave emergency arises in which the Executive finds itself unable to restore order by employing the ordinary civilian machinery and it becomes necessary for it to use force, it may declare what is commonly termed 'martial law'. Martial law means that the executive calls the military to its aid and the military, acting under the general authority of Executive, proceeds to quell violence by violence. When martial law is in force, it is well settle that the courts cannot issue a writ of habeas corpus or otherwise interfere with the military authorities or the Executive to protect the life or liberty of an individual, even if illegal or mala fide action is taken or threatened to be taken by the military authorities or the Executive. To give only one example : In Ireland in John Allen's case ((1921) 2 Irish Reporter 241), the martial law authorities ordered all person to deposit their firearms within twenty-four hours with the army authorities on pain of death. John Allen, who failed to obey, was arrested and sentenced by the military tribunal, which was, in law, a mere body of army men advising the officer commanding, to death, and the martial law authorities announced the day and date when he was to be executed. The court was moved on behalf of John Allen on the ground that the order of the military tribunal was invalid, but the court refused to interfere on the theory that when martial law is properly declared, the court will not issue habeas corpus during the period when martial law is in force. It is the basic characteristic and essence of martial law that during the time that it is in force, the individual cannot enforce his right to life and liberty by resorting to judicial process and the courts cannot issue the writ of habeas corpus or pass any similar orders.

462. Now, under our Constitution there does not appear to be any express provision conferring power on the Executive to declare martial law. But it is implicit in the text of Article 34 of the Constitution that the Government may declare martial law in any area within the territory of India. What are the legal implications and consequences of declaration of martial law is not provided anywhere in the Constitution. It is, therefore, obvious that merely declaring martial law would not, by itself, deprive the courts of the power to issue the writ of habeas corpus or other process for the protection of the right of the individual to life and liberty. In our country, unlike England, the right to life and liberty is secured as a fundamental right and the right to move the Supreme Court for enforcement of this right is also guaranteed as a fundamental right. Also the power to issue a writ or order in the nature of habeas corpus has been expressly conferred on the High Courts by a constitutional provision, namely, Article 226. Therefore, the declaration of martial law, which is not even expressly provided in the Constitution, cannot override the provisions of the articles conferring the right to life and liberty as also of Article 32 and 226 and, unless the right of an individual to move the courts for enforcement of the right to life and liberty can be suspended or taken away by or under an express provisions of the Constitution, the individual would be entitled to enforce the right to life and liberty under Article 32 or Article 226 or by resorting to the ordinary process of law, even during martial law. That would be contradictory of the basic and essential feature of martial law and make it impossible to impose effective martial law anywhere at any time in the territory of India. Such a consequence could never have been imagined by the Constitution-makers. They could never have intended that the Government should have the power to declare martial law and yet it should be devoid of the legal effect which must inevitably follow when martial law is in force. Moreover, Article 34 itself pre-supposes that acts contrary to law may be committed by the military authorities or the Executive during the time when martial law is in force and that is why it provides that after the martial law ceases to be in force, Parliament may be law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area ... where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

This provision clearly postulates that during the time that martial law is in force, no judicial process can issue to examine the legality of any act done by the military authorities or the Executive in connection with the maintenance or restoration of order. But, how is this result to be achieved under the Constitution ?

463. The only provision in the Constitution which authorises temporary suspension or taking away of the right of an individual to move any court for enforcement of his right to life and liberty is Article 359, clause (1). If the Presidential Order under clause (1) of Article 359 suspending enforcement of the fundamental right under Article 21 were construed not to have the effect of barring an individual from moving the court for impugning the legality of the act of the Executive interfering with his life or liberty, on the assumption that in doing so, he is merely enforcing his right to life or personal liberty based on the rule of law, the result would be that even when and where martial law is in force, courts will continue to have the power to examine the legality of the act of the Executive, because, as explained earlier, the mere declaration of martial law does not, under our Constitution, have the effect of taking away that power. That would be plainly an insufferable situation which would carry the power of courts even beyond that claimed by the United States courts in the case of Ex parte Milligan ((1866) 4 Wallace 2) which case went to the farthest limit and which has for that reason been criticised by great authorities like E. S. Corwin and has not been consistently followed even by the United States Supreme Court. Vide, Moyer v. Peabody ((1909) 212 US 76) and Duncan v. Kohanmeku ((1945) 327 US 304). There can be no two

opinions that during martial law the courts cannot and should not have power to examine the legality of the action of the military authorities or the Executive on any ground whatsoever, including the ground of mala fide. But, if the courts are to be prevented from exercising such power during martial law, that situation can be brought about only by a Presidential Order issued under Article 359, clause (1) and in no other way and the Presidential Order in so far as it suspends the enforcement of the right of personal liberty conferred under Article 21 must be construed to bar challenge to the legality of detention in any court, including the Supreme Court and the High Courts, whilst the Presidential Order is in operation.

464. I may also in this connection refer to the decision of the House of Lords in Attorney General v. De Keyser's Royal Hotel (1920 AC 508). There, in May 1916, the Crown, purporting to act under the Defence of Realm Consolidation Act, 1914 and the Regulations made thereunder took possession of a hotel for the purpose of housing the headquarters' personnel of the Royal Flying Corps and denied the legal right of the owners to compensation. The owners yielded up possession under protest and without prejudice to their rights and by a petition of right, they asked for a declaration that they were entitled to compensation under the Defence Act, 1842. The Crown was plainly liable to pay compensation under the statute, but it sought to justify its action in taking possession of the hotel without payment of compensation, under the sanction of the royal prerogative. The question which, therefore, arose for consideration before the House of Lords was whether the royal prerogative was available to the Crown for taking possession of the hotel without compensation, when the statute authorised taking of such possession but on condition of payment of compensation. The House of Lords unanimously held that, in view of the statutory provision on the subject, the royal prerogative to take property without payment of compensation did not subsist and the principle laid down was that where by statute, the Crown is empowered to do what it might heretofore have done by virtue of its prerogative, it can no longer act under the prerogative and must act under and subject to the conditions imposed by the statute. Lord Dunedin in the course of his speech observed :

> None the less, it is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules.

Lord Atkinson quoted with approval the following pregnant passage from the judgment of the Master of the Rolls in the same case :

> Those powers which the Executive exercise without parliamentary authority are comprised under the comprehensive term of the prerogative. Where, however, Parliament has intervened and has provided by statute for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations and provisions contained in the statute, they can only be so exercised. Otherwise, what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative ? and pointed out that the question by the Master of the Rolls was unanswerable. The learned Law Lord then proceeded to add :
>
> It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do.

The other learned Law Lords who participated in the decision also made observations to the same effect in the course of their speeches.

465. Now it is obvious that the contention of the detenues in the present case is very similar to that advanced on behalf of the Crown in De Keyser's Royal Hotel's case. It almost seems to be an echo of that contention and it must inevitably be answered the same way. When the right of personal liberty based on the rule of law which existed immediately prior to the commencement of the Constitution has been enacted in the Constitution as a fundamental right in Article 21 with the limitation that, when there is a proclamation of emergency, the President may, by order under Article 359, clause (1) suspend its enforcement, it is impossible to imagine how that right of personal liberty based on the rule of law can continue to exist as a distinct and independent right free from the limitation as to enforcement contained in Article 359, clause (1). It would be meaningless and futile for the Constitution-makes to have imposed this limitation in regard to enforcement of the right of personal liberty guaranteed by Article 21, if the detenue could, with impunity, disregard such limitation and fall back on the right of personal liberty based on the rule of law.

466. There is a decision of this Court in Dhirubha Devisingh Gohil v. State of Bombay ((1955) 1 SCR 691 : AIR 1955 SC 47) which clearly supports this view. The question which arose for determination in this case was whether the Bombay Taluqdari Tenure Abolition Act, 1949 was a valid piece of legislation. When this Act was enacted by the Bombay Legislature, the Government of India Act, 1935 was in force and the validity of this Act was challenged on the ground that it was in violation of Section 299, sub-section (2) of the Government of India Act, 1935. Since this Act was included in the Ninth Schedule to the Constitution by the Constitution of India (First Amendment) Act, 1951, the State contended that by reason of Article 31B, this Act was immune from attack of the kind put forward on behalf of the petitioner. Article 31B provides inter alia that none of the Acts specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void or ever to have become void on the ground that such act or provisions is inconsistent with or takes away or abridges any of the rights conferred by any provisions of Part III. The petitioner disputed the applicability of Article 31B on the ground that the protection under that article was confined only to a challenge based on the provisions of Part III of the Constitution and did not extend to a challenge based on violation of Section 299, sub-section (2) of the Government of India 1935. The petitioner relief on the words "..... is inconsistent with or takes away or abridges any rights conferred by any provisions" of Part III and contended that inconsistency with or taking away or abridgment of the right conferred by Section 299, sub-section (2) of the Government of India Act, 1935 was not within the protection of Article 31B. This contention of the petitioner was negatived and it was held by this Court speaking through Jagannatha Das, J. (pp. 695, 696) :

> What Article 31B protects is not a mere "contravention of the provisions" of Part III of the Constitution but an attack on the grounds that the impugned Act is "inconsistent with or takes away or abridges any of the rights conferred by any provisions of this Part". One of the rights secured to a person by Part III of the Constitution is a right that his property shall be acquired only for public purposes and under a law authorising such acquisition and providing for compensation which is either fixed by the law itself or regulated by principles specified by the law. That is also the very right which was previously secured to the person under Section 299 of the Government of India Act. The challenge now made to the validity of the impugned Act is based on the alleged violation of that right ..... But it is urged, that even so, Article 31B protects only the violation of the fundamental right in so far as

> "it was conferred by Part III of the Constitution" and that this right cannot be said to have been "conferred" by the Constitution. We cannot agree with this contention. This is clearly a case where the concerned right which was secured under Section 299 of the Government of India Act in the form of a fetter on the competency of the Legislature and which in substance was a fundamental right, was lifted into the formal category of a fundamental right along with other fundamental rights recognised in the present Constitution. There is therefore nothing inappropriate in referring to this right which was pre-existing, along with the other fundamental rights for the first time secured by this Constitution, when grouping them together, as fundamental rights "conferred" by the Constitution.

This Court held that when Article 31B protected the Act against attack on the ground that the Act is "inconsistent with or takes away or abridges any of the rights conferred by any provisions of "Part III, the protection extended to giving immunity against violation of the right secured by Section 299, sub-section (2) of the Government of India Act, 1935 because that was the very right lifted into the category of fundamental right and enacted as Article 31, clause (2) of the Constitution and it could accordingly, with appropriateness, be referred to as the right conferred by Article 31, clause (2). On a parity of reasoning, it may be said that the right based on the principle of rule of law that no one shall be deprived of his life or personal liberty except by authority of law, which was a pre-existing right, was lifted into the category of fundamental right and enacted as Article 21 and hence it became a fundamental right conferred by Article 21 and ceased to have any distinct and separate existence.

467. The maxim 'expressum facit cessare tacitum' that is what is expressed makes what is silent cease, would also clearly be applicable in the present case. This maxim is indeed a principle of logic and common sense and not merely a technical rule of construction. It was applied in the construction of a constitutional provision in Shankara Rao Badami v. State of Mysore ((1969) 3 SCR 1 : (1969) 1 SCC 1). The argument which was advanced in that case was that the existence of public purpose and the obligation to pay compensation were necessary concomitants of compulsory acquisition of private property and so the term 'acquisition' in Entry 36 of List II of the Seventh Schedule to the Constitution must be construed as importing by necessary implication the two conditions of public purpose and payment of adequate compensation, and consequently, the Mysore (Personal and Miscellaneous) Inams Abolition Act, 1955, which provided for acquisition of the rights of the inamdars in inam estates in Mysore State without payment of just and adequate compensation was beyond the legislative competence of the State Legislature. This argument was rejected on the ground that the limitations of public purpose and payment of compensation being expressly provided for as conditions of acquisition of Article 31(2), there was no room for implying either of these limitations in the interpretation of the term 'acquisition' in Entry 36 of List II, Ramaswamy, J., speaking on behalf of the Court observed : [SCC pp. 8-9]

> It is true that under the common law of eminent domain as recognised in Anglo-Saxon jurisprudence the State cannot take the property of its subject unless such property is required for a public purpose and without compensating the owner for its loss. But when these limitations are expressly provided for in Article 31(2) and it is further exacted that no law shall be made which takes away or abridges these safeguards, and any such law, if made, shall be void, there can be no room for implication, and the words 'acquisition of property' in entry 36 must be understood in their natural sense of the act of acquiring property, without importing into the phrase an obligation to pay compensation or a condition as to the existence of a public

> purpose. In other words, it is not correct to treat the obligation to pay compensation as implicit in the legislative entry 33 of List I or legislative entry 36 of List II for it is separately and expressly provided for in Article 31(2). The well-known maxim expressum facit cessare tacitum is indeed a principle of logic and commonsense and not merely a technical rule of construction. The express provision in Article 31(2) that a law of acquisition in order to be valid must provide for compensation will, therefore, necessarily exclude all suggestion of an implied obligation to provide for compensation sought to be imported into the meaning of the world "acquisition" in entry 36 of List II. In the face of the express provision of Article 31(2), there remains no room for reading any such implication in the legislative heads.

Similarly, in the present case, on an application of the maxim expressum facit cessare tacitum, the express provision in Article 21 that no person shall be deprived of his life or personal liberty except according to procedure prescribed by law will necessarily exclude a provision to the same effect to be gathered or implied from the other provisions of the Constitution.

468. I find myself fortified in this conclusion by the view taken on a similar question under the Irish Constitution which also contains a catena of articles conferring fundamental rights. Kelly in his book on 'Fundamental Rights in the Irish Law and Constitution' points out that the various fundamental rights which were previously notionally present in the common law have been subsumed in and replaced by the written guarantees, and, therefore, these rights cannot be found elsewhere than in the Constitution. The decision of the High Court of Justice in Ireland in State (Walsh) v. Lennon (1942 Irish Reports 112) has also adopted the same view. The petitioners in this case, who were detained in Arbour Hill Military Detention Barracks awaiting trial on a charge of murder before a military court established under Emergency Powers (No. 41) Order, 1940, made an application to the High Court for an order of habeas corpus directed to the Governor of the detention barracks in which they were held and for an order of prohibition directed to the President and members of the military court before whom it was ordered by Emergency Powers (No. 41F) Order, 1941 that they should be tried. The application inter alia challenged the validity of the Emergency Powers (No. 41F) Order, 1941 on the ground that it was ultra vires the Government, as it directed that the military court, which was to try the petitioners, should try them together and so precluded the court from exercising its discretion and control over its own procedure and was thus violative of the right of a citizen to insist that he shall not be tried on a criminal charge save in due course of law and was also in conflict with the right of a citizen to personal liberty. The right of personal liberty was guaranteed by Article 40, Section 4, sub-section (1) of the Constitution, while the right of a citizen charged with a criminal offence to insist that he shall not be tried save in due course of law was to be found in Article 38, Section 1. The respondents relied on Article 28, Section 3, sub-section (3) of the Constitution which provided :

> Nothing in this Constitution shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion or to nullify any act done or purported to be done in pursuance of any such law, and contended that by reason of this provisions, the Emergency Powers (No. 41F) Order 1941 was protected from challenge on the ground of contravention of Article 38, Section 1 and Article 40, Section 4, sub-section (1) of the Constitution. This contention clearly had the effect of putting the petitioners out of court an, therefore, they sought to get round this difficulty by arguing that the constitutional rights, which they claimed to have been infringed, were derived not from the written Constitution, but from the

> common law, and consequently, Article 28, Section 3, sub-section (3) of the Constitution did not stand in their way. This argument, which was very similar to the present argument advanced before us, was unhesitatingly rejected by all the three judges who took part in the decision. Maguire, P. said :
>
> The contention is that the constitutional principles which assure to a citizen his personal liberty, his right to resort to this Court for an order of habeas corpus, his right that he shall not be tried on a criminal charge save in due course of law, have as their source the common law, and exist side by side with these rights in the written Constitution. In support of this contention reliance is placed on the decision of the Supreme Court in Burke's case (1940 Irish Reports 136) particularly on the passage in the judgment of Murnaghan, J. at p. 171, where he says "certain constitutional principles are stated in the Constitution but many other important constitutional principles have been accepted as existing in the law then in force".

I do not find in the judgment of Murnaghan, J. or elsewhere in the judgments in that case any basis for the contention that these rights are to be found in a body of principles which exist side by side with the written Constitution, having their source in the common law, and of equal validity with the principles stated in the Constitution, and which on the argument here, would have the added virtue that they are uncontrolled by Article 28, Section 3, sub-section (3). The constitutional rights relied upon in this case find clear expression in Article 40 and 38 of the Constitution. In my view they cannot be found elsewhere than in the Constitution.

The advantages of a written Constitution are manifest. Such a Constitution can, and our Constitution does, give rights such as these definite and clear expression. Our Constitution can, and does, protect them against being whittled away save with great difficulty. The framers of the Constitution have provided that, after the passage of a limited time, many, though not all, of the rights which it gives are put beyond the reach of interference by ordinary law. The framers have, however, deliberately inserted Article 28, Section 3, sub-section (3), which is clearly designed to prevent the courts from invoking anything in the Constitution to invalidate enactments passed, or to nullify acts done, or which purport to be done, in pursuance of Acts passed for securing the public safety or the preservation of the State in time of war.

Cavan Duffy, J. also observed to the same effect :

> The applicants seek, in the alternative, to base their claims to habeas corpus and prohibition upon antecedent rights of personal liberty and regular trial at common law; but, whether or not the imminent common law of Ireland needed generally and Article 50 (containing the laws in force) to retain its vigour, the particular common law principles here invoked must both, in my opinion, of necessity have merged in the express provisions declaring how the two corresponding rights are to be in force under the new polity established by an Bunreacht.

And so did Martin Maguire, J. when he said :

> It is argued, in the alternative, that, apart from the Constitution and existing side by side with it, there is a body of constitutional law, founded on common law, and comprising the same constitutional rights which the prosecutors seek to assert, an in respect of which they demand the relief claimed in these proceedings. This argument

> involves the propositions that the State has two Constitutions, the one enacted by the people, written and defined; the other unwritten and undefined; and that the latter may be invoked, or called in aid, to the extent even of defeating the clear terms of the Constitution where a conflict real or apparent is alleged between them. There is no authority for these propositions. I am unable to accept this argument.

On this view, all the three judges of the High Court held that the Emergency Powers (No. 41F) Order, 1941 was immune from challenge by reason of Article 28, Section 3, sub-section (3) of the Constitution. This decision was taken in appeal and affirmed by the Supreme Court, but this point about the continuance of the common law rights side by side in the Constitution, was not examined since it was obvious that the Emergency Powers (No. 41F) Order, 1941 could not be set at naught on the ground of repugnancy to any supposed common law rights. It will be seen that there is a close analogy between this decision of the High Court an the present case and the observations of the three judges quoted above are directly applicable here.

469. The detenues, however, strongly relied on the decisions of this Court in Bharat Singh's case (supra), Ibrahim & Co.'s case (supra), Bennett Coleman & Co.'s case (supra) and Shree Meenakshi Mills's case (supra) in support of their contention that the principle of rule of law that the Executive cannot act to the prejudice of a person except by authority of law continues to exist as a distinct and independent principle unaffected inter alia by the enactment of Article 21. I have already referred to these decisions earlier and it will be evident from what I have said, that these decisions do not lay down any such proposition as is contended for on behalf of the detenues. What these decisions say is only this, namely, that Article 358 protects against challenge under Article 19 only such executive action as is taken under lawful authority and if any executive action is taken without authority of law or in pursuance of a law which is void, it will not be protected from challenge under Article 19 by Article 358 and it will be void to the extent to which it conflicts with Article 19. These decisions, properly read, do not support the thesis put forward on behalf of the detenues.

470. The detenues then relied on the decision of this Court in Bidi Supply Co. v. Union of India (1956 SCR 267 : AIR 1956 SC 479 : 29 ITR 717). There, an omnibus order was made under Section 5, sub-section (7A) of the Income Tax Act transferring cases of the petitioner from one place to another. The petitioner challenged this order as being outside the power conferred under Section 5, sub-section (7A) and hence violative of the fundamental rights guaranteed to him by Article 14, 19(1)(f) and (g) and 31 of the Constitution. This Court held that the omnibus order made in this case was not contemplated or sanctioned by sub-section (7A) of Section 5 and, therefore, the petitioner was still entitled to the benefit of the provisions of sub-section (1) and (2) of Section 64 and since the income tax authorities had by an executive order, unsupported by law, picked out the petitioner for discriminatory treatment, there was violation of the equality clause of the Constitution and hence the petitioner was entitled to relied under Article 32 of the Constitution setting aside the impugned order. S. R. Das, C. J., speaking on behalf of the Court observed (pp. 276-277) :

As said by Lord Atkin in Eshugbayi Eleko's case the Executive can only act in pursuance of the powers given to it by law and it cannot interfere with the liberty, property and rights of the subject except on the condition that it can support the legality of its action before the court. Here there was no such order of transfer as is contemplate or sanctioned by sub-section (7A) of Section 5 and, therefore, the present assessee still has the right, along with all other bidi merchants carrying on business in Calcutta, to have his assessment proceedings before the Income-tax Officer of the areas in which his place of business is situate. The income-tax authorities have by an executive order, unsupported by law, picked out this petitioner and transferred all his cases by an omnibus order

unlimited in point of time.

and since the action of the income-tax authorities was contrary to sub-sections (1) and (2) of Section 64, the impugned order was held to be bad. Here it will be noticed that the impugned order operated to the prejudice of the petitioner by affecting his rights under sub-sections (1) and (2) of Section 64 but it did affect any of his rights under Article 19 or Article 21 or clause (1) of Article 31 and therefore, the principle of rule of law that the executive cannot act to the prejudice of a person without authority of law could be legitimately invoked. It continued to be law in force to the extent to which it was not recognised and enacted in any provision of the Constitution.

471. The next decision to which I must refer in this connection is Bishan Das v. State of Punjab ((1962) 2 SCR 69 : AIR 1961 SC 1570). This was a petition under Article 32 of the Constitution and the action of the officers of the State Government impugned in this case was forcible dispossession of the petitioners of properties which were in their management and possession. The challenge to the impugned action of the officers of the State Government was based on violation of the fundamental right guaranteed under clause (1) of Article 31. This Court upheld the challenge and struck down the impugned action as being without the authority of law and while doing so, made the following observations which were strongly relied upon on behalf of the detenues (p. 80) :

> Before we part with this case, we feel it our duty to say that the executive action taken in this case by the State and its officers is destructive of the basic principle of the rule of law ..... the action of the Government in taking the law into their hands and dispossessing the petitioners by the display of force, exhibits a callous disregard of the normal requirements of the rule of law ..... We have here a highly discriminatory and autocratic act which deprives a person of the possession of property without reference to any law or legal authority. (emphasis supplied)

These observations made in the context of a petition for enforcement of the fundamental right under Article 31, clause (1) clearly show that this Court regarded the principle of rule of law that no person shall be deprived of this property "without reference to any law or legal authority" as embodied in Article 31, clause (1) and did not rely upon this principle of rule of law as a distinct and independent principle apart from Article 31, clause (1); otherwise the petition under Article 32 would not have been maintainable and this Court could not have granted relief.

472. The last decision to which I must refer is the decision of this Court in State of Bihar v. Kameshwar Prasad Verma ((1963) 2 SCR 183 : AIR 1965 SC 575 : (1965) 1 Cri LJ 494). That was a case arising out of a petition for a writ of habeas corpus filed under Article 226 for release of one Bipat Gope from illegal detention. This Court held that the State Government had failed to show under what lawful authority Bipat Gope had been re-arrested and in the absence of such lawful authority, the detention was illegal. Kapur, J. speaking on behalf of the Court referred with approval to the observations of Lord Atkin in Eshugbayi Eleko's case (supra) and pointed out (p. 189) :

> It is the same jurisprudence which has been adopted in this country on the basis of which the courts of this country exercise jurisdiction.

These observations were relied upon on behalf of the detenues to contend that the principle of rule of law in Eshugbayi Eleko's case was held by this Court to have been adopted in this country and it must, therefore, be enforced independently of Article 21. But I do not think that is the effect of these observations. What Kapur, J. said was only this, namely that the principle of rule of law in

Eshugbayi Eleko's case had been adopted in this country. He did not make it clear how it had been adopted nor did he say that it had been adopted as a distinct and independent principle apart from the fundamental rights. There can be no doubt that the principle in Eshugbayi Eleko's case had been adopted in this country in Article 21 to the extent to which it protects personal liberty. It will, therefore, be seen that there is no decision of this Court which says that there is a right of personal liberty based on the rule of law distinct and independent from that guaranteed by Article 21.

473. I must now turn to the decision of this Court in Makhan Singh v. State of Punjab ((1964) 4 SCR 797 : AIR 1964 SC 381 : (1964) 1 Cri LJ 269) on which very strong reliance was placed on behalf of the detenues. That was a decision given in a batch of twenty-six appeals from the decisions of the High Courts of Bombay and Punjab. The appellants in these six appeals were detained respectively by the Punjab and the Maharashtra State governments under rule 30(1)(b) of the Defence of India Rules made by the Central Government in exercise of the powers conferred on it by Section 3 of the Defence of India Ordinance, 1962. They applied to the Punjab and the Bombay High Courts respectively under Section 491(1)(b) of the code of criminal Procedure and alleged that they had been improperly and illegally detained. Their contention was that Section 3(2) (15)(i) and Section 40 of the Defence of India Act, 1962 which replaced the defence of India Ordinance and Rule 30(1)(b) under which they were detained were constitutionally invalid because they contravened their fundamental rights under Articles 14, 21 and 22(4), (5) and (7) of the Constitution and so they claimed that an order should be passed in their favour directing the respective State Governments to set them at liberty. There was in operation at that time a proclamation of emergency dated October 26, 1962 issued by the President under Article 352, clause (1) on account of the Chinese aggression. The President had also issued an order dated November 3, 1962 under Article 359, clause (1) suspending the right of any person to move any court for the enforcement of the rights conferred by Article 21 and 22 "if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder". The contention of the State Governments based on the Presidential Order was - and that contention found favour with both High Courts - that the Presidential Order created a bar which precluded the appellants from maintaining the petitions under Section 491(1)(b) of the Code of Criminal Procedure. On this contention, two questions arose for determination before this Court. The first was as to what was the true scope and effect of the Presidential Order and the second was whether the bar created by the Presidential Order operated in respect of applications made by the appellants under Section 491(1)(b) of the Code of Criminal Procedure. This Court in a majority judgment delivered by Gajendragadkar, J. analysed the provisions of Article 359, clause (1) and held that the words "any court" in that article must be given their plain grammatical meaning and must be construed to mean any court of competent jurisdiction which would include the Supreme Court and the High Courts before which the specified rights can be enforced by the citizens. The majority judgment then proceeded to add (pp. 817-818) :

> The sweep of Article 359(1) and the Presidential Order issued under it is thus wide enough to include all claims made by citizens in any court of competent jurisdiction when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is, in substance, seeking to enforce any of the said specified fundamental rights.

Having thus disposed of the first question, the majority judgment went on to consider the second question and after analysing the nature of the proceedings under Section 491(1)(b) of the code of Criminal procedure, held that the prohibition contained in Article 359, clause (1) and the Presidential Order would apply "as much to proceedings under Section 491(1)(b) as to those under

Article 226(1) and Article 32(1) ". It was obvious that on this view, the petitions under Section 491(1)(b) were not maintainable, since the only ground on which they challenged the orders of detention was that the provisions of Section 3(2)(15)(i) as well as Rule 30(1)(b) were invalid as offending against Articles 14, 21 and 22 and in the circumstances it was not necessary for this Court to express any opinion on the question as to what were the pleas available to a citizen under the Presidential Order in challenging the legality or properiety of his detention. Still, however, the majority judgment proceeded to give its opinion on this question in the following terms (pp. 828-829) :

> It still remains to consider what are the pleas which are now open to the citizens to take in challenging the legality or the propriety of their detentions either under Section 491(1) (b) of the code or Article 226(1) of the Constitution. We have already seen that the right to move any court which is suspended by Article 359(1) and the Presidential Order issued under it is the right for the enforcement of such of the rights conferred by Part III as may be mentioned in the order. If in challenging the validity of his detention order, the detenu is pleading any right outside the rights specified in the order, his right to move any court in that behalf is not suspended, because it is outside Article 359(1) and consequently outside the Presidential Order itself. Let us take a case where a detenu has been detained in violation of the mandatory provisions of the Act. In such a case, it may be open to the detenu to contend that his detention is illegal for the reason that the mandatory provisions of the Act have been contravened. Such a plea is outside Article 359(1) and the right of the detenu to move for his release on such a ground cannot be affected by the Presidential Order.

Take also a case where the detenu moves the court for a writ of habeas corpus on the ground that his detention has been ordered mala fide. It is hardly necessary to emphasise that the exercise of a power mala fide is wholly outside the scope of the Act conferring the power and can always be successfully challenged. It is true that a mere allegation that the detention is mala fide would not be enough; the detenu will have to prove the mala fides. But if the mala fides are alleged, the detenu cannot be precluded from substantiating his plea on the ground of the bar created by Article 359(1) and the Presidential Order. That is another kind of plea which is outside the purview of Article 359(1) ..... We ought to add that these categories of pleas have been mentioned by us by way of illustration, and so, they should not be read as exhausting all the pleas which do not fall within the purview of the Presidential Order.

The strongest reliance was placed on behalf of the detenues on these observations in the majority judgment. It was contended on behalf of the detenues that the observations clearly showed that if an order of detention is challenged on the ground that it is in violation of the mandatory provisions of the Act or is made mala fide, such a plea would be outside Article 359, clause (1) and would not be barred by a Presidential Order specifying Article 21. The detenues, in support of this contention learned heavily on the words "such a plea is outside Article 359(1) and the right of the detenue to move for his release on such a ground cannot be affected by the Presidential Order", and "that is another kind of plea which is outside the purview of Article 359(1) " occurring in these observations and urged that such a plea was held to be permissible because it was outside the purview of Article 359, clause (1) and not because it was outside the terms of the particular Presidential Order.

474. Now, at first blush, these observations do seem to support the contention of the detenues. But there are two very good reasons why I do not think these observations can be of much help in the

determination of the question before us. In the first place, the question as to what were the other pleas available to a detenu in challenging the legality or propriety of his detention, despite the Presidential Order dated November 3, 1962, was not in issue before the court and did not fall to be decided and the aforesaid observations made by the court on this question were, therefore, clearly obiter. These observations would undoubtedly be entitled to great weight, but, as pointed out by this Court in H. H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur v. Union of India ((1971) 3 SCR 9 : (1971) 1 SCC 85) "an obiter cannot take the place of the ratio. Judges are not oracles". These observations do not, therefore have any binding effect and they cannot be regarded as conclusive on the point. Moreover, it must be remembered that when we are considering the observations of a high judicial authority like this Court, the greatest possible care must be taken to relate the observations of a judge to the precise issues before him and to confine such observations, even though expressed in broad terms, in the general compass of the question before him, unless he makes it clear that he intended his remarks to have a wider ambit. It is not possible for judges always to express their judgments so as to exclude entirely the risk that in some subsequent case their language may be misapplied and any attempt at such perfection of expression can only lead to the opposite result of uncertainty and even obscurity as regards the case in hand. It may be noticed that, in this case the Presidential Order dated November 3, 1962, which came up for consideration before the Court, was a conditional order, inasmuch as it operated to suspend the right of any person to move any court for enforcement of the rights conferred by Articles 21 and 22, only if he was deprived of any such rights under the Defence of India Act, 1962 or any rule or order made under it. It was in the context of this Presidential Order that the aforesaid observations were made by this Court. It is obvious that, on the terms of this Presidential Order, if a person was deprived of his personal liberty otherwise than in accordance with the provisions of the Defence of India Act, 1962 or any rule or order made under it, his right to move the Court for enforcement of his right of personal liberty under Article 21 would not be barred by the Presidential Order. That is why it was said in this case, that, if the detention is illegal for the reason that the mandatory provisions of the Defence of India Act, 1962 or any rule or order made thereunder have been contravened or that the detention has been ordered mala fide, such a plea would not fall within the terms of the Presidential Order and hence it would be outside the purview of Article 359, clause (1). That is the only way in which these observations can and must be understood. It was pointed out by the House of Lords as far back as 1901 in Quinn v. Leatham (1901 AC 495) :

> Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be exposition of the whole law, but are governed and qualified by the particular facts in which such expressions are to be found.

This Court had also occasion to point out in the State of Orissa v. Sudhansu Sekhar Misra ((1968) 2 SCR 154 : AIR 1968 SC 647 : (1970) 1 LLJ 662) that the observations in a judgment must be "only in the context of the question that arose for decision". It would not be right, as observed by this Court in Madhav Rao v. Union of India (supra), "to regard a word, a clause or a sentence occurring in a judgment of this Court, divorced from its context, as containing a full exposition of the law on a question" particular "when the question did not even fall to be answered in that judgment". Here, in the present case, unlike the Presidential Order dated November 3, 1962, which was a conditional order, the Presidential Order dated June 27, 1975 is, on the face of it, an unconditional one and as such there is a vital difference in effect between the Presidential Order dated November 3, 1962 and the present Presidential Order. In fact, it appears that because of the interpretation and effect of the Presidential Order dated November 3, 1962 given in this case and the subsequence cases following it, the President deliberately and advisedly departed from the earlier precedent and made the present

Presidential Order an unconditional one. These observations made in the context of a conditional Presidential Order cannot, therefore be read as laying down that a plea that an order of detention is not in accordance with the provisions of law or is mala fide, is outside the purview of Article 359, clause (1) and would not be barred even by an unconditional Presidential Order such as the one we have in the present case.

475. This distinguishing feature of Makhan Singh's case (supra) was in fact highlighted and emphasised in the subsequent decision of this Court in A. Nambiar v. Chief Secretary ((1966) 2 SCR 406 : AIR 1966 SC 657 : 1966 Cri LJ 586). There Gajendragadkar, C. J. stressed the conditional nature of the Presidential Order dated November 3, 1962 and indicated that it was in view of the last clause of the Presidential Order, that the aforesaid observations were made by this Court in Makhan Singh's case. The learned Chief Justice explained the position in the following words (pp. 411-412) :

> In Makhan Singh Tarsikka v. State of Punjab a Special Bench of this Court has had occasion to consider the effect of the proclamation of emergency issued by the President and the Presidential Order with which we are concerned in the present writ petitions ..... This Court took the precaution of pointing out that as a result of the issue of the proclamation of emergency and the Presidential Order, a citizen would not be deprived of his right to move the appropriate court for a writ of habeas corpus on the ground that his detention has been ordered mala fide. Similarly, it was pointed out that if a detenu contends that the operative provisions of the Defence of India Ordinance under which he is detained suffer from the vice of excessive delegation, the plea thus raised by the detenue cannot, at the threshold, be said to be barred by the Presidential Order, because, in terms, it is not a plea which is relatable to the fundamental rights specified in the said order.

Let us refer to two other pleas which may not fall within the purview of the Presidential Order. If the detenu, who is detained under an order passed under Rule 30(1)(b) contends that the said order has been passed by a delegate outside the authority conferred on him by the appropriate Government under Section 40 of the Defence of India Act, or it had been exercised inconsistently with the conditions prescribed in that behalf, a preliminary bar against the competence of the detenue's petition cannot be raised under the Presidential Order, because the last clause of the Presidential Order would not cover such a petition, and there is no doubt that unless the case falls under the last clause of the Presidential Order, the bar created by it cannot be successfully invoked against a detenu. Therefore, our conclusion is that the learned Additional Solicitor-General is not justified in contending that the present petitions are incompetent under Article 32 because of the Presidential Order. The petitioners contend that the relevant rule under which the impugned orders of detention have been passed, is invalid on grounds other than those based on Articles 14, 19, 21 and 22; and if that plea is well-founded, the last clause of the Presidential Order is not satisfied and the bar created by it suspending the citizens' fundamental rights under Article 14, 21 and 22 cannot be pressed into service.

These observations, and particularly the portions underlined by me (herein in bold type), clearly show that it was because of the conditional nature of the Presidential Order that the view was taken that if a detenu contends that the order of detention has been made mala fide or that it has been passed by a delegate outside the authority conferred on him under the Act or that it has been exercised inconsistently with the conditions prescribed in that behalf, that is, it is not in accordance with the provisions of law, such a plea would not be barred at the threshold by the Presidential

Order. The conditional nature of the Presidential Order was also stressed by this Court in State of Maharashtra v. Prabhakar Pandurang Sangzgiri ((1966) 1 SCR 702 : AIR 1966 SC 424 : 1966 Cri LJ 311) where this Court, speaking through Subba Rao, J. pointed out that, in view of the last clause of the Presidential Order, "if a person was deprived of his personal liberty not under the Act or a rule or order made thereunder, but in contravention thereof, his right to move the said courts", that is the High Court and the Supreme Court "in that regard would not be suspended".

476. It was then contended on behalf of the detenues that in any event the right of personal liberty is a natural right which inheres in everyone from the moment of his birth and this right can always be enforced by the detenues under Article 226 by a writ "for any other purpose" and the Presidential Order does not operate as a bar. When, in answer to this contention, the Union of India and the State Governments relied on His Holiness Kesavananda Bharati Sripadagalavaru v. State of Kerala (1973 Supp SCR 1 : (1973 4 SCC 225), the detenues urged that Kesavananda Bharati's case did not say that there is no natural right inhering in a person, but all that it said was that natural rights do not stand in the way of amendment of the Constitution. Kesavananda Bharati's case according to the detenues, did not negative the existence and enforceability of natural rights. But this contention of the detenues is clearly belied by the observations from the judgments of at least seven of the judges who decided Kesavananda Bharati's case, Ray, J., as he then was, said at page 419 of the report : [SCC p. 561, para 931]

> Fundamental rights are conferred by the Constitution. There are no natural rights under our Constitution.

Palekar, J. also said at page 594 of the report : [SCC p. 696, para 1278]

> The so called natural rights ..... have in course of time ..... lost their utility as such in the fast changing world and are recognised in modern political constitutions only to the extent that organised society is able to respect them.

So also Khanna, J. said at page 703 of the report : [SCC p. 781, para 1456]

> ..... the later writers have generally taken the view that natural rights have no proper place outside the Constitution and the laws of the State. It is up to the State to incorporate natural rights, or such of them as are deemed essential, and subject to such limitations as are considered appropriate, in the Constitution or the laws made by it. But independently of the Constitution and the laws of State, natural rights can have no legal sanction and cannot be enforced.

Mathew, J., too, spoke to the same effect when he said at page 814 of the report : [SCC p. 865, para 1672]

> Although called 'rights', they are not per se enforceable in courts unless recognised by the positive law of a State.

Beg, J. also discounted the theory of natural rights at pages 881 and 882 of the report [SCC pp. 915-917] and Dwivedi, J. observed at page 910 of the report [SCC p. 938] that to regard fundamental rights as natural rights overlooks the fact that some of these rights did not exist before the Constitution and "were begotten by our specific national experience". Chandrachud, J. was equally emphatic in saying at pages 975 and 976 of the report that : [SCC pp. 987, 988, paras 2083, 2084]

> There is intrinsic evidence in Part III of the Constitution to show that the theory of natural rights was not recognised by our Constitution-makers ..... The natural theory stands, by and large, repudiated today ..... The belief is now widely held that natural rights have no other than political value.

It may be pointed out that Subba Rao, J. also in I. C. Golak Nath v. State of Punjab ((1967) 2 SCR 762 : AIR 1967 SC 1643) at page 789 of the report rejected the theory of natural rights independent and apart from fundamental rights in Part III. He said :

> Fundamental rights are the modern name for what have been traditionally known as natural rights.

There is, therefore, no scope for the contention that even if the enforcement of the fundamental right conferred by Article 21 is suspended by the Presidential Order, the detenu can still enforce a supposed natural right of personal liberty in a court of law.

477. I may also refer to one other argument advanced on behalf of the detenues that in any event the right not to be deprived of personal liberty except by authority of law is a statutory right which can be enforced, despite the Presidential Order suspending enforcement of the right of personal liberty guaranteed under Article 21. I agree and there can be no doubt about it that if the positive law of the State decrees that no person shall be deprived of his personal liberty except according to the procedure prescribed by law, the enforcement of such statutory right would not be barred by the Presidential Order. But I am afraid, the premise on which the argument is founded is incorrect. There is no legislation in our country which confers the right of personal liberty by providing that there shall be no deprivation of it except in accordance with law. On the contrary, Section 18 of the Maintenance of Internal Security Act, 1971 enacts that no person in respect of whom an order of detention is made or purported to be made under Section 3 shall have any right to personal liberty by virtue of natural law or common law, if any. The Indian penal Code in Section 342 undoubtedly makes it penal to wrongfully confine any person and the offence of wrongful confinement postulates that no one shall be deprived of his personal liberty except by authority of law. But it can hardly be said on that account that Section 342 of the Indian penal Code confers a right of personal liberty. The utmost that can be said is that this section proceeds on a recognition of the right of personal liberty enacted in Article 21 and makes it an offence to wrongfully confine a person in breach of the right conferred by that constitutional provision.

478. Then I must refer to one other contention of the detenues and that is that the remedy under Article 226 can be invoked not only for the purpose of enforcement of the fundamental rights, but also "for any other purpose". These words greatly enlarge the jurisdiction of the High Court and the High Court can issue a writ of habeas corpus if it finds that the detention of a person is illegal. It is not necessary for this purpose that the court should be moved by the detenu. It is sufficient if it is moved by any person affected by the order of detention. When it is so moved and it examines the legality of the order of detention, it does not enforce the right of personal liberty of the detenu, but it merely keeps the Executive within the bounds of law and enforces the principle of legality. The remedy of habeas corpus is a remedy in public law and hence it cannot be excluded by suspension of enforcement of the right of an individual. This contention of the detenues does appear, at first sight, to be quite attractive, but I am afraid, it is not well founded. It fails to take into account the substance of the matter. When an applicant moves the High Court for a writ of habeas corpus, he challenges the legality of the order of detention on the ground that it is not in accordance with law. That challenge proceeds on the basis that the Executive cannot deprive a person of his personal

liberty except by authority of law and that is why the order of detention is bad. But once it is held that the obligation of the Executive not to deprive a person of his personal liberty except in accordance with law is to be found only in Article 21 and nowhere else, it must follow necessarily that, in challenging the legality of the detention, what the applicant claims is that there is infraction by the Executive of the right of personal liberty conferred under Article 21 and that immediately attracts the applicability of the Presidential Order. If we look at the substance of the matter and analyse what is it exactly that the High Court is invited to do, it will be clear that what the applicant wants the High Court to do is to examine whether the Executive has carried out the obligation imposed upon it by Article 21 not to deprive a person of his personal liberty except according to the procedure prescribed by law and if it finds that the Executive has failed to comply with this obligation, then to strike down the order of detention. That is precisely what is not permitted to be done by the Presidential Order, for it plainly amounts to enforcement of the right of personal liberty conferred by Article 21. The words "any other purpose" cannot be availed of for the purpose of circumventing the constitutional inhibition flowing from the Presidential Order.

479. It is necessary to point out that Article 359 clause (1) and the Presidential Order issued under it do not have the effect of making unlawful actions of the Executive lawful. There can be no doubt that the Executive is bound to act in accordance with law and cannot flout the command of law. The Executive cannot also act to the detriment of a person without authority of law or except in accordance with law. If the Executive takes any action which is not supported by law or is contrary to law, its action would be unlawful. This unlawful characteristic of the action is not obliterated by the Presidential Order issued under Article 359 clause (1). Article 359, clause (1) and the Presidential Order issued under it do not give any power to the Executive to alter or suspend or flout the law nor do they enlarge by the power of the Executive so as to permit it to go beyond what is sanctioned by law. They merely suspend the right of a person to move any court for redress against the unlawful action of the Executive, if his claim involves enforcement of any of the fundamental rights specified in the Presidential Order. This is position akin in some respects to that in the United States when the privilege of the writ of habeas corpus is suspended under Article 1, Placitum 9, clause (2) of the United States Constitution and in Great Britain when the Habeas Corpus Suspension Act is passed. It must inevitably follow from this position that as soon as the emergency comes to an end and the Presidential Order ceases to be operative, the unlawful action of the Executive becomes actionable and the citizen is entitled to challenge it by moving a court of law.

480. It will be clear from what is stated above that whilst a Presidential Order issued under Article 359, clause (1) is in operation, the rule of law is not obliterated and it continues to operate in all its vigour. The Executive is bound to observe and obey the law and it cannot ignore or disregard it. If the Executive commits a breach of the law, its action would be unlawful, but merely the remedy would be temporarily barred where it involves enforcement of any of the fundamental rights specified in the Presidential Order. This would be obvious if we consider what would be the position under the criminal law. If the Executive detains a person contrary to law or shoots him dead without justifying circumstances, it would clearly be an offence of wrongful confinement in one case and murder in the other, punishable under the relevant provisions of the Indian Penal Code, unless the case falls within the protective mantle of Section 76 or 79 and the officer who is responsible for the offence would be liable to be prosecuted, if there is no procedural bar built by the Code of Criminal Procedure against the initiation of such prosecution. The Presidential Order suspending the enforcement of Article 21 would not bar such a prosecution and the remedy under the Indian Penal Code would be very much available. The offence of wrongful confinement or murder is an offence against the society and anyone can set the criminal law in motion for punishment of the offender. When a person takes proceedings under the Code of Criminal Procedure in connection with the

offence of wrongful confinement or murder or launches a prosecution for such offence he cannot be said to be enforcing the fundamental right of the detenu or the murdered man under Article 21 so as to attract the inhibition of the Presidential Order.

481. So also, if a positive legal right is conferred on a person by legislation and he seeks to enforce it in a court, it would not be within the inhibition of a Presidential Order issued under Article 359, clause (1). Take for example the class of cases of detention where no declaration has been made under sub-sections (2) and (3) of Section 16A. This category would cover cases where orders of detention have been passed prior to June 25, 1975, because in such cases no declaration under sub-section (2) or (3) of Section 16A is contemplated and it would also cover the rather exceptional cases where orders of detention have been made after June 25, 1975 without a declaration under sub-section (2) or sub-section (3) of Section 16A. Sections 8 to 12 would continue to apply in such cases and consequently the detaining authority would be under an obligation to refer the case of the detenu to the Advisory Board and if the Advisory Board reports that there is in its opinion no sufficient cause for the detention of the detenu, the State Government would be bound to revoke the detention order and release the detenu. That is the plain requirement of sub-section (2) of Section 12. Now, suppose that in such a case the State Government fails to revoke the detention order and release the detenu in breach of its statutory obligation under sub-section (2) of Section 12. Can the detenu not enforce this statutory obligation by filing a petition for a writ of mandamus ? The answer must obviously be : he can. When he files such a petition for a writ of mandamus, he would be enforcing his statutory right under sub-section (2) of Section 12 and the enforcement of such statutory right would not be barred by a Presidential Order specifying Article 21. The Presidential Order would have no operation where a detenu is relying upon a provision of law to enforce a legal right conferred on him and is not complaining of absence of legal authority in the matter of deprivation of his personal liberty.

482. I may also refer by way of another illustration to Section 57 of the Code of Criminal Procedure Code, 1973. This section provides that no police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a magistrate under Section 167, exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the magistrate's court. There is clearly a legal injunction enacted by this section requiring a police officer not to detain an arrested person in custody for a period longer than 24 hours without obtaining a special order of a magistrate and to release him on the expiration of such period of 24 hours, if in the meantime such special order is not obtained. If, in a given case, an arrested person is detained in custody by the police officer for a period longer than 24 hours without obtaining an order of a magistrate, can he not apply to the magistrate that he should be directed to be released by the police officer under Section 57 ? Would such an application be barred by a Presidential Order specifying Article 21 ? I do not think so. When the arrested person makes such an application, he seeks to enforce a statutory obligation imposed on the police officer and a statutory right created in his favour by Section 57 and that would not be barred, because what is suspended by a Presidential Order specifying Article 21 is the right to move the court for enforcement of the fundamental right conferred by that article and not the right to move the court for enforcement of the statutory right to be released granted under Section 57.

483. I may take still another example to illustrate the point I am making. Take a case where an order of detention has been made without a declaration under sub-section (2) or sub-section (3) of Section 16A. Sections 8 to 12 would admittedly apply in such a case and under Section 8, the detaining authority would be bound to communicate to the detenu the grounds on which the order of detention

has been made and to afford him the earliest opportunity of making a representation to the appropriate government. If, in a given case, the detaining authority declines to furnish the grounds of detention to the detenu or to afford him an opportunity of making a representation, in violation of the statutory right conferred on him under Section 8, can the detenu not enforce this statutory right by filing a petition for a writ of mandamus against the detaining authority ? Would it be any answer to such an application that the enforcement of the fundamental right conferred by Article 22, clause (5) has been suspended by the Presidential Order ? The answer is plainly : no. There are two rights which the detenu has in this connection : one is the fundamental right conferred by Article 22, clause (5) and the other is the statutory right conferred by Section 8. Though the existence and merely because enforcement of one is suspended, it does not mean that the other also cannot be enforced. The 'theory of reflection' which found favour with the Kerala High Court in Fathima Beebi v. M. K. Ravindranathan (1975 Cri LJ 1164) is clearly erroneous. If the right conferred under Section 8 were a reflection of the fundamental right conferred by Article 22, clause (5) as the Kerala High Court would have us believe, the removal of the fundamental right under Article 22, clause (5), which is the object reflected, must necessarily result in the effacement of the right under Section 8 which is said to constitute the reflection. But even if Article 22, clause (5) were deleted from the Constitution, Section 8 would still remain on the statute book until repealed by the legislature. The Presidential Order would, not, therefore, bar enforcement of the right conferred by Section 8.

484. To my mind, it is clear that if a petition or other proceeding in court seeks to enforce a positive legal right conferred by some legislation, it would not be barred by the Presidential Order. I may also point out that, in the present case, if I had taken the view that there is, independently and apart from Article 21, a distinct and separate right not to be deprived of personal liberty except according to law, I would have held, without the slightest hesitation, that the Presidential Order suspending enforcement of the fundamental right conferred by Article 21 does not have the effect of suspending enforcement of this distinct and separate legal right. But since I have come to the conclusion, for reasons already discussed, that there is no such distinct and separate right of personal liberty apart from and existing side by side with Article 21, it must be held that when a detenu claims that his detention is not under the Act or in accordance with it, he seeks to enforce the fundamental right conferred by Article 21 and that is barred by the Presidential Order. Of course, this does not mean that whenever a petition for a writ of habeas corpus comes before the court, it must be rejected straightway without even looking at the averments made in it. The court would have to consider whether the bar of the Presidential Order is attracted and for that purpose, the court would have to see whether the order of detention is one made by an authority empowered to pass such an order under the Act; if it is not, it would not be State action and the petition would not be one for enforcement of the right conferred by Article 21. On this view in regard to the interpretation of the constitutional provision, it is unnecessary to go into the question of construction and validity of Section 18 of the Act.

485. It was strongly urged upon us that if we take the view that the Presidential Order bars the right of a person to move a court even when his detention is otherwise then in accordance with law, there would be no remedy against illegal detention. That would encourage the Executive to disregard the law and exercise arbitrary powers of arrest. The result would be - so ran the argument - that the citizen would be at the mercy of the Executive : everyone would be living in a state of constant apprehension that he might at any time be arrested and detained : personal liberty would be at an end and our cherished values destroyed. Should we accept a construction with such fearful consequences was the question posed before us. An impassioned appeal was made to us to save personal liberty against illegal encroachments by the Executive. We were exhorted to listen to the voice of judicial conscience as if judicial conscience were a blithe spirit like Shelley's skylark free to

sing and soar without any compulsions. I do not think I can allow myself to be deflected by such considerations from arriving at that I consider to be the correct construction of the constitutional provision. The apprehensions and fears voiced on behalf of the detenues may not altogether be ruled out. It is possible that when vast powers are vested in the Executive, the exercise of which is immune from judicial scrutiny, they may sometimes be abused and innocent persons may be consigned to temporary detention. But merely because power may sometimes be abused, it is no ground for denying the existence of the power. All power is likely to be abused. That is inseparable from the nature of human institutions. The wisdom of man has not yet been able to conceive of a government with power sufficient to answer its legitimate ends and at the same time incapable of mischief. In the last analysis, a great deal must depend on the wisdom and honesty, integrity and character of those who are in charge of administration and the existence of enlightened and alert public opinion. It was Lord Wright who said in Liversidge v. Anderson (supra) that the safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved.

486. It is true that, if, in a situation of emergency, judicial scrutiny into legality of detention is held to be barred by a Presidential Order specifying Article 21, illegalities might conceivably be committed by the Executive in exercise of the power of detention and unlawful detentions might be made against which there would be no possibility of redress. The danger may not be dismissed as utterly imaginary, but even so, the fact remains that when there is a crisis-situation arising out of an emergency, it is necessary to vest the Government with extraordinary powers in order to enable it to overcome such crisis-situation and restore normal conditions. Even Harold Laski conceded in his article on "Civil Liberties in Great Britain in Wartime" that "the necessity ..... of concentrating immense power in a Government waging total war is beyond discussion" and what he said there regarding a Government waging total war must apply equally in relation to a government engaged in meeting internal subversion or disturbance, for the two stand on the same footing so far as our Constitution is concerned. Now, when vast powers are conferred on the Executive and judicial scrutiny into the legality of exercise of such powers is excluded, it is not unlikely that illegalities might be committed by the Executive in its efforts to deal with the crisis situation. Dicey, in his "Introduction to the study of Law of the Constitution" frankly admits that it is almost certain that, when the suspension of the Habeas Corpus Act makes it possible for the Government to keep suspected persons in a prison for a length of time without bringing them to trial, a smaller or greater number of unlawful acts will be committed, if not by the members of Ministry themselves, at any rate by their agents. But howsoever unfortunate this situation might be, that cannot be helped. The Constitution permits judicial scrutiny to be barred during times of emergency, because it holds that when a crisis arises in the life of the nation, the rights of individuals must be postponed to considerations of State and national safety must override any other considerations. I may add that there is nothing very unusual in this situation because, as already pointed out above, such a situation is contemplated even in countries like the United States of America and Great Britain which are regarded as bastions of democracy. But at the same time it must be remembered by the Executive that, because judicial scrutiny for the time being is excluded, its responsibility in the exercise of the power of detention is all the greater. The Executive is under an added obligation to take care to see that it acts within the four corners of the law and its actions are beyond reproach. It must guard against misuse or abuse of power, for, though such misuse or abuse may yield short-term gains, it is a lesson of history which should never be forgotten that ultimately means have a habit of swallowing up ends.

487. Before I leave this question, I may point out that, in taking the view I have, I am not unaware of the prime importance of the rule of law which, since the dawn of political history, both in India

and Brahadaranyaka Upanishad and Greece of Aristotle, has tamed arbitrary exercise of power by the government and constitutes one of the basic tenets of constitutionalism. I am not unmindful of the famous words of Lord Atkin in his powerful dissent in Liversidge v. Anderson (supra) that "amid the clash of arms" - and much more so in a situation of emergency arising from threat of internal subversion - "laws are not silent. They may be changed, but they speak the same language in war and in peace". I am also conscious - and if I may once again quote the words of that great libertarian Judge :

> Judges are no respecter of persons and stand between the subject and any attempted encroachments on his liberty by the Executive, alert to see that any coercive action is justified in law.

But at the same time it cannot be overlooked that, in the ultimate analysis, the protection of personal liberty and the supremacy of law which sustains it must be governed by the Constitution itself. The Constitution is the paramount and supreme law of the land and if it says that even if a person is detained otherwise than in accordance with the law, he shall not be entitled to enforce his right of personal liberty, whilst a Presidential Order under Article 359, clause (1) specifying Article 21 is in force, I have to give effect to it. Sitting as I do, as a Judge under the Constitution, I cannot ignore the plain and emphatic command of the Constitution for what I may consider to be necessary to meet the ends of justice. It is said that law has the feminine capacity to tempt each devotee to find his own image in her bosom. No one escapes entirely. Some yield blindly, some with sophistication. Only a few more or less effectively resist. I have always learned in favour of upholding personal liberty, for, I believe, it is one of the most cherished values of mankind. Without it life would not be worth living. It is one of the pillars of free democratic society. Men have readily laid down their lives at its alter, in order to secure it, protect it and preserve it. But I do not think it would be right for me to allow my love of personal liberty to cloud my vision or to persuade me to place on the relevant provision of the Constitution a construction which its language cannot reasonably bear. I cannot assume to myself the role of Plato's 'Philosopher King; in order to render what I consider ideal justice between the citizen and the State. After all, the Constitution is the law of all laws and there alone judicial conscience must find its ultimate support and its final resting place. It is in this spirit of humility and obedience to the Constitution and driven by judicial compulsion, that I have come to the conclusion that the Presidential Order dated June 27, 1975 bars maintainability of a writ petition for habeas corpus where an order of detention is challenged on the ground that it is mala fide or not under the Act or not in compliance with it.

488. On the view I have taken in regard to the answer to be given to the first question, it would be unnecessary to consider the second question, but since the second question has been debated fully and elaborate arguments have been advanced before us touching not only the interpretation but also the validity of sub-section (9)(a) of Section 16A, I think it will be desirable if I pronounce my opinion on this question as well. But before I proceed to do so, I may make it clear once again that though this question is framed in general terms and so framed, it invites the Court to consider the area of judicial scrutiny in a petition for a writ of habeas corpus, it is not really necessary to embark on a consideration of this issue, since it was conceded by the learned Attorney General, and in my opinion rightly, that the area of judicial scrutiny remains the same as laid down in the decisions of this Court, subject only to such diminution or curtailment as may be made by sub-section (9)(a) of Section 16A. The learned Additional Solicitor General, who argued this question on behalf of the Union of India, took us through various decisions of English courts on the issue as to what is the nature of the jurisdiction which the court exercises in a petition for a writ of habeas corpus, and what is the manner in which such jurisdiction must be exercised. It is not necessary for the purpose

of these appeals to wade through these decisions and to analyse them, because the practice in our country in regard to the exercise of this jurisdiction, as it has evolved over the years as a result of the decisions of this Court, is a little different from that prevailing in England. This Court has never insisted on strict rules of pleading in cases involving the liberty of a person nor placed on strict rules of pleading in cases involving the liberty of a person nor placed undue emphasis on the question as to on whom the burden of proof lies. Even a postcard written by a detenu from jail has been sufficient to activise this Court into examining the legality of detention. This Court has consistently shown great anxiety for personal liberty and refused to throw out a petition merely on the ground that it does not disclose a prima facie case invalidating the order of detention. Whenever a petition for a writ of habeas corpus has come up before this Court, it has almost invariably issued a rule calling upon the detaining authority to justify the detention. This Court has on many occasions pointed out that when a rule is issued, it is incumbent on the detaining authority to satisfy the Court that the detention of the petitioner is legal and in conformity with the mandatory provisions of the Act. Vide Naranjan Singh v. State of Madhya Pradesh ((1972) 2 SCC 542 : 1972 SCC (Cri) 880); Shaikh Hanif, Gudma Majhi & Kamal Saha v. State of West Bengal ((1974) 3 SCR 258 : (1974) 1 SCC 637 : 1974 SCC (Cri) 292); and Dulal Roy v. District Magistrate, Burdwan ((1975) 3 SCR 186 : (1975) 1 SCC 837 : 1975 SCC (Cri) 329). It has also been insisted by this Court that in answer to the rule, the detaining authority must place all the relevant facts before the Court which would show that the detention is in accordance with the provisions of the Act. It would be no argument on the part of the detaining authority to say that a particular ground is not taken in the petition. Vide Nizamuddin v. State of West Bengal ((1975) 2 SCR 593 : (1975) 3 SCC 395 : 1975 SCC (Cri) 21). Once the rule is issued, it is the bounden duty of the Court to satisfy itself that all the safeguards provided by law have been scrupulously observed and the citizen is not deprived of his personal liberty otherwise than in accordance with law. Vide Mohd. Alam v. State of West Bengal ((1974) 3 SCR 379 : (1974) 4 SCC 463 : 1974 SCC (Cri) 499) and Khudiram Das v. State of West Bengal ((1975) 2 SCR 832 : (1975) 2 SCC 81 : 1975 SCC (Cri) 435). This practice marks a slight departure from that obtaining in England but it had been adopted by this Court in view of the peculiar socio-economic conditions prevailing in the country. Where large masses of people are poor, illiterate and ignorant and access to the courts is not easy on account of lack of financial resources, it would be most unreasonable to insist that the petitioner should set out clearly and specifically the grounds on which he challenges the order of detention and make out a prima facie case in support of those grounds before a rule can be issued on the petition and when the rule is issued, the detaining authority should not be liable to do anything more than just meet the specific grounds of challenge put forward by the petitioner in the petition. Of course, I must make it clear that where an order of detention is challenged as mala fide, a clear and specific averment to that effect would have to be made in the petition and in the absence of such averments, the court would not entertain the plea of mala fide. The petitioner would have to make out a prima facie case of mala fide before the detaining authority can be called upon to meet it. Whether a prima facie case has been made out or not would depend on the particular facts and circumstances of each case, but the test would be whether the prima facie case made out is of such a nature that the Court feels that it requires investigation. The Court would then investigate and decide the question of mala fide on the basis of the material which may be placed before it by both parties.

489. What is the area of judicial scrutiny in a petition for a writ of habeas corpus has been laid down by this Court in numerous decisions. It is not necessary to refer to all these decisions, since there is one recent decision, namely, Khudiram Das v. State of West Bengal (supra) where the entire law on the subject has been reviewed by a Bench of four Judges of this Court. There, the effect of the previous decisions has been considered and the law has been summarised at pages 843 to 845 of the

report in a judgment delivered by me on behalf of the Court. I have carefully listened to the most elaborate arguments advanced before us in this case and even after giving my most serious consideration to them, I still adhere to all that I said in Khudiram Das's case. I maintain that the subjective satisfaction of the detaining authority is liability to be subjected to judicial scrutiny on the grounds enumerated by me in Khudiram Das's case and the decision in Khudiram Das's case lays down the correct law on the subject. The only question is : how far and to what extent sub-section (9)(a) of Section 16A has encroached upon this area of judicial scrutiny and whether it is a valid piece of legislation.

490. Now the first question that arises for consideration is as to what is the correct interpretation of Section 16A, sub-section (9)(a), that sub-section reads as follows :

> (9) Notwithstanding anything contained in any other law or any rule having the force of law,-
>
> (a) the grounds on which an order of detention is made or purported to be made under Section 3 against any person in respect of whom a declaration is made under sub-section (2) or sub-section (3) and any information or materials on which such grounds or a declaration under sub-section (2) or a declaration or confirmation under sub-section (3) or the non-revocation under sub-section (4) of a declaration are based, shall be treated as confidential and shall be deemed to refer to matters of State and to be against the public interest to disclose and save as otherwise provided in this Act, no one shall communicate or disclose any such ground, information or material or any document containing such ground, information or material;

The argument urged on behalf of the detenues was that sub-section (9)(a) of Section 16A should be read down and construed so as not to exclude the power of the High Court in the exercise of its jurisdiction under Article 226 to call for the grounds, information and materials on which the order of detention is made and the declaration under sub-section (2) is based with a view to satisfying itself as regards the legality of the detention. It was pointed out on behalf of the detenues that, unlike Section 54 of the Indian Income-tax Act, 1922 and Section 14 of the Preventive Detention Act, 1950, sub-section (9)(a) of Section 16A does not include any reference to a court and it is clear that it is not directed against the court. Reliance was also placed on behalf of the detenues on the following statement of the law in Wigmore on Evidence (3rd Ed.) Vol. 8 at page 801, Article 2379 :

> Any statute declaring in general terms that official records are confidential should be liberally construed to have an implied exception for disclosure when needed in court of justice, and reference was also made to the decision of the English court in Lee v. Burrell (170 ER 1402) in support of the proposition that in a statutory provision, like sub-section (9)(a) of Section 16A, the court must read an implied exception in favour of the court and particularly the High Court exercising constitutional function under Article 226. It was also stressed on behalf of the detenues that if a wider construction is placed on sub-section (9)(a) of Section 16A taking within its sweep the High Court exercising jurisdiction under Article 226, that sub-section would be rendered void as offending Article 226 and hence the narrower construction must be preferred which excludes the High Court from the purview of the sub-section. This contention, attractive though it may seem because it has the merit of saving judicial scrutiny from being rendered ineffectual and illusory, is not justified by the plain language of sub-section (9)(a) of Section 16A and hence, despite these weighty considerations

which have been pointed out on behalf of the detenues, I find myself unable to accept it.

491. It is true that sub-section (9)(a) of Section 16A does not specifically refer to any court. It does not say in so many terms, as did Section 54 of the Indian Income-tax Act, 1922, that no court shall require any officer to produce before it the grounds, information and materials on which the order of detention is made or the declaration under sub-section (2) or sub-section (3) is based nor does it contain any provision, like Section 14 of the Preventive Detention Act, 1950 that no court shall allow any statement to be made or any evidence to be given of such grounds, information and materials. But there is inherent evidence in the sub-section itself to show that it is intended to prevent disclosure of such grounds, information and materials before a court. It says that the grounds, information and materials on which the order of detention is made or the declaration under sub-section (2) or sub-section (3) is based "shall be treated as confidential and shall be deemed to refer to matters of State and to be against public interest to disclose". There is clearly an echo here of Section 123 of the Indian Evidence Act. That section is intended to prevent disclosure in a court of "unpublished official records relating to any affairs of State" and likewise, sub-section (9)(a) of Section 16A must also be held to be designed to achieve the same and, namely, prevent, inter alia, disclosure in a court. The words "shall be treated as confidential" and "shall be deed ..... to be against the public interest to disclose" are very significant. If they are to have any meaning at all, they must be construed as prohibiting disclosure even to a court. How can the grounds, information and materials referred to in this sub-section remain 'confidential', if they can be required to be produced before a court ? How can they be permitted to be disclosed to a court when the legislature says in so many terms that it would be against the public interest to disclose them ? Even if the court holds its sittings in camera, there would be a real danger of leakage and that might, in a given case, jeopardize national security and weaken the efforts towards meeting the crisis-situation arising out of the emergency. Vide observations in the speech of Lord Wright at page 266 in Liversidge's case (supra. Sub-section (9)(a) of Section 16A cannot, therefor, be read down so as to imply an exception in favour of disclosure to a court.

492. But then it was contended on behalf of the detenues that if, on a proper construction of its language, sub-section (9)(a) of Section 16A, precludes the High Court in exercise of its jurisdiction under Article 226, from calling for the production of the grounds, information and materials on which the order of detention is made or the declaration under sub-section (2) or sub-section (3) is based, it would impede the exercise of its constitutional power by the High Court and make it virtually ineffective and hence it would be void as offending Article 226. This contention requires serious consideration. Prima facie it appears to be formidable, but for reasons which I shall immediately proceed to state, I do not think it well-founded.

493. There can be no doubt that Article 226 is a constitutional provision and it empowers the High Court to issue a writ of habeas corpus for enforcement of the fundamental right conferred by Article 21 and also for any other purpose. The High Court has, therefore, constitutional power to examine the legality of detention and for that purpose, to inquire and determine whether the detention is in accordance with the provisions of law. Now, obviously this being a constitutional power, it cannot be taken away or abridged by a legislative enactment. If there is any legislative provision which obstructs or retards the exercise of this constitutional power, it would be void. There are several decisions of this Court which recognise and lay down this proposition. It was said by this Court in one of its early decisions in Hari Vishnu Kamath v. Syed Ahmad Ishaque ((1955) 1 SCR 1104 : AIR 1955 SC 233 : 10 ELR 216) that the jurisdiction under Article 226 having been conferred by the Constitution, limitation cannot be placed on it except by the Constitution itself. So also in Durga

Shankar Mehta v. Thakur Raghuraj Singh ((1955) 1 SCR 267 : AIR 1954 SC 520 : 9 ELR 494) this Court, while considering the effect of Section 105 of the Representation of the People Act, 1951 which gave finality to an order made by the Election Tribunal, observed that section cannot "cut down and affect the overriding powers which this Court can exercise in the matter of grant of special leave under Article 136", and the same rule was applied to Article 226 in Raj Krushna Bose v. Binod Kanungo (1954 SCR 913 : AIR 1954 SC 202 : 9 ELR 294) where the court held that Section 105 cannot take away or whittle down the power of the High Court under Article 226. The same view was taken by this Court in In re The Kerala Education Bill, 1957 (1959 SCR 995 : AIR 1958 SC 956) where S. R. Das, C. J. speaking on behalf of the Court said in relation to Article 226 that (p. 1072) :

> No enactment of a State legislature can, as long as that article stands, take away or abridge the jurisdiction and power conferred on the High Court by that article.

This Court in Prem Chand Garg v. Excise Commissioner, U. P. Allahabad (1963 Supp 1 SCR 885 : AIR 1963 SC 996) actually struck down Rule 12 of Order XXXV of the Supreme Court Rules which required the petitioner in a writ petition under Article 32 to furnish security for the cost of the respondent, on the ground that it retarded or obstructed the assertion or vindication of the fundamental right guaranteed under Article 32 by imposing a pecuniary obligation on the petition. The principle of this decision must equally apply in a case where the legislative provision impedes or obstructs the exercise of the constitutional power of the High Court under Article 226. It is, therefore, clear that if it can be shown that sub-section (9)(a) of Section 16A abridges or whittles down the constitutional power of the High Court under Article 226 or obstructs or retards its exercise, it would be void as being in conflict with Article 226.

494. Now, it is settled law that when a petition for writ of habeas corpus is filed and a rule is issued, it is the bounden duty of the court to satisfy itself that all the safeguards provided by law have been scrupulously observed and the liberty of the detenu has not been taken away otherwise than in accordance with law. Vide Khudiram Das v. State of West Bengal (supra). The Court may also for the purpose of satisfying itself as regards the legality of detention, call for the record of the case relating to the detention and look into it. That is what the Court did in Biren Dutta v. Chief Commissioner of Tripura ((1964) 8 SCR 295 : AIR 1965 SC 596 : (1965) 1 Cri LJ 501). There, an interim order was made by this Court "directing that the Chief Secretary to the Tripura Administration shall forthwith transmit to this Court the original file in respect of the detenues concerned" since the court wanted to satisfy itself that the Minister or the Secretary or the Administrator had reviewed the cases of the detenues and arrived at a decision that their detention should be continued. So also in M. M. Damnoo v. J & K State ((1972) 2 SCR 1014 : (1972) 1 SCC 536 : 1972 SCC (Cri) 304) this Court required the State Government to produce the file containing the grounds of detention so that the Court could satisfy itself that "the grounds on which the detenu has been detained have relevance to the security of the State". It would, therefore, be seen that if there is a legislative provision which prohibits disclosure of the grounds, information and materials on which the order detention is based and prevents the court form calling or the production of such grounds, information and materials, it would obstruct and retard the exercise of the constitutional power of the High Court under Article 226 and would be void as offending that article.

495. This was the basis on which Section 14 of the Preventive Detention Act, 1950 was struck down by this Court in A. K. Gopalan's case (supra). That section prohibited the disclosure of the grounds of detention communicated to the person detained and the representation made by him against the order of detention and barred the court from allowing such disclosure to be made except for

purposes of a prosecution for such disclosure. It was held by this Court - in fact by all the judges who participated in the decision - that this section was void as it contravened inter alai Article 32. Kania, C. J. observed at page 130 of the report in a passage of which certain portions have been underlined by me.

By that section the court is prevented (except for the purpose of punishment for such disclosure) from being informed, either by a statement or by leading evidence, of the substance of the grounds conveyed to the detained person under Section 7 on which the order was made, or of any representation made by him against such order. It also prevents the court from calling upon any public officer to disclose the substance of those grounds or from the production of the proceedings or report of the advisory board which may be declared confidential. It is clear that if this provision is permitted to stand, the court can have no material before it to determine whether the grounds are sufficient or not. I do not mean whether the grounds are sufficient or not. It even prevents the court from ascertaining whether the alleged grounds of detention have anything to do with the circumstances or class or classes of cases mentioned in Section 12(1)(a).

Patanjali Sastri, J. also observed to the same effect at page 217 of the report :

> If the grounds are too vague to enable him to make any such representation, or if they are altogether irrelevant to the object of his detention, or are such as to show that his detention is not bona fide, he has the further right of moving this Court an this remedy is also guaranteed to him under Article 32. These rights and remedies, the petitioner submits, cannot be effectively exercised, if he is prevented on pain of prosecution, from disclosing the grounds to the Court. There is great force in this contention ..... The argument (of the Attorney General) overlooks that it was recognised in the decision referred to above that it would be open to the court to examine the grounds of detention in order to see whether they were relevant to the object which the legislature had in view, such as, for instance, the prevention of acts prejudicial to public safety and tranquillity, or were such as to show that the detention was not bona fide. An examination of the grounds for these purposes is made impossible by Section 14, and the protection afforded by Article 22(5) and Article 32 is thereby rendered nugatory. It follows that Section 14 contravenes the provisions of Article 22(5) and Article 32 in so far as it prohibits the person detained from disclosing to the court the grounds of his detention communicated to him by the detaining authority or the representation made by him against the order of detention, and prevents the court from examining them for the purpose aforesaid, and to that extent it must be held under Article 13(2) to be void. (emphasis supplied)

And so did the other learned Judges. It is clear from what they said that inasmuch as Section 14 prohibited the disclosure of the grounds of detention and prevented the Court from looking at them for the purpose of deciding whether the detention is legal, it was violative of Article 32 which conferred a fundamental right on a detenu to move this Court for impugning the legality of his detention.

496. The same view was taken by a Constitution Bench of this Court in M. M. Damnoo v. J. & K. State (supra). In fact, the observations of Kania, C. J. in A. K. Gopalan's case, which I have reproduced above, were quoted with approval in this decision. The petitioner in this case challenged the legality of his detention by the State of Jammu and Kashmir on several grounds. One of the grounds was that the proviso to Section 8 of the Jammu and Kashmir Preventive Detention Act was

void as it conflicted with Section 103 of the Constitution of Jammu and Kashmir. Section 103 was in the same term as Article 226 and it conferred power on the High Court of Jammu and Kashmir to issue inter alia a writ of habeas corpus. Section 8 of the Preventive Detention Act required the detaining authority to communicate to the detenu the grounds on which the order of detention was made, but the proviso to that section dispensed with the requirement in case of any person detained with a view to preventing him from acting in any manner prejudicial to the security of the State if the authority making the order ..... directs that the person detained may be informed that it would be against the public interest to communicate to him the grounds on which his detention has been made.

The argument of the petitioner was that the proviso to Section 8 of the Preventive Detention act was violative of Section 103, since it debarred the High Court and this Court from calling for the grounds of detention and thus made it virtually impossible for the High Court and this Court to examine the legality of the detention. This Court agreed that there would have been some force in the contention of the petitioner, if the High Court and this Court were prevented from calling upon the State Government to produce the grounds of detention, but it pointed out that the proviso to Section 8 was not ultra vires "because the proviso and the Act do not bar the High Court and this Court from looking into the validity of the detention". This Court, after referring to the observations made by Kania, C. J. in A. K. Gopalan's case in regard to Section 14 of the Preventive Detention Act, 1950 said : [SCC p. 549, para 35]

> But fortunately there is no similar provision in this Act and it leaves the High Court and the Supreme Court free to exercise the jurisdiction by calling upon the State in appropriate cases to produce before it the grounds of detention and other material in order to satisfy itself that the detenu was being detained in accordance with law. If it were not so, we would have difficulty in sustaining the proviso.

It will, therefore, be seen that prima facie this Court was of the view that if the proviso to Section 8 had debarred the High Court and this Court from requiring the grounds of detention to be produced before them, it would have been difficult to sustain that proviso.

497. The learned Additional Solicitor General, however, sought to distinguish these two decisions and contended that subsection 9(a) of Section 16A merely enacts a rule of evidence and it cannot, therefore, be said to obstruct or retard the exercise of the constitutional power of the High Court under Article 226 so as to be in conflict with that Article. now, there can be no doubt, although at one time in the course of his argument Mr. Shanti Bhushan contended to the contrary, that a rule of evidence can always be enacted by the legislature for the purpose of regulating the proceedings before the High Court under Article 226. A rule of evidence merely determines what shall be regarded as relevant and admissible material for the purpose of enabling the court to come to a decision in the exercise of its jurisdiction and it does not in any way detract from or affect the jurisdiction of the court and it cannot, in the circumstances, be violative of Article 226. But in order that it should not fall foul of Article 226, it must be a genuine rule of evidence. If in the guise of enacting a rule of evidence, the legislature in effect and substance disables and impedes the High Court from effectively exercising its constitutional power under Article 226, such an enactment would be void. It will be colourable exercise of legislative power. The legislature cannot be permitted to violate a constitutional provisions by employing an indirect method. If a legislative provision, though in form and outward appearance a rule of evidence, is in substance and reality something different, obstructing or impeding the exercise of the jurisdiction of the High Court under Article 226, the form in which the legislative provision is clothed would not save it from

condemnation. Let us, therefore, examine whether sub-section (9)(a) of Section 16A enacts a genuine rule of evidence or it is a colourable piece of legislation in the garb of a rule or evidence. If it is the former, it would be valid; but if it is latter, it would be an indirect and covert infringement of Article 226 and hence void.

498. Now, it is well settled that in order to determine the true character of a legislative provision, we must have regard to the substance of the provision and not its form. We must examine the effect of the provision and not be misled by the method and manner adopted or the phraseology employed. Sub-section (9)(a) of Section 16A is in form and outward appearance a rule of evidence which says that the grounds, information and materials on which the order of detention is made or the declaration under sub-section (2) or sub-section (3) is based shall be treated as confidential and shall be deemed to refer to matters of State and be against the public interest to disclose. But in substance and effect, is it a genuine rule of evidence ? The argument on behalf of the detenues was that it is only a legislative device adopted by the legislature for the purpose of excluding the grounds, information and materials from the scrutiny of the court and thereby making it virtually impossible for the court to examine the legality of the detention and grant relief to the detenu. If the veil is removed, contended the detenues, the position is no different from that obtaining in A. K. Gopalan's case where Section 14 of the Preventive Detention Act, 1950 was struck down as constituting a direct assault on Article 226. It was pointed out that, in every case of detention, the grounds, information and materials would not necessarily refer to matters of State and be against the public interest to disclose. Since, even order of detention purported to be made under Section 3 are brought within the purview of sub-section (9)(a) of Section 16A, the grounds information and material in cases of such detention may be wholly unrelated to the objects and purposes set out in Section 3 and in that event, they would mostly have nothing to do with matters of State and it may not be possible to say that their disclosure would injure public interest. But even so, sub-section (9)(a) of Section 16A surrounds such grounds, information and materials with the veil of secrecy and, to use the words of Mahajan, J. in A. K. Gopalan's case places "an iron curtain around them". This sub-section, according to the detenues, compels the court to shut its eyes to reality and presume by a legal fiction that in every case, whatever be the actuality - and in many cases the actuality may be otherwise - the grounds, information and materials shall be deemed to refer to matters of State and shall be against the public interest to disclose. This contention of the detenues is undoubtedly very plausible and it caused great anxiety to me, but on deeper consideration, I think it cannot be sustained.

499. It is significant to note that sub-section (9)(a) of Section 16A is a provision enacted to meet the emergency declared under the proclamations dated December 3, 1971 and June 25, 1975. Vide sub-section (1) of Section 16A. It comes into operation only when there is a declaration made under sub-section (2) or sub-section (3) that the detention of the person concerned is necessary for dealing effectively with the emergency. The condition precedent to the applicability of the sub-section is that there should be a declaration under sub-section (2) or sub-section (3) in respect of the person detained. It may also be noted that though the words "or purported to be made" were added after the words "an order of detention is made" in the sub-section by the Maintenance of Internal Security (Amendment) Act, 1976, no such or similar words were added in relation to the declaration under sub-section (2) or sub-section (3). Sub-section (9)(a) of Section 16A, therefore assumes a valid declaration under sub-section (2) or sub-section (3) and it is only when such a declaration has been made, that sub-section (9)(a) of Section 16A applies, or in other words it is only in cases where a person is detained in order to deal effectively with the emergency that the disclosure of the grounds, information and materials is prohibited by sub-section (9)(a) of Section 16A.

500. I have already pointed out how emergency can create a crisis situation imperiling the existence of constitutional democracy and jeopardizing the functioning of the social and political machine. It is, therefore, reasonable to assume that where a person is detained in order to deal effectively with the emergency, the grounds, information and materials on which the order of detention is made or the declaration under sub-section (2) or sub-section (3) is based would, by and large, belong to a class of documents referring to matters of State which it would be against public interest to disclose. What was observed by two of the Law Lords in Liversidge's case (supra) would be applicable in such a case. Viscount Maugham said at page 221 of the report :

> ..... it is obvious that in many cases he will be acting on information of the most confidential character, which could not be communicated to the person detained or disclosed in court without the greatest risk of prejudicing the future efforts of the Secretary of State in this and like matters for the defence of the realm . . . . It is sufficient to say that there must be a large number of cases in which the information on which the Secretary of State is likely to act will be of a very confidential nature.

and Lord Wright also observed to the same effect at page 266 of the report :

> In these cases full legal evidence or proof is impossible, even if the Secretary does not claim that disclosure is against the public interest, a claim which must necessarily be made in practically every case, and a claim which a judge necessarily has to admit.

In view of the fact that the detention is made in order to deal effectively with the emergency, the grounds, information and materials would in most cases be confidential and if a claim of privilege were made under Section 123 of the Indian Evidence Act, it would almost invariably be held justified. The Legislature, therefore, taking into account the privileged character of the grounds, information and materials in the generality of cases, enacted sub-section (9)(a) of Section 16A laying down a rule that the grounds, information and materials shall be deemed to refer to matters of State which it would be injurious to public interest to disclose, instead of leaving it to the discretion of the detaining authority to make a claim of privilege in each individual case and the court to decide it. The rule enacted in sub-section (9)(a) of Section 16A bears close analogy to a rule of conclusive presumption and in the circumstances, it must be regarded as a genuine rule of evidence. I may make it clear that if the grounds, information and materials were not, by and large, of such a character as to fall within the class of documents relating to matters of State which it would be injurious to public interest to disclose, I would have found it impossible to sustain this statutory provision as a genuine rule of evidence. If the grounds, information and materials have no relation to matters of State or they cannot possibly be of such a character that their disclosure would injure public interest, the Legislature cannot, by merely employing a legal fiction, deem them to refer to matters of State which it would be against public interest to disclose and thereby exclude them from the judicial ken. That would not be a genuine rule of evidence : it would be a colourable legislative device - a fraudulent exercise of power. There can be no blanket ban on disclosure of the grounds, information and materials to the High Court or this Court, irrespective of this true character. That was the reason why Section 14 of the Preventive Detention Act, 1950 was struck down by this Court in A. K. Gopalan's case (supra) and this Court said in M. M. Damnoo's case (supra) that if the proviso to Section 8 had debarred the High Court and this Court from calling for the grounds of detention and looking into them, it would have been difficult to sustain that proviso. But here, on account of the declaration under sub-section (2) or sub-section (3), which, as I said above, must be a valid declaration in order to attract the applicability of sub-section (9)(a) of Section 16A, the

grounds, information and materials in almost all cases would be of a confidential character falling within the class of documents privileged under Section 123 and hence the rule enacted in the sub-section genuinely partakes of the character of a rule of evidence. It may be pointed out that if the declaration under sub-section (2) or sub-section (3) is invalid sub-section (9)(a) of Section 16A will not be attracted and the grounds, information and materials on which the order of detention is made would not be privileged under that sub-section. I am, therefore, of the view that sub-section (9)(a) of Section 16A enacts a genuine rule of evidence and it does not detract from or affect the jurisdiction of the High Court under Article 226 and hence it cannot be successfully assailed as invalid.

501. I accordingly answer the first question by saying that the Presidential Order dated June 27, 1975 bars maintainability of a petition for a writ of habeas corpus where an order of detention is challenged on the ground that it is vitiated by mala fides, legal or factual, or is based on extraneous considerations or is not under the Act or is not in compliance with it. So far as the second question is concerned, I do not think there is any warrant for reading down sub-section (9)(a) of Section 16A so as to imply an exception in favour of disclosure to the court, and, on the interpretation placed by me on that provision, I hold that it does not constitute an encroachment on the constitutional jurisdiction of the High Court under Article 226 and is accordingly not void. In the circumstances, I allow the appeals and set aside the judgments of the High Court impugned in the appeals.

KHANNA, J. (dissenting) -

Law of preventive detention, of detention without trial is an anathema to all those who love personalliberty. Such a law makes deep inroads into basic human freedoms which we all cherish and which occupy prime position among the higher values of life. It is, therefore, not surprising that those who have an abiding faith in the rule of law, and sanctity of personal liberty do not easily reconcile themselves with law under which persons can be detained for long periods without trial. The proper forum for bringing to book those alleged to be guilty of the infraction of law and commission of crime, according to them, is the court of law where the correctness of the allegations can be gone into in the light of the evidence adduced at the trial. The vesting of power of detention without trial in the Executive, they assert, has the effect of making the same authority both the prosecutor as well as the judge and is bound to result in arbitrariness.

503. Those who are entrusted with the task of administering the land have another viewpoint. According to them, although they are conscious of the value of human liberty, they cannot afford to be oblivious of the need of the security of the State or the maintenance of public order. Personal liberty has a value if the security of the State is not jeopardised and the maintenance of public order is not threatened. There can be, the administrators assert, no freedom to destroy freedom. Allegiance to ideals of freedom cannot operate in vacuum. Danger lurks and serious consequences can follow when thoughts become encysted in fine phrases oblivious of political realities and the impact of realpolitik. No Government can afford to take risks in matters relating of the security of the State. Liberty, they accordingly claim, has to be measured against community's need for security against internal and external peril.

504. It is with a view to balancing the conflicting viewpoints that the framers of the Constitution made express provisions for preventive detention and at the same time inserted safeguards to prevent abuse of those powers and to mitigate the rigour and harshness of those provisions. The dilemma which faced the Constitution-makers in balancing the two conflicting view-points relating to liberty of the subject and the security of the State was not, however laid to rest for good with the drafting of the Constitution. It has presented itself to this Court in one form or the other ever since

the Constitution came into force. A. K. Gopalan's (1950 SCR 88 : AIR 1950 SC 27) was the first case wherein a Bench of six Judges of this Court dealt with the matter. Another Bench of seven Judges again dealt with the matter in 1973 in the case of Shambhu Nath Sarkar v. State of West Bengal ((1974) 1 SCR 1 : (1973) 1 SCC 856). In between a number of Benches have dealt with the various facets of the question. One such facet has now presented itself to this Constitution Bench.

505. The question posed before us is whether in view of the Presidential Order dated June 27, 1975 under clause (1) of Article 359 of the Constitution, any petition under Article 226 before a High Court for writ of habeas corpus to enforce the right of personal liberty of a person detained under the Maintenance of Internal Security Act, 1971 (Act 26 of 1971) (hereinafter referred to as MISA) as amended is maintainable. A consequential question which may be numbered as question No. 2 is, if such a petition is maintainable, what is the scope or extent of judicial scrutiny. The above questions arise in Criminal Appeals Nos. 279 of 1975, 355 of 1975, 1845-49 of 1975, 380 of 1975, 1926 of 1975, 389 of 1975, 3 of 1976, 41 of 1976 and 46 of 1976. These appeals have been filed against the order of Madhya Pradesh High Court, Allahabad High Court, Karnataka High Court, Delhi High Court, Nagpur Bench of Bombay High Court and Rajasthan High Court whereby the High Courts repelled the preliminary objections relating to the maintainability of petitions under Article 226 for writs of habeas corpus on account of Presidential Order dated June 27, 1975. On the second question, some of the High Courts expressed the view that this was a matter which would be gone into while dealing with individual cases on their merits. The other High Courts went into the matter and expressed their view. This judgment would dispose of all the appeals.

506. MISA was published on July 2, 1971. Section 2 of the Act contains the definition clause. Section 3 grants powers to make orders for detaining certain persons and reads as under :

> 3. (1) The Central Government or the State Government may,-
>
> (a) if satisfied with respect to any person (including a foreigner) that with a view to preventing him from acting in any manner prejudicial to -
>
> (i) the defence of India, the relations of India with foreign powers, or the security of India, or
>
> (ii) the security of the State or the maintenance of public order, or
>
> (iii) the maintenance of supplies and services essential to the community, or
>
> (b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India,
>
> it is necessary so to do, make an order directing that such person be detained.
>
> (2) Any of the following officers namely-
>
> (a) district magistrates,
>
> (b) additional district magistrates, specially empowered in this behalf by the State Government,

(c) Commissioners of Police, wherever they have been appointed, may, if satisfied as provided in sub-clauses (ii) and (iii) of clause (a) of sub-section (1), exercise the power conferred by the said sub-section.

(3) When any order is made under this section by an officer mentioned in sub-section (2), he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as in his opinion have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof unless in the meantime it has been approved by the State Government :

Provided that where under Section 8 the grounds of detention are communicated by the authority making the order after five days but not later than fifteen days from the date of detention, this sub-section shall apply subject to the modification that for the words 'twelve days', the words 'twenty-two days' shall be substituted.

(4) When any order is made or approved by the State Government under this section, the State Government shall, within seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as in the opinion of the State Government have a bearing on the necessity for the order.

Sections 4 and 5 deal respectively with execution of detention orders and the power to regulate place and conditions of detention. According to Section 6, detention orders are not to be invalidated or inoperative on the ground that the person to be detained is outside the limits of the territorial jurisdiction of the Government or officer making the order, or that the place of detention of such person is outside the said limits. Section 8 requires that the grounds of order of detention should be disclosed to persons affected by the order and he should be granted the earliest opportunity of making a representation against the order. Section 9 deals with the constitution of Advisory Boards. Section 10 makes provision for reference to Advisory Board. Section 11 prescribes the procedure of Advisory Boards and section 12 requires that action should be taken in accordance with the report of the Advisory Board. According to Section 13, the maximum period of detention shall be 12 months from the date of detention. Section 14 confers power of revocation of detention orders. Section 15 confers power upon the appropriate Government to temporarily release the detained persons. Section 16 gives protection to action taken in good faith. Section 17 provides for detention up to two years in certain cases of foreigners. Section 18, which has subsequently been renumbered as Section 19, provides for the repeal of the Maintenance of Internal Security Ordinance and the saving clause.

507. According to clause (1) of Article 352 of the Constitution, if the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by was or external aggression or internal disturbance, he may, by proclamation, make a declaration to that effect. On December 3, 1971 the President of India issued the following proclamation of emergency :

In exercise of the powers conferred by clause (1) of Article 352 of the Constitution,

I, V. V. Giri, President of India, by this Proclamation declare that a grave emergency exists whereby the security of India is threatened by external aggression.

V. V. Giri President.##

Clause (1) of Article 359 of the Constitution reads as under :

Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

On November 16, 1974 the President of India made the following order :

In exercise of the powers conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that-

(a) the right to move any court withe respect to orders of detention which have already been made or which may hereafter be made under Section 3(1)(c) of the Maintenance of Internal Security Act, 1971 as amended by Ordinance 11 of 1974, for the enforcement of the rights conferred by Article 14, Article 21 and clauses (4), (5), (6), and (7) of Article 22 of the Constitution, and

(b) all proceedings pending in any court for the enforcement of any of the aforesaid rights with respect of orders of detention made under the said Section 3(1)(c),

shall remain suspended for a period of six months from the date of issue of this Order or the period during which the Proclamation of Emergency issued under clause (1) of Article 352 of the Constitution on the 3rd December, 1971 is in force, whichever period expires earlier.

2. This Order shall extend to the whole of the territory of India.

On June 20, 1975 the President of India amended the above order by substituting "twelve months" in the order. On June 25, 1975 the President of India issued another proclamation of emergency and the same reads as under :

PROCLAMATION OF EMERGENCY##

In exercise of the powers conferred by clause (1) of Article 352 of the Constitution, I, Fakhruddin Ali Ahmed, President of India, by this Proclamation declare that a grave emergency exists whereby the security of India is threatened by internal disturbance.

#New Delhi Sd/- F. A. Ahmedthe 25th June, 1975 President.##

On June 27, 1975 the President of India made the following order :

> In exercise of the powers conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution and all proceedings pending in any court for the enforcement of the above mentioned rights shall remain suspended for the period during which the Proclamation of Emergency made under clause (1) of Article 352 of the Constitution on the 3rd December, 1971 and on the 25th June, 1975 are both in force.

This Order shall extend to the whole of the territory of India except the State of Jammu and Kashmir.

This Order shall be in addition to and not in derogation of any Order made before the date of this order under clause (1) of Article 359 of the Constitution.

On June 29, 1975 another order was issued by the President whereby the words "except the State of Jammu and Kashmir" in the order dated June 27, 1975 were omitted. On September 25, 1975 another Presidential Order was issued as a result of which the last paragraph in the Presidential Order dated June 27, 1975 was omitted.

508. By Act 39 of 1975 Section 16A was introduced in MISA with effect from June 29, 1975 and the same reads as under :

> 16A. (1) Notwithstanding anything contained in this Act or any rules of natural justice, the provisions of this section shall have effect during the period of operation of the Proclamation of Emergency issued under clause (1) of Article 352 of the Constitution on the 3rd day of December, 1971, or the Proclamation of Emergency issued under that clause on the 25th day of June, 1975, or a period of twelve months from the 25th day of June, 1975, whichever period is the shortest.
>
> (2) The case of every person (including a foreigner) against whom an order of detention was made under this Act on or after the 25th day of June, 1975, but before the commencement of this section, shall, unless such person is sooner released from detention, be reviewed within fifteen days from such commencement by the appropriate Government for the purpose of determining whether the detention of such person under this Act is necessary for dealing effectively with the emergency in respect of which the Proclamations referred to in sub-section (1) have been issued (hereinafter in this section referred to as the emergency) and if, on such review, the appropriate Government is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government may make a declaration to that effect and communicate a copy of the declaration to the person concerned.

When making an order of detention under this Act against any person (including a foreigner) after the commencement of this section, the Central Government or the State Government or, as the case may be, the officer making the order of detention shall consider whether the detention of such person under this Act is necessary for dealing effectively with the emergency and if, on such consideration, the Central Government or the State Government or, as the case may be, the officer is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government or officer may make a declaration to that effect and communicate a copy of declaration

to the person concerned :

Provided that where such declaration is made by an officer, it shall be reviewed by the State Government to which such officer is subordinate within fifteen days from the date of making of the declaration and such declaration shall cease to have effect unless it is confirmed by the State Government, after such review, within the said period of fifteen days.

(4) The question whether detention of any person in respect of whom a declaration has been made under sub-section (2) or sub-section (3) continues to be necessary for effectively dealing with the emergency shall be reconsidered by the appropriate Government within four months from the date of such declaration and thereafter at intervals not exceeding four months and if, on such reconsideration, it appears to the appropriate Government that the detention of the person is no longer necessary for effectively dealing with the emergency, that Government may revoke the declaration.

(5) In making any review, consideration or reconsideration under sub-sections (2), (3) or (4), the appropriate Government or officer may, if such Government or officer considers it to be against public interest to do otherwise, act on the basis of the information and materials in its or his possession without disclosing the facts or giving an opportunity of making a representation to the person concerned.

(6) In the case of every person detained under a detention order to which the provisions of sub-section (2) apply, being a person the review of whose case is pending under that sub-section or in respect of whom a declaration has been made under that sub-section,-

(i) Sections 8 to 12 shall not apply; and

(ii) Section 13 shall apply subject to the modification that the words and figures 'which has been confirmed under Section 12' shall be omitted.

(7) In the case of every person detained under a detention order to which the provisions of sub-section (3) apply, being a person in respect of whom a declaration has been made under that sub-section,-

(i) Section 3 shall apply subject to the modification that for sub-sections (3) and (4) thereof, the following sub-section shall be substituted, namely :-

'(3) when any order of detention is made by a State Government or by an officer subordinate to it, the State Government shall, within twenty days, forward to the Central Government a report in respect of the order.';

(ii) Sections 8 to 12 shall not apply; and

(iii) Section 13 shall apply subject to the modification that the words and figures 'which has been confirmed under Section 12' shall be omitted.

Act 39 of 1975 also inserted Section 18 with effect from June 25, 1975 and the same reads as under :

18. No person (including a foreigner) detained under this Act shall have any right to personal liberty by virtue of natural law or common law, if any.

509. By the Constitution (Thirty-eighth Amendment) Act, 1975 clauses (4) and (5) which read as under were added in Article 352 of the Constitution :

(4) The power conferred on they President by this article shall include the power to issue different Proclamations on different grounds, being war or external aggression or internal disturbance or imminent danger of was or external aggression or internal disturbance, whether or not there is a Proclamation already issued by the President under clause (1) and such Proclamation is in operation.

(5) Notwithstanding anything in this Constitution,-

(a) the satisfaction of the President mentioned in clause (1) and clause (2) shall be final and conclusive and shall not be questioned in any court on any ground;

(b) subject to the provisions of clause (2), neither the Supreme Court nor any other court shall have jurisdiction to entertain any question, on any ground, regarding the validity of-

(i) a declaration made by Proclamation by the President to the effect stated in clause (1), or

(ii) the continued operation of such Proclamation.

Following clause (1A) was also added after clause (1) of Article 359 and the same reads as under :

(1A) While an order made under clause (1) mentioning any of the rights conferred by Part III is in operation, nothing in that Part conferring those rights shall restrict the power of the State as defined in the said Part to make any a law or to take any executive action which the State would but the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetence, cease to have effect as soon as the order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

The Constitution (Thirty-ninth Amendment) Act, 1975 was published on August 10, 1975 and inserted the Maintenance of Internal Security Act, 1971 as item 92 in the Ninth Schedule to the Constitution.

510. On October, 17, 1975 Ordinance 16 of 1975 was issued making further amendment in Section 16A of MISA and the same read as under :

(a) for sub-section (5), the following sub-section shall be substituted, namely :-

'(5) In making any review, consideration or re-consideration under sub-section (2), sub-section (3) or sub-section (4), the appropriate Government or officer may act on the basis of the information and materials in its or his possession without communicating or disclosing any such information or materials to the person

concerned or affording him any opportunity of making any representation against the making under sub-section (2), or the making or confirming under sub-section (3), or the non-revocation under sub-section (4), of the declaration in respect of him.' :

(b) in sub-section (7), in clause (i),-

(i) in the opening portion, for the words 'the following sub-section' the words 'the following' shall be substituted;

(ii) in sub-section (3), as substituted by that clause, for the words 'forward to the Central Government a report in respect of the orders. The words 'report the fact to the Central Government' shall be substituted;

(iii) after sub-section (3) aforesaid, the following shall be inserted, namely :-

'(4) At any time after the receipt of a report under sub-section (3), the Central Government may require the State Government to furnish to the Central Government the grounds on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order.':

(c) after sub-section (7), the following sub-sections shall be inserted, namely :-

'(8) in the case of any person in respect of whom a declaration has been made by a State Government under sub-section (2) or a declaration has been made by a State Government or an officer subordinate to it or confirmed by the State Government under sub-section (3), or a declaration has not been revoked by a State Government under sub-section (4), the Central Government may, whenever it considers it necessary so to do, require the State Government to furnish to the Central Government the information and materials on the basis of which such declaration has been made or confirmed, or not revoked, a the case may be, and such other information and materials as the Central Government may deem necessary.

(9) Notwithstanding anything contained in any other law or any rule having the force of law, -

(a) the grounds on which an order of detention is made under sub-section (1) of Section 3 against any person in respect of whom a declaration is made under sub-section (2) of sub-section (3) and any information or materials on which such grounds or declaration under sub-section (2) or a declaration or confirmation under sub-section (3) or the non-revocation under sub-section (4) of a declaration are based, shall be treated as confidential and shall be deemed to refer to matters of State and to be against the public interest to disclose and save as otherwise provided in this Act, no one shall communicate or disclose any such ground, information or material or any document containing such ground, information or material;

(b) no person against whom an order of detention is made under sub-section (1) of Section 3 shall be entitled to the communication of disclosure of any such ground, information or material as is referred to in clause (k) or the production to him of any document containing such ground, information or material.

511. On November 16, 1975 Ordinance 22 of 1975 was issued making certain amendments in MISA. By Section 2 of the ordinance the words "twelve days" and "twenty days" in sub-section (3) of Section 3 MISA were substituted by the words "twenty days" and "twenty-five days" respectively. In Section 14 of the principal Act following sub-section was substituted for the original sub-section :

> (2) The expiry or revocation of a detention order (hereafter in this sub-section referred to as the earlier detention order) shall not bar the making of another detention order (hereafter in this sub-section referred to as the subsequent detention order) under Section 3 against the same person :
>
> Provided that in a case where no fresh facts have arisen after the expiry or revocation of the earlier detention order made against such person, the maximum period for which such person may be detained in pursuance of the subsequent detention order shall, in no case, extend beyond a period of twelve months from the date of detention under the earlier detention order or until the expiry of the Defence and Internal Security of India Act, 1971, whichever is later.

Following sub-section (2A) was also inserted in Section 16A of the principal Act :

> (2A) If the State Government makes a declaration under sub-section (2) that the detention of any person in respect of whom a detention order is made by an officer subordinate to that Government is necessary for dealing effectively with the emergency, the State Government shall be deemed to have approved such detention order and the provisions of sub-section (3) of Section 3, in so far as they relate to the approval of the State Government, and of sub-section (4) of that section, shall not apply to such detention order.

The amendments made by the ordinance were given retrospective effect for the purpose of validating all acts done previously.

512. During the pendency of these appeals, the Maintenance of Internal Security (Amendment) Act, 1976 (Act 14 of 1976) was published on January 25, 1976. This amending Act incorporated and in some respects modified the changes which had been brought about in the principal Act by Ordinance 16 of 1975 and Ordinance 22 of 1975. Sections 2 and 3 of the amending Act incorporate the changes which had been introduced by Sections 2 and 3 of Ordinance 22 of 1975. At the same time Sections 2 and 3 of the amending Act make it clear that substitution brought about by those sections shall be with effect from June 29, 1975. Sections 4, 5 and 6 of the amending Act read as under :

> 4. In Section 16A of the principal Act,-
>
> (a) after sub-section (2), the following sub-section shall be inserted, and shall be deemed to have been inserted with effect from the 29th day of June, 1975, namely :-
>
> '(2A) If the State Government makes a declaration under sub-section (2) that the detention of any person in respect of whom a detention order is made by an officer subordinate to that Government is necessary for dealing effectively with the emergency, the State Government shall be deed to have approved such detention order and the provisions of sub-section (3) of Section 3, in so far as they relate to the

approval of the State Government, and of sub-section (4) of that section, shall not apply to such detention order.':

(b) for sub-section (5), the following sub-section shall be substituted, and shall be deemed to have been substituted with effect from the 29th day of June, 1975, namely :-

'(5) In making any review, consideration or reconsideration under sub-section (2), sub-section (3) or sub-section (4), the appropriate Government or officer may act on the basis of the information and materials in its or his possession without communicating or disclosing any such information or materials to the person concerned or affording him any opportunity of making any representation against the making under sub-section (2), or the making or confirming under sub-section (3), or the non-revocation under sub-section (4), of the declaration in respect of him.';

(C) in sub-section (7), in clause (i), -

(i) in the opening portion, for the words 'the following sub-section', the words 'the following' shall be substituted, and shall be deemed to have been substituted with effect from the 29th day of June 1975;

(ii) in sub-section (3), as substituted by that clause, for the words 'forward to the Central Government a report in respect of the order', the words 'report the fact to the Central Government' shall be substituted, and shall be deemed to have been substituted with effect from the 29th day of June, 1975;

(iii) after sub-section (3) aforesaid, the following shall be inserted, and shall be deemed to have been inserted with effect from the 17th day of October, 1975, namely :-

'(4) At any time after the receipt of a report under Sub-section (3), the Central Government may require the State Government to furnish to the Central Government the grounds on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order.';

(d) after sub-section (7), the following sub-sections shall be inserted, and shall be deemed to have been inserted with effect from the 29th day of June 1975, namely :-

'(8) In the case of any person in respect of whom a declaration has been made by a State Government under sub-section (2) or a declaration has been made by a State Government or an officer subordinate to it or confirmed by the State government under sub-section (3), or a declaration has not been revoked by a State Government under sub-section (4), the Central Government may, whenever it considers it necessary so to do, require the State Government to furnish to the Central Government the information and materials on the basis of which such declaration has been made or confirmed, or not revoked as the case may be, and such other information and materials as the Central Government may deem necessary.

(9) Notwithstanding anything contained in any other law or any rule having the force of law, -

(a) the grounds on which an order of detention is made or purported to be made under Section 3 against any person in respect of whom a declaration is made under sub-section (2) or sub-section (3) and any information or materials on which such grounds or a declaration under sub-section (3) or the non-revocation under sub-section (4) of a declaration are based, shall be treated as confidential and shall be deemed to refer to matters of State and to be against the public interest to disclose and save as otherwise provided in this Act, no on shall communicate or disclose any such ground, information or material or any document containing such ground, information or material;

(b) no person against whom an order of detention is made or purported to be made under Section 3 shall be entitled to the communication or disclosure of any such ground, information or material as is referred to in clause (a) or the production to him of any document containing such ground, information or material.'

5. In Section 18 of the principal Act, for the words 'detained under this Act', the words and figure 'in respect of whom an order is made or purported to be made under Section 3' shall be substituted, and shall be deemed to have been substituted with effect from the 25th day of June, 1975.

6. Any act or thing done or purporting to have been done, before the 16th day of November, 1975, under the principal Act in respect of any person against whom an order of detention was made under that Act on or after the 25th day of June, 1975 or in respect of any such order of detention shall, for all purposes, be deemed to be as valid and effective as if the amendments made to the principal Act by Sections 2 and 3, and clause (a) of Section 4, of this Act had been in force at all material times.

513. During the pendency of these petitions under Article 226 of the Constitution of India before the High Courts for issue of writs of habeas corpus, it was contended on behalf of the Union of India and the States that in view of the Presidential Order dated June 27, 1975 under Article 359 suspending the right of all persons to move any court for the enforcement of the rights conferred by Articles 14, 21 and 22 of the Constitution, petitions for issue of writs of habeas corpus were not maintainable. Particular stress was laid upon the fact that the right to move the court for enforcement of the right under Article 21 had been suspended and as such no petition for a writ of habeas corpus could be proceeded with. The abovementioned Presidential Order was stated to be an absolute bar to the judicial scrutiny of the detention order. This contention did not find favour with the High Courts and they held that despite the said Presidential Order the petitions were maintainable and could be proceeded with. Although opinions were not unanimous on the point as to whether the High Courts should without examining the individual facts of each case go into the question of the judicial scrutiny and if so, what was the area of the judicial scrutiny, all the nine High Courts which dealt with the matter came to the conclusion that the Presidential Order did not create an absolute bar to the judicial scrutiny of the validity of the detention. The nine High Courts are :

#(1) Delhi (6) Rajasthan(2) Karnataka (7) Madhya Pradesh(3) Bombay (Nagpur Bench) (8) Andhra Pradesh(4) Allahabad (9) Punjab & Haryana(5) Madras##

514. In these appeals before us, learned Attorney-General on behalf of the appellants has drawn our attention to the difference in phraseology of the Presidential Order dated June 27, 1975 and the

earlier Presidential Orders dated November 3, 1962 and November 16, 1974 and has urged that in view of the absolute nature of the Presidential Order of June 27, 1975, petition for a writ of habeas corpus is not maintainable.

515. There can be no doubt that the Presidential Order dated June 27, 1975 has been worded differently compared to the earlier Presidential Orders which were issued under clause (1) of Article 359 and that there has been a departure from the pattern which used to be adopted while issuing such orders. The Presidential Order dated November 16, 1974 has already been reproduced earlier. Presidential Order dated November 3, 1962 issued under clause (1) of Article 359 of the Constitution read as under :

> ORDER
>
> New Delhi, the 3rd November, 1962 G. S. R. 1464-In exercise of the powers conferred by clause (2) of Article 359 of the Constitution, the President hereby declares that the right of any person to move any court for the enforcement of the rights conferred by Article 21 and Article 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of Article 352 thereof on the 26th October, 1962 is in force, if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder.
>
> On November 6, 1962, the rules framed under the ordinance by the Central Government were published. On November 11, 1962 the Presidential Order reproduced above was amended and for the words and figure "Article 21", the words and figures "Articles 14 and 21" were substituted. The Defence of India Ordinance was subsequently replaced by the Defence of India Act and the rules framed under the ordinance were deemed to have been framed under the Act. Perusal of the above Presidential Order of 1962 shows that what was suspended was the right of any person to move any court for the enforcement of rights conferred by Articles 14, 21 and 22. The suspension was, however, conditioned by the circumstance that such person had been deprived of such rights under the Defence of India Act or any rule or order made thereunder. It was plain that in case a detention order was made or any other action was taken not under the provisions of the Defence of India Act or any rule or order made thereunder, the same could not enjoy the protection of the Presidential Order under Article 359. Another effect of the Presidential Order was that as long as the proclamation of emergency was in force, the validity of the provisions of the Defence of India Act or the rules or orders made thereunder could not be assailed on the ground of being violative of Articles 14, 21 and 22. It is also clear that in view of Article 358, while a proclamation of emergency was in operation, nothing in Article 19 could have restricted the power of the State to make any law or to take any executive action which the State could but for the provisions contained in Part III was competent to make or to take.

516. Likewise, under the Presidential Order dated November 16, 1974 which has been already reproduced earlier, what was suspended was the right to move any court with respect to an order of detention which might have been made or which might be made thereafter under Section 3(1)(c) of the Maintenance of Internal Security Act as amended for the enforcement of rights conferred by Articles 14, 21 and clauses (4) to (7) of Article 22 of the Constitution. Proceedings pending in any

court for the enforcement of any of the aforesaid rights with respect to orders of detention made under Section 3(1)(c) too were suspended. It was plain from the language of the Presidential Order that there could be no suspension of the right mentioned in the Presidential Order if the detention order could not be shown to have been made under Section 3(1)(c) of MISA because an order not under Section 3(1)(c) was outside the Presidential Order.

517. The Presidential Order of 1962 under Article 359(1) of the Constitution came to be considered by this Court in the case of Makhan Singh v. State of Punjab ((1964) 4 SCR 797 : AIR 1964 SC 381 : (1964) 1 Cri LJ 269). Gajendragadkar, J. (as he then was) speaking for six out of the Bench of seven Judges of this Court observed while dealing with the effect of the Presidential Order on a petition of habeas corpus (pp. 828-829) :

> We have already seen that the right to move any court which is suspended by Article 359(1) and the Presidential Order issued under it is the right for the enforcement of such of the rights conferred by Part III as may be mentioned in the order. If in challenging the validity of his detention order, the detenu is pleading any right outside the rights specified in the order, his right to move any court in that behalf is not suspended, because it is outside Article 359(1) and consequently outside that Presidential Order itself. Let us take a case where a detenu has been detained in violation of the mandatory provisions of the Act. In such a case, it may be open to the detenu to contend that his detention is illegal for the reason that the mandatory provision of the Act have been contravened. Such a plea is outside Article 359(1) and the right of the detenu to move for his release on such a ground cannot be affected by the Presidential Order.

Take also a case where the detenu moves the court for a writ of habeas corpus on the ground this his detention has been ordered mala fide. It is hardly necessary to emphasise that the exercise of a power mala fide is wholly outside the scope of the Act conferring the power and can always be successfully challenged. It is true that a mere allegation that the detention is mala fide would not be enough : the detenu will have to prove the mala fides. But if the mala fides are alleged, the detenu cannot be precluded from substantiating his plea on the ground of the bar created by Article 359 (1) and the Presidential Order. That is another kind of plea which is outside the purview of Article 359(1).

It was further observed (p. 829) :

> It is only in regard to that class of cases falling under Section 491(1)(b) where the legality of the detention is challenged on grounds which fall under Article 359(1) and Presidential Order that the bar would operate. In all other cases falling under Section 491(1) the bar would be inapplicable and proceedings taken on behalf of the detenu will have to be tried in accordance with law. We ought to add that these categories of pleas have been mentioned by us by way of illustrations, and so, they should not be read as exhausting all the pleas which do not fall within the purview of the Presidential Order.

There is yet another ground on which the validity of the detention may be open to challenge. If a detenu contends that the operative provision of the law under which he is detained suffers from the vice of excessive delegation and is, therefore, invalid, the plea thus raised by the detenu cannot at the threshold be said to be barred by the Presidential Order. In terms, it is not a plea which is

relatable to the fundamental right specified in the said order. It is a plea which is independent of the said rights and its validity must be examined.

In the case of State of Maharashtra v. Prabhakar Pandurang Sangzgiri ((1966) 1 SCR 702 : AIR 1966 SC 424 : 1966 Cri LJ 311) Subba Rao, J. (as he then was) speaking for the Constitution Bench of this Court observed (p. 705) :

> Article 358 of the Constitution suspends the provisions of Article 19 of Part III of the Constitution during the period the proclamation of emergency is in operation; and the order passed by the President under Article 359 suspended the enforcement, inter alia, of Article 21 during the period of the said emergency. But the President's Order was a conditional one. In effect it said that the right to move the High Court or the Supreme Court remained suspended if such a person had been deprived of his personal liberty under the Defence of India Act, 1962, or any rule or order made thereunder. If a person was deprived of his personal liberty not under the Act or a rule or order made thereunder but in contravention thereof, his right to move the said courts in that regard would not be suspended. The question, therefore, in this case is whether the first respondent's liberty has been restricted in terms of the Defence of India Rules whereunder he was detained. If it was in contravention of the said Rules he would have the right to approach the High Court under Article 226 of the Constitution.

Similar view was expressed in the case of Dr. Ram Manohar Lohia v. State of Bihar ((1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608). Sarkar, J. (as he then was) in that case observed that where a person was detained in violation of the mandatory provisions of the Defence of India Act, his right to move the court was not suspended. Hidayatullah and Bachawat, JJ. referred to the fact that the Presidential Order did not say that even if a person was proceeded against in breach of the Defence of India Act or the Rules, he could not move the court or complain that the Act and the Rules under colour of which some action was taken did not warrant it. The Presidential Order was held to have not intended to condone an illegitimate enforcement of the Defence of India Act. Raghubar Dayal, J. held that the Court could go into the question as to whether the District Magistrate exercised the power of detention under the Defence of India Rules bona fide and in accordance with the rules. Mudholkar, J. observed that if a detenu contends that the order, though it purports to be under Rule 30(1) of the Defence of India Rules, was not competently made, this Court had a duty to enquire into the matter. Sarkar, Hidayatullah, Mudholkar and Bachawat, JJ., on consideration of the material before them found that as the detention order had been made with a view to prevent the detenu from acting in a manner prejudicial to the maintenance of law and order and not public order, as contemplated by Rule 30, the detention order was not in conformity with law. The petitioner in that case was accordingly directed to be set at liberty.

518. The observations in the cases referred to above show that the validity of the detention orders could be assailed despite the Presidential Orders of 1962 and 1974 under Article 359 in case the right relied upon was to one covered by these Presidential Orders. The protection a afforded by those Presidential Orders was not absolute : it was conditional and confined to ruling out the challenge to detention orders and other actions taken under the provisions mentioned in those Presidential Orders on the score of contravention of the articles specified in these orders. If the detention of a detenu was not in accordance with the provisions mentioned in the Presidential Orders, the Presidential Orders did not have the effect of affording protection to the detention order and it was permissible to challenge the validity of the detention on the ground that it had not been

made under the specified provisions but in contravention of those provisions.

519. We may now deal with the Presidential Order dated June 27, 1975 with which we are concerned. Unlike the Presidential Orders under clause (1) of Article 359 issued earlier, this Presidential Order makes no reference to any detention order made under any specified provision. It seeks to impose a blanket suspension of the right of any person, including a foreigner, to move any court for the enforcement of the right conferred by Articles 14, 21 and 22 of the Constitution and of all proceedings pending in any court for the enforcement of the abovementioned rights for the period during which the proclamation of emergency is in force. The observations which were made by this Court in the cases referred to above in the context of the phraseology of the earlier Presidential Orders of 1962 and 1974, namely, the detention order made under specified provisions cannot now be relied upon while construing the ambit of the Presidential Order of June 27, 1975.

520. The difference in phraseology of the Presidential Order dated June 27, 1975 and that of the earlier Presidential Orders would not, however, justify the conclusion that because of the new Presidential Order dated June 27, 1975 a detention order need not comply with the requirements of the law providing for preventive detention. Such a detention order would still be liable to be challenged in a court on the ground that it does not comply with the requirement of law for preventive detention if ground for such challenge be permissible in spite of and consistently with the new Presidential Order. The effect of the change in phraseology would only be that such observations which were made in the cases mentioned above in the context of the language of the earlier Presidential Orders cannot now be relied upon. Reliance, however, can still be placed upon the observations made in those cases which were not linked with the phraseology of the earlier Presidential Orders.

521. Question then arises as to what is the effect of the suspension of the right of a person to move any court for the enforcement of rights conferred by Articles 14, 21 and 22 of the Constitution. One obvious result of the above is that no one can rely upon Articles 14, 21 and 22 with a view to seek relief from any court. According to the stand taken by the learned Attorney General, the effect of the suspension of the right of a person to move any court for the enforcement of the right conferred by Article 21 is that even if the order for detention has been made without the authority of law, no redress can be sought from the court against such detention order. Article 21 of the Constitution reads as under :

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

It is urged that Article 21 is the sole repository of one's right to life or personal liberty. The moment the right to move any court for enforcement of Article 21 is suspended, no one can, according to the submission, complain to the court of deprivation of life or personal liberty for any redress sought from the court on that score would be enforcement of Article 21. Petition under Article 226 for the issue of a writ of habeas corpus, it is contended by learned Attorney General, is essentially a petition to enforce the right of personal liberty and as the right to move any court for the enforcement of the right conferred by Article 21 is suspended, no relief can be granted to the petitioner in such petition.

522. In order to assess the force of the above argument, it may be necessary to give the background and the history of Article 21. In the original draft of the Indian Constitution, in the article which now stands as Article 21 the words used were "in accordance with due process of law" instead of the words "according to procedure established by law". The concept of expression "due process of law"

or its equivalent "law of the land" traces its lineage far back into the beginning of the 13th century A. D. The famous 39th chapter of the Magna Carta provides that no free man shall be taken or imprisoned or disseized, or outlawed or exiled or in any way destroyed; nor shall we go upon him nor send upon him but by the lawful judgment of his peers and by the law of the land.

Magna Carta as a charter of English liberty was confirmed by successive English monarchs. It was in one of these confirmations (21 Ed. III, Chap. 3) known as "Statute of Westminster of the liberties of London" that the expression "due process of law" appears to have been used for the first time. Neither of the expressions "due process of law" or "law of the land" was explained or defined in any of the documents, but on the authority of Sir Edward Coke it may be said that both the expressions have the same meaning. In substance, they guaranteed that persons should not be imprisoned without proper indictment and trial by peers, and that property should not be seized except in proceedings conducted in due form in which the owner or the person in possession should have an opportunity to show cause why seizure should not be made. The expression "due process of law" came to be a part of the U. S. Constitution by the Fifth Amendment which was adopted in 1791 and which provided that "no person shall ..... be deprived of life, liberty or property without due process of law". Similar expression was used in the Fourth Amendment in 1868. It has been said that few phrases in the law are so elusive of exact apprehension as "due process of law". The United States Supreme Court has always declined to give a comprehensive definition of it and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions as they arise. The expression "due process of law", as used in the U. S. Constitution, has been taken to impose a limitation upon the powers of the Government, legislative as well as executive and judicial. Applied in England as protection against executive usurpation and royal tyranny, in America it became a bulwark against arbitrary legislation."Due process of law", according to Cooley means in each particular case such an exercise of the powers of Government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. (Constitutional Limitations, Vol. II, p. 741)

523. Till about the middle of the 19th century, due process clause was interpreted as a restriction upon procedure, and particularly the judicial procedure, by which the Government exercises its power. Principally it related to the procedure by which persons were tried for crimes and guaranteed to accused persons the right to have a fair trial in compliance with well established criminal proceedings. The same principle applied to the machinery or proceedings by which property rights were adjudicated and by which the powers of eminent domain and taxation were exercised. During this period it was not considered to have any bearing on substantive law at all. Subsequently view came to be accepted that the concept or due process of law protected rights of life, liberty and property. This change in judicial thinking was influenced in a great measure by the industrial development leading to accumulation of large capital in the hands of industrialists and the emergence of a definite labouring class. What constituted legitimate exercise of the powers of legislation now came to be a judicial question and no statute was valid unless it was reasonable in the opinion of the court. The U. S. Supreme Court laid stress upon the word "due" which occurs before and qualifies the expression "process of law"."Due" means "what is just and proper" according to the circumstances of a particular case. The word introduces a variable element in the application of the doctrine, for what is reasonable in one set of circumstances may not be so in another set of circumstances. The requirement of due process clause as a substantial restriction on government control is also now becoming a thing of the past and the rule is being restricted more and more to its original procedural aspect (see observations of Mukherjea, J. in the case of A. K. Gopalan).

524. At the time the Constitution was being drafted, the Constitutional Adviser Mr. B. N. Rau had discussions with U. S. constitutional experts some of whom expressed the opinion that power of review implied in due process clause was not only undemocratic because it gave the power of vetoing legislation to the judges, but also threw an unfair burden on the Judiciary. This view was communicated by Mr. Rau to the Drafting Committee which thereupon substituted the words "except according to procedure established by law" for the words "due process of law". In dropping the words "due process of law", the framers of our Constitution prevented the introduction of elements of vagueness, uncertainty and changeability which had grown round the due process doctrine in the United States. The words "except according to procedure established by law" were taken from Article 31 of the Japanese Constitution, according to which no person shall be deprived of life or liberty nor shall any criminal liability be imposed, except according to procedure established by law.

The article is also somewhat similar to Article 40(4)(i) of Irish Constitution, according to which "no person shall be deprived of his personal liberty save in accordance with law". It was laid down in Gopalan's case by the majority that the word "law" has been used in Article 21 in the sense of State-made law and not as an equivalent of law in the abstract or general sense embodying the principles of natural justice. "The procedure established by law" was held to mean the procedure established by law made by the State, that is to say, the Union Parliament or the legislatures of the States. Law, it was also observed by Mukherjea, J., meant a valid and binding law under the provisions of the Constitution and not one infringing fundamental rights.

525. The effect of the suspension of the right to move any court for the enforcement of the right conferred by Article 21, in my opinion, is that when a petition is filed in a court, the court would have to proceed upon the basis that no reliance can be placed upon that article for obtaining relief from the court during the period of emergency. Question then arises as to whether the rule that no one shall be deprived of his life or personal liberty without the authority of law still survives during the period of emergency despite the Presidential Order suspending the right to move any court for the enforcement of the right contained in Article 21. The answer to this question is linked with the answer to the question as to whether Article 21 is the sole repository of the right to life and personal liberty. After giving the matter my earnest consideration, I am of the opinion that Article 21 cannot be considered to be the sole repository of the right to life and personal liberty. The right to life and personal liberty is the most precious right of human beings in civilised societies governed by the rule of law. Many modern Constitutions incorporate certain fundamental rights, including the once relating to personal freedom. According to Blackstone, the absolute rights of Englishmen were the rights of personal security, personal liberty and private property. The American Declaration of Independence (1776) states that all men are created equal, and among their inalienable rights are life, liberty, and the pursuit of happiness. The Second Amendment to the U. S. Constitution refers inter alia to security of person, while the Fifth Amendment prohibits inter alia deprivation of life and liberty without due process, of law. The different Declarations of Human Rights and fundamental freedoms have all laid stress upon the sanctity of life and liberty. They have also given expression in varying words to the principle that no one shall be deprived of his life or liberty without the authority of law. The International Commission of Jurists, which is affiliated to UNESCO, has been attempting with considerable success to give material content to "the rule of law", an expression used in the Universal Declaration of Human Rights. One of its most notable achievements was the Declaration of Delhi, 1959. This resulted from a Congress held in New Delhi attended by jurists from more than 50 countries, and was based on a questionnaire circulated to 75,000 lawyers."Respect for the supreme value of human personality" was stated to be the basis of all law (see page 21 of the Constitutional and Administrative Law by O. Hood Phillips, 3rd Ed.).

526. Freedom under law, it may be added, is not absolute freedom. It has its own limitations in its own interest, and can properly be described as regulated freedom. In the words of Ernest Barker, (i) the truth that every man ought to be free has for its other side the complementary and consequential truth that no man can be absolutely free; that (ii) the need of liberty for each is necessarily qualified and conditioned by the need of liberty for all; that (iii) liberty in the State, or legal liberty, is never the absolute liberty of all; that (iv) liberty within the State is thus a relative and regulated liberty; and that (v) a relative and regulated liberty; actually operative and enjoyed, is a liberty greater in amount than absolute liberty could ever be-if indeed such liberty could ever exist, or even amount to anything more than nothing at all.

527. Rule of law is the antithesis of arbitrariness. Plato believed that if philosophers were kings or kings philosophers government by will would be intrinsically superior to government by law, and he so proclaimed in his Republic. Experience eventually taught him that this ideal was not obtainable and that if ordinary men were allowed to rule by will alone the interests of the community would be sacrificed to those of the ruler. Accordingly, in the Laws be modified his position and urged the acceptance of the"second best", namely government under law. Since then the question of the relative merits of rule by law as against rule by will has been often debated. In the aggregate the decision has been in favour of rule by law. On occasions, however, we have slipped back into government by will only to return again, sadder and wiser men, to Plato's "second best" when the hard facts of human nature demonstrated the essential egoism of men and truth of the dictum that all power corrupts and absolute power corrupts absolutely. Bracton's dicta that if the king has no bridle one ought to be put upon him, and that although the king is under no man he is under God and the law; Fortescue's insistence that the realm of England is a reginem politicium et regale and hence limited by law; Coke's observation that "Magna Carta is such a fellow that he will have no sovereign", these are but a few of the beacons lighting the way to the triumph of the rule of law (see pages 3-6 of the Rule of Law by H. Malcolm Macdonald and others). Rule of law is now the accepted norm of all civilised societies. Even if there have been deviations from the rule of law, such deviations have been covert and disguised for no government in a civilized country is prepared to accept the ignominy of governing without the rule of law. As observed on page 77 of Constitutional Law by Wade and Phillips, 8th Ed., the rule of law has come to be regarded as the mark of a free society. Admittedly its content is different in different countries, nor is it to be secured exclusively through the ordinary courts. But everywhere it is identified with the liberty of the individual. It seeks to maintain a balance between the opposing notions of individual liberty and public order. In every State the problem arises of reconciling human rights with the requirements of public interest. Such harmonising can only attained by the existence of independent courts which can hold the balance between citizen and State and compel government to conform to the law.

528. Sanctity of life and liberty was not something new when the Constitution was drafted. It represented a facet of higher values which mankind began to cherish in its evolution from a state of tooth and claw to a civilized existence. Likewise, the principle that no one shall be deprived of his life and liberty without the authority of law was not the gift of the Constitution. It was a necessary corollary of the concept relating to the sanctity of life and liberty, it existed and was in force before the coming into force of the Constitution. The idea about the sanctity of life and liberty as well as the principal that no one shall be deprived of his life and liberty without the authority of law re essentially two facets of the same concept. This concept grew and acquired dimensions in response to the inner urges and nobler impulses with the march of civilisation. Great writers and teachers, philosophers and political thinker nourished and helped in the efflorescence of the concept by rousing the conscience of mankind and by making it conscious of the necessity of the concept as necessary social discipline in self-interest and for orderly existence. According even to the theory of

social compact, many aspects of which have now been discredited, individuals have surrendered a part of their theoretically unlimited freedom in return for the blessings of the government. Those blessings include governance in accordance with certain norms in the matter of life and liberty of the citizens. Such norms take the shape of the rule of law. Respect for law, we must bear in mind, has a mutual relationship with respect for government. Erosion of the respect for law, it has accordingly been said, affects the respect for the government. Government under the law means, as observed by Macdonald, that the power to govern shall be exercised only under conditions laid down in Constitutions and laws approved by either the people or their representatives. Law thus emerges as a norm limiting the application of power by the government over the citizen or by citizens over their fellows. Theoretically all men ar equal before the law and are equally bound by it regardless of their status, class, office or authority. At the same time that the law enforces duties it also protects rights, even against the sovereign. Government under law thus seeks the establishment of an ordered community in which the individual, aware of his rights and duties, comprehends the area of activity within which, as a responsible and intelligent person, he may freely order his life, secure from interference from either the government or other individuals (see Rule of Law, page 6). To quote further from Professor Macdonald :

> It is clear enough that high echelon administrators are understandably impatient with the restraints imposed upon them by the traditional concept of the rule of law as developed by Dicey. Administrators deal with implementation of highly technical and complex matters involving the immediate interests of many citizens. To accomplish this they are granted wide discretion in the use of administrative power to effectuate broad policies laid down by the legislators. It is natural that they should desire to have the conflicts which arise as the result of the exercise of their discretion adjudicated by tribunals composed of experts acquainted with the details of the matters at issue, rather than by judges trained only in the law. Hence their resistance to judicial review of administrative 'finding of fact' as opposed to 'finding of law'. The very things which a court of law prizes - rules of evidence, common law procedures, even due process - frequently appear to the administrators as obscurantist devices employed by those who oppose the very principle of the policy he is attempting to effectuate. Often, secretly if not openly, the administrator considers his policy to be the incarnation of the best interests of the people, or at lest of their best interests if they really understood them, and hence considers himself as arrayed on the side of progress and light against the dark forces of reaction.

Thus our 'wonderland of bureaucracy', as Beck has called it, has sought autonomy from the traditional rule of courts and law. If it should succeed we should then indeed be confronted with a vital segment of governmental power which would have escaped from legal control and become arbitrary in its acts. To prevent this we have subjected the acts of administrators to challenge in the courts on the basis of ultra vires, and provided for judicial review of administrative tribunals' finding of law. (see ibid, page 8)

529. To use the words of Justice Brandeis (Olmstead v. United States, (1928) 277 US 438) with some modification, experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evilminded persons Greatest danger to liberty lies in insidious encroachment by men of zeal, well - meaning but lacking in due deference for the rule of law.

530. Even in the absence of Article 21 in the Constitution, the State has got no power to deprive a

person of his life or liberty without the authority of law. This is the essential postulate and basic assumption of the rule of law and not of men in all civilised nations. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning. The principle that no one shall be deprived of his life or liberty without the authority of law is rooted in the consideration that life and liberty are priceless possessions which cannot be made the plaything of individual whim and caprice and that any act which has the effect of tampering with life and liberty must receive sustenance from and sanction of the laws of the land. Article 21 incorporates an essential aspect of that principle and makes it part of the fundamental rights guaranteed in Part III of the Constitution. It does not, however, follow from the above that if Article 21 had not been drafted and inserted in Part III, in that event it would have been permissible for the State to deprive a person of his life or liberty without the authority of law. No case has been cited before us to show that before the coming into fore of the Constitution or in countries under rule of law where there is no provision corresponding to Article 21, a claim was ever sustained by the courts that the State can deprive a person of his life or liberty without the authority of law. In fact, any suggestion to such a claim was unequivocally repelled. In the case of James Sommersett ((1772) 16 Cri Pract 289) Lord Mansfield dealt with a case of a negro named Sommersett, who was being taken in a ship to Jamaica for sale in a slave market. When the ship anchored at the London port, a habeas corpus petition was presented by some Englishmen who were moved by the yelling and cries of Sommersett. In opposition to the petition the slave trader took the plea that there was no law which prohibited slavery. Lord Mansfield while repelling this objection made the following observation in respect of slavery which is one of the worst forms of deprivation of personal freedom :

> It is so odious that nothing can be suffered to support it but positive law : whatever inconvenience, therefore, may follow from this decision, I cannot say this case is allowed or approved by the law of England, and therefore the black must be discharged.

In another case, Fabrigas v. Mostyn (1 Crowp 161) Lord Mansfield observed on page 173 :

> To lay down in an English court of justice that a Governor acting by virtue of Letters Patent, under the Great Seal, is accountable only to God and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect His Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.

The above observations were relied upon in the matter of Ameer Khan (6 Beng LR 392). I may also refer to the observation of Lord Atkin in the case of Eshugbayi Eleko v. Officer Administering the Government of Nigeria (AIR 1931 PC 248 : 1931 ALJ 466) :

> In accordance with British jurisprudence, no member of the Executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the Executive.

The above rule laid down in Eleko's case was followed by the High Courts in India before the coming into force of the Constitution in Prabhakar Kesheo Tare v. Emperor (AIR 1943 Nag 26 : ILR 43 Nag 154 : 44 Cri LJ 345); Vimlabai Deshpande v. Emperor (AIR 1945 Nag 8 : ILR 1945

Nag 6); Jitendranath Ghosh v. Chief Secretary to the Government of Bengal (ILR 60 Cal 364 : AIR 1932 Cal 753); and In re Banwari Lal Roy (48 CWN 766). The rule laid down in Eleko's case was also followed by the Constitution Benches of this Court after the coming into force of the Constitution in the cases of Bidi Supply Co. v. Union of India (1956 SCR 267 : AIR 1956 SC 479 : 29 ITR 717) and Basheshar Nath v. Commissioner of Income-tax, Delhi & Rajasthan (1959 Supp 1 SCR 528 : AIR 1959 SC 149 : 35 ITR 190).

531. I am unable to subscribe to the view that when right to enforce the right under Article 21 is suspended, the result would be that there would be no remedy against deprivation of a person's life or liberty by the State even though such deprivation is without the authority of law or even in flagrant violation of the provisions of law. The right not to be deprived of one's life or liberty without the authority of law was not the creation of the Constitution. Such right existed before the Constitution came into force. The fact that the framers of the Constitution made an aspect of such right a part of the fundamental rights did not have the effect of exterminating the independent identity of such right and of making Article 21 to be the sole repository of that right. Its real effect was to ensure that a law under which a person can be deprived of his life or personal liberty should prescribe a procedure for such deprivation or, according to the dictum laid down by Mukherjea, J. in Gopalan's case, such law should be a valid law not violative of fundamental rights guaranteed by Part III of the Constitution. Recognition as fundamental right of one aspect of the pre-constitutional right cannot have the effect of making things less favourable so far as the sanctity of life and personal liberty is concerned compared to the position if an aspect of such right had not been recognised as fundamental right because of the vulnerability of fundamental rights accruing from Article 359. I am also unable to agree that in view of the Presidential Order in the matter of sanctity of life and liberty, things would be worse off compared to the state of law as it existed before the coming into force of the Constitution.

532. The case of Dhirubha Devisingh Gohil v. State of Bombay ((1955) 1 SCR 691 : AIR 1955 SC 47) upon which reliance has been placed by learned Attorney General cannot be of much assistance to him. In that case this Court held that the validity of the Bombay Taluqdari Tenure Abolition Act, 1949 cannot be questioned on the ground that it takes away or abridges the fundamental rights conferred by the Constitution of India in view of the fact that Act had been inserted in the Ninth Schedule to the Constitution. This Court also repelled the contention that the said Act was violative of Section 229 of the Government of India Act, 1935 because, in the opinion of the court, the right secured by Section 229 was lifted into the formal category of a fundamental right. The principle laid down in that case cannot be invoked in a case like the present wherein the area covered by the right existing since before the Constitution is wider than the area covered by the fundamental right and the fundamental right deals with only an aspect of such pre-existing right. Moreover, the correctness of the view taken in the above case, in my opinion, is open to question in view of the later decision of Makhan Singh (supra) decided by a Bench of seven Judges wherein it has been observed on page 821 that after the coming into force of the Constitution, a detenu has two remedies, one under Article 226 or Article 32 of the Constitution and another under Section 491 of the Code of Criminal Procedure. Makhan Singh's case, as discussed elsewhere, shows that the remedy under an earlier statutory provision would not get obliterated because of the identical remedy by a subsequent constitutional provision and that the two can coexist without losing their independent identity.

533. Preventive detention, though not strictly punishment, is akin to punishment, because of the evil consequences of being deprived on one's liberty. No one under our laws can be deprived of his life or liberty without the authority of law. This would be evident from the fact that if a person without the authority of law takes another person's life, he would normally be guilty of the offence of

culpable homicide. Likewise, if a person deprives another of his liberty by confining him, he would in the absence of any valid justification, be guilty of wrongful confinement. It is for that reason that courts have insisted upon the authority of law for a public servant to take away someone's life or liberty. An executioner carrying out the sentence of death imposed by the court would not commit the offence of homicide, because he is executing the condemned man in obedience to a warrant issued by a court having jurisdiction in accordance with the law of the land. Likewise, a jailor confining a person sentenced to imprisonment is not guilty of the offence of wrongful confinement. The principle that no one shall be deprived of his life or liberty without the authority of law stems not merely from the basic assumption in every civilised society governed by the rule of law of the sanctity of life and liberty, it flows equally from the fact that under our penal laws no one is empowered to deprive a person of his life or liberty without the authority of law.

534. The fact that penal laws of India answer to the description of the word "law", which has been used in Article 21 would not militate against the inference that Article 21 is not the sole repository of the right to life or personal liberty and that the principle that no one shall be deprived of his life or personal liberty without the authority of law flows from the penal laws of India. Nor is it the effect of Article 21 that penal laws get merged in Article 21 because of the fact that they constitute "law" as mentioned in Article 21, for were it so the suspension of the right to move a court for enforcement of fundamental right contained in Article 21 would also result in suspension of the right to move any court for enforcement of penal laws.

535. It has been pointed out above that even before the coming into force of the Constitution, the position under the common law both in England and in India was that the State could not deprive a person of his life and liberty without the authority of law. The same was the position under the penal laws of India. It was an offence under the Indian Penal Code, as already mentioned, to deprive a person of his life or liberty unless such a course was sanctioned by the laws of the land. An action was also maintainable under the law of torts for wrongful confinement in case any person was deprived of his personal liberty without the authority of law. In addition to that, we had Section 491 of the Code of Criminal Procedure which provided the remedy of habeas corpus against detention without the authority of law. Such laws continued to remain in force in view of Article 372 after the coming into force of the Constitution. According to that article, notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force, therein until altered or repealed or amended by a competent legislature or other competent authority. The law in force, as observed by the majority of the Constitution Bench in the case of Director of Rationing and Distribution v. Corporation of Calcutta ((1961) 1 SCR 158 : AIR 1960 Sc 1355 : 1960 Cri LJ 1684), include not only the statutory law but also customs or usage having the force of law as also the common law of England which was adopted as the law of the country before the coming into force of the Constitution. The position thus seems to be firmly established at the time the Constitution came into force, the legal position was that no one could be deprived of his life or liberty without the authority of law.

536. It is difficult to accede to the contention that because of Article 21 of the Constitution, the law which was already in force that no one could be deprived of his life or liberty without the authority of law was obliterated and ceased to remain in force. No rule of construction or interpretation warrants such an inference. Section 491 of the Code of Criminal Procedure continued to remain an integral part of that Code despite the fact that the High Courts were vested with the power of issuing writs of habeas corpus under Article 226. No submission was ever advanced on the score that the said provision had become a dead letter or unenforceable because of the fact that Article 226 was

made a part of the Constitution. Indeed, in the case of Makhan Singh (supra) Gajendragadkar, J. speaking for the majority stated that after the coming into force of the Constitution, a party could avail of either the remedy of Section 491 of the Code of Criminal Procedure or that of Article 226 of the Constitution. The above observations clearly go to show that constitutional recognition of the remedy of writ of habeas corpus did not obliterate or abrogate the statutory remedy of writ of habeas corpus. Section 491 of the Code of Criminal Procedure continued to be a part of that Code till that Code was replaced by the new Code. Although the remedy of writ of habeas corpus is not now available under the new Code of Criminal Procedure, 1973, the same remedy is still available under Article 226 of the Constitution.

537. Our attention has been invited to Section 18 of the Maintenance of Internal Security Act as amended. According to that section, no person, including a foreigner, in respect of whom an order is made or purported to be made under Section 3 shall have any right to personal liberty by virtue of natural law or common law, if any. This section would not, in my opinion, detract from my conclusion that Article 21 is not the sole repository of the right to personal liberty. It has been pointed out above that the principle that no one shall be deprived of his life and personal liberty without the authority of laws follows not merely from common law, it flows equally from statutory law like the penal law in force in India. The above principle, as would appear from what has been discussed elsewhere, is also an essential facet of the rule of law. Section 18, therefore, cannot be of much assistance to the appellants. I am also unable to subscribe to the view that Section 18 would have the effect of enlarging the ambit of the power of the detaining authority for the purpose of passing an order for detention. There has been, it needs to be emphasised, no amendment of Section 3 of the Act. Section 18 cannot be construed to mean that even if an order for detention is made on grounds not warranted by Section 3 of the Act, it shall be taken to be an order under Section 3 of the Act. Apart from the fact that such an inference is not permissible on the language of Section 18, the acceptance of this view would also render the validity of Section 18 open to question on the ground that it suffers from the vice of excessive delegation of legislative power. The legislature is bound to lay down the legislative policy by prescribing the circumstances in which an order for detention can be made. It is not permissible for the legislature to confer a power of detention without laying down guidelines and prescribing the circumstances in which such order should be made. To do so would be tantamount to abdication of legislative function for in such an event it would be open to the detaining authority to detain a person on any ground whatsoever.

538. I agree with the learned Attorney General that if we are to accept his argument about the scope of the Presidential Order of June 27, 1975, in that event we have to accept it in its entirety and go the whole hog; there is no halfway house in between. So let us examine the consequence of the acceptance of the above argument. This would mean that if any official, even a head constable of police, capriciously or maliciously, arrests a person and detains him indefinitely without any authority of law, the aggrieved person would not be able to seek any relief from the courts against such detention during the period of emergency. This would also mean that it would not be necessary to enact any law on the subject and even in the absence of any such law, if any official for reasons which have nothing to do with the security of State or maintenance of public order, but because of personal animosity, arrests and puts behind the bar and person or a whole group or family of persons, the aggrieved person or persons would not be able to seek any redress from a court of law. The same would be the position in case of threat of deprivation or even actual deprivation of life of a person because Article 21 refers to both deprivation of life as well as personal liberty. Whether such things actually come to pass is not the question before us, it is enough to state that all these are permissible consequences from the acceptance of the contention that Article 21 is the sole repository of the right to life and personal liberty and that consequent upon the issue of the Presidential Order,

no one can approach any court and seek relief during the period of emergency against deprivation of life or personal liberty. In other words the position would be that so far as executive officers are concerned, in matters relating to life and personal liberty of citizens, they would not be governed by any law, they would not be answerable to any court and they would be wielding more or less despotic powers.

539. To take another illustration. Supposing the Presidential Order under Article 359(1) were to mention Article 21 but not Article 22. The acceptance of the above submission advanced on behalf of the applicants would mean that if the State does not release a detenu despite the opinion of the Advisory Board that there is no sufficient cause for his detention and thus keeps him in detention in flagrant violation of the provisions of Article 22, habeas corpus petition would be maintainable and this would be so even though Article 12 itself is a fundamental right.

540. The right to move a court for enforcement of a right under Article 19 has now been suspended by the President under an order issued under Article 359(1). The effect of that, on a parity of reasoning advanced on behalf of the appellant would be that one can file a suit during the period of emergency against the State for recovery of property or money (which is a form of property) because such a suit, except in some contingencies, would be a suit to enforce the right contained in Article 19.

541. Not much argument is needed to show that if two constructions of Presidential Order were possible, one leading to startling results and the other not leading to such results, the court should lean in favour of such construction as would not lead to such results.

542. Equally well established is the rule of construction that if there be a conflict between the municipal law on one side and the international law or the provisions of any treaty obligations on the other, the courts would give effect to municipal law. If, however, two constructions of the municipal law are possible, the courts should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law or treaty obligations. Every statute, according to this rule, is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations, or the established rules of international law, and the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language. But if the language of the statute is clear, it must be followed notwithstanding the conflict between municipal and international law which results (see page 183 of Maxwell on the interpretation of Statutes, Twelfth Edition). As observed by Oppenheim's International Law, although municipal courts must apply municipal law even if it conflicts with the law of nations, there is a presumption against the existence of such a conflict. As the law of nations in based upon the common consent of the different States, it is improbable that an enlightened State would intentionally enact a rule conflicting with the law of nations. A rule of municipal law, which ostensibly seems to conflict with the law of nations, must, therefore, if possible, always be so interpreted as to avoid such conflict (see Vol. I, pages 45-46). Lord Denning gave expression to similar view in the case of Corocraft Ltd. v. Pan American Airways Inc ((1969) 1 ALL ER 80). when he observed :

> The Warsaw Convention is an international convention which is binding in international law on all the countries who have ratified it : and it is the duty of these courts to construe our legislation so as to be in conformity with international law and not in conflict with it.

The rule about the construction of municipal law also holds good when construing the provisions of the Constitution as would appear from International Law by Fenwick, Third Edition, page 90, wherein it is observed :

> But while in the case of a direct conflict between national and international law, the rule of national law will of necessity take priority until changed to conform to the international obligations of the State, there are numerous cases in which the provisions of the national Constitution or the provisions of a particular legislative Act are not so explicit but that they may be interpreted so as to enable the executive and the judicial agencies of the State to act in accordance with the obligations of international law.

According to Article 51 of our Constitution, the State shall endeavor to inter alia foster respect for international law and treaty obligations in the dealings of organised peoples with one another. Relying upon that article, Sikri, C. J. observed in the case of Kesavananda Bharati v. State of Kerala (1973 Supp SCR 1 : (1973) 4 SCC 225) : [SCC p. 333, para 151]

> It seems to me that, in view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India.

Articles 8 and 9 of the Universal Declaration of Human Rights in respect of which resolution was passed by the United Nations and was supported by India read as under :

> ARTICLE 8
>
> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.
>
> ARTICLE 9
>
> No one shall be subjected to arbitrary arrest, detention or exile.

543. While dealing with the Presidential Order under Article 359(1), we should adopt such a construction as would, if possible, not bring it in conflict with the above Articles 8 and 9. From what has been discussed elsewhere, it is plain that such a construction is not only possible, it is also pre-eminently reasonable. The Presidential Order, therefore, should be so construed as not to warrant arbitrary arrest or to bar right to an effective remedy by competent national tribunals for acts violating basic right of personal liberty by law.

544. It has been argued that suspending the right of a person to move any court for the enforcement of right to life and personal liberty is done under a constitutional provision and therefore it cannot be said that the resulting situation would mean the absence of the rule of law. This argument, in my opinion, cannot stand close scrutiny for it tries to equate illusion of the rule of law with the reality of rule of law. Supposing a law is made that in the matter of the protection of life and liberty, the administrative officers would not be governed by any law and that it would be permissible for them to deprive a person of life and liberty without any authority of law. In one sense, it might in that event be argued that even if lives of hundreds of persons are taken capriciously and maliciously without the authority of law, it is enforcement of the above enacted law. As observed by Friedmann

on page 500 of Law in a Changing Society, 2nd Ed., in a purely formal sense, any system of norm based on a hierarchy of orders, even the organised mass murders of Nazi regime qualify as law. This argument cannot, however, disguise the reality of the matter that hundreds of innocent lives have been taken because of the absence of rule of law. A state of negation of rule of law would not cease to be such a state because of the fact that such a state of negation of rule of law has been brought about by statute. Absence of rule of law would nevertheless be absence of rule of law even though it is brought about by a law to repeal all laws. In the words of Wade, government under the rule of law demands proper legal limits on the exercise of power. This does not mean merely that acts of authority must be justified by law, for if the law is wide enough it can justify a dictatorship based on the tyrannical but perfectly legal principle quod principi placuit legis habet vigorem. The rule of law requires something further. Powers must first be approved by Parliament, and must then be granted by Parliament within definable limits (See Administrative Law, Third Edition, page 46). It is no doubt true that Dicey's concept of rule of law has been criticised by subsequent writers since it equates the rule of law with the absence not only of arbitrary but even of wide discretionary power. The following reformulation of Dicey's ideas as applicable to modern welfare State given by H. W. Jones eliminates the equation of arbitrary and wide discretionary powers :

> There are, I believe, ideas of universal validity reflected in Dicey's 'three meanings' of the rule of law .... (1) in a decent society it is unthinkable that government, or any officer of government, possesses arbitrary power over the person or the interests of the individual; (2) all members of society, private persons and governmental official alike, must be equally responsible before the law; and (3) effective judicial remedies are more important than abstract constitutional declarations in securing the rights of the individual against encroachment by the State (See Law in a Changing Society by Friedmann, 2nd Ed., page 501)

545. One of the essential attributes of the rule of law is that executive action to the prejudice of or detrimental to the right of an individual most have the sanction of some law. This principle has now been well settled in a chain of authorities of this Court.

546. In the case of Rai Sahib Ram Jawaya Kapur v. State of Punjab ((1955) 2 SCR 225 : AIR 1955 SC 549) Mukherjea, C. J. speaking for the Constitution Bench of this Court observed (p. 248) :

> Specific legislation may indeed be necessary if the Government require certain powers in addition to what they possess under ordinary law, in order to carry on the particular trade or business. Thus when it is necessary to encroach upon private rights in order to enable the Government to carry on their business, a specific legislation sanctioning such course would have to be passed.

547. The above attribute of the rule of law has been specially highlighted in the decision of this Court in the case of State of Madhya Pradesh v. Thakur Bharat Singh ((1967) 2 SCR 454 : AIR 1967 SC 1170). In that case the State Government made an order under Section 3 of the Madhya Pradesh Public Security Act, 1959, directing that the respondent (i) shall not be in any place in Raipur district, (ii) shall immediately proceed to and reside in a named town, and (iii) shall report daily to a police station in that town. The respondent challenged the order by a writ petition under Articles 226 and 227 of the Constitution on the ground inter alia, that Section 3 infringed the fundamental rights guaranteed under Article 19 of the Constitution. The High Court declared clause (ii) and (iii) of the order invalid on the ground that clauses (b) and (c) of Section 3(1) of the Madhya Pradesh Public Security Act on which they were based contravened Article 19. On appeal this Court

held that Section 3(1)(b) violated Article 19 and as it was a pre-emergency enactment, it must be deemed to be void when enacted. Section 3(1)(b) was further held not to have revived as a result of the proclamation of emergency by the President. Counsel for the State submitted in the alternative that even in Section 3(1)(b) was void, Article 358 protected action, both legislative and executive, taken after proclamation of emergency, and therefore any executive action taken by the State would not be liable to be challenged on the ground that it infringed the fundamental freedoms under Article 19. This contention was repelled. Shall, J. (as he then was) speaking for the Court observed (pp. 459-460) :

> All executive action which operates to the prejudice of any person must have the authority of law to support it, and the terms of Article 358 do not detract from that rule. Article 358 expressly authorises the State to take legislative or executive action provided such action was competent for the State to make or take, but for the provisions contained in Part III of the Constitution. Article 358 does not purport to invest the State with arbitrary authority to take action to the prejudice of citizens and others : it merely provides that so long as the proclamation of emergency subsists laws may be enacted, and executive action be taken in pursuance of lawful authority, which if the provisions of Article 19 were operative would have been invalid. Our federal structure is founded on certain fundamental principles : (1) the sovereignty of the people with limited government authority i.e. the Government must be conducted in accordance with the will of the majority of the people. The people govern themselves through their representatives, whereas the official agencies of the executive Government possess only such powers as have been conferred upon them by the people, (2) there is distribution of powers between the three organs of the State - legislative, executive and judicial - each organ having some check direct or indirect on the other; and (3) the rule of law which includes judicial review of arbitrary executive actions. As pointed out by Dicey in his 'Introduction to the Study of the Law of the Constitution', 10th Edn., at p. 202 the expression 'rule of law' has three meanings, or may be regarded from three different points of view.
>
> 'It means in the first place, the absolute, supremacy or predominance of regular law as opposed to the influence of arbitrary power, and exclude the existence of arbitrariness, of prerogative or even of wide discretionary authority on the part of the government.'

At p. 188 Dicey points out :

> 'In almost every continental community the Executive exercises far wider discretionary authority in the matter of arrest, of temporary imprisonment, of expulsion from its territory, and the like, than is either legally claimed or in fact exerted by the government in England : and a study of European politics now and again reminds English readers that wherever there is discretion there is room for arbitrariness, and that in a republic no less that under a monarchy discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects.'

We have adopted under our Constitution not the continental system but the British system under which the rule of law prevails. Every act done by the Government or by its officers must, if it is to operate to the prejudice of any person, be supported by some legislative authority.

548. In Chief Settlement Commissioner, Rehabilitation Department, Punjab v. Om Prakash ((1968) 3 SCR 655 : AIR 1969 SC 33) a Division Bench of this Court observed (p. 661) :

> In our constitutional system, the central and most characteristic feature is the concept of the rule of law which means, in the present context, the authority of the law courts to test all administrative action by the standard of legality. The administrative or executive action that does not meet the standard will be set aside if the aggrieved person brings the appropriate action in the competent court.

549. In District Collector of Hyderabad v. M/s. Ibrahim & Co ((1970) 3 SCR 498 : (1970) 1 SCC 386). The respondents who were recognized dealers in sugar were prevented by an executive order from carrying on the business. The question which actually arose for decision before this Court was whether the said order was protected under Article 358 and 359 because of the declaration of state of emergency by the President. Shah, J. speaking for a Bench of six Judges of this Court observed : [SCC p. 390, para 10]

> But the executive order immune from attack is only that order which the State was competent, but for the provisions contained in Article 19, to make. Executive action of the State Government which is otherwise invalid is not immune from attack, merely because a proclamation of emergency is in operation when it is taken. Since the order of the State Government was plainly contrary to the statutory provisions contained in the Andhra Pradesh Sugar Dealers Licensing Order and the Sugar Control Order, it was not protected under Article 358 of the Constitution.

Nor had it the protection under Article 359.

550. In Bennett Coleman & Co. v. Union of India ((1973) 2 SCR 757 : (1972) 2 SCC 788) Ray, J. (as he then was) speaking for the majority of the Constitution Bench relied upon Thakur Bharat Singh and M/s. Ibrahim & Co. cases and observed : [SCC pp. 807-808, para 26]

> Executive action which is unconstitutional is not immune during the proclamation of emergency. During the proclamation of emergency Article 19 is suspended. But it would not authorise the taking of detrimental executive action during the emergency affecting the fundamental rights in Article 19 without any legislative authority or in purported exercise or power conferred by any pre-emergency law which was invalid when enacted.

551. In Shree Meenakshi Mills Ltd. v. Union of India ((1974) 2 SCR 398 : (1974) 1 SCC 468) this Court dealt with petitions challenging the validity of the fixation of price of cotton yarns under an executive order. Objection was raised to the maintainability of the petitions on the score of proclamation of emergency. This objection was repelled and reliance was placed on the decision of the Court in the case of Bennett Coleman & Co.

552. In Naraindas Indurkhya v. State of Madhya Pradesh (AIR 1974 SC 1232 : (1974) 4 SCC 788 : 1974 SCC (Cri) 727) the Constitution Bench of this Court to which three of us (Ray, C. J., Khanna and Bhagwati, JJ.) were parties placed reliance on the decisions in the cases of Ram Jawaya Kapur, Thakur Bharat Singh and Bennett Coleman & Co.

553. These authorities clearly highlight the principle that executive authorities cannot under the rule of law take any action to the prejudice of an individual unless such action is authorised by law. A

fortiori it would follow that under the rule of law it is not permissible to deprive a person of his life or personal liberty without the authority of law.

554. It may be appropriate at this stage to referee to other cases in which stress has been laid on rule of law by this Court.

555. Wanchoo, J. in the case of Director of Rationing and Distribution v. Corporation of Calcutta ((1961) 1 SCR 158 : AIR 1960 SC 1355 : 1960 Cri LJ 1684) stated that in our country the rule of law prevails and our Constitution has guaranteed it by the provisions contained in Part III thereof as well as other provisions in other parts.

556. In Bishan Das v. State of Punjab ((1962) 2 SCR 69 : AIR 1961 SC 1570) S. K. Das, J. speaking for the Constitution Bench of this Court deprecated action taken by the State and its officers on the ground that it was destructive of the basic principles of the rule of law.

557. In G. Sadanandan v. State of Kerala (supra) Gajendragadkar, C. J. speaking for the Constitution Bench observed that the paramount requirement of the Constitution was that even during emergency the freedom of Indian citizens would not be taken away without the existence of justifying necessity specified by the Defence of India Rules.

558. In S. G. Jaisinghani v. Union of India ((1967) 2 SCR 703 : AIR 1967 SC 1427 : 65 ITR 34), Ramaswami, J. speaking for the Constitution Bench of this Court observed as under (pp. 718-719) :

> In this context it is important to emphasise that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey : 'Law of the Constitution', Tenth Edition, Introduction ex).'Law has reached its finest moments', stated Douglas, J. in United States v. Wunderlick (342 US 98), when it has freed man from the unlimited discretion of some ruler .... Where discretion is absolute, man has always suffered.' It is in this sense that the rule of law may be said to be sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilkes ((1770) 4 Burr 2528, 2539), 'means sound discretion guided by law. It must be governed by law. It must be governed by rule, not by humour : it must not be arbitrary, vague and fanciful.'

559. In the case of Indira Nehru Gandhi v. Raj Narain (1975 Supp SCC 1), both Ray, C. J. and Chandrachud, J laid stress on the rule of law in our constitutional scheme.

560. It would not, in any opinion, be correct to consider rule of law as a vague or nebulous concept because of its description as an unruly horse by Ivor Jennings. Indeed, according to Jennings, the rule of law demands in the first place that the powers of the Executive should not only be derived from law, but that they should be limited by law. Whatever might be the position in peripheral cases, there are certain aspects which constitute the very essence of the rule of law. Absence of

arbitrariness and the need of the authority of law for official acts affecting prejudicially rights of individuals is one of those aspects. The power of the courts to grant relief against arbitrariness or absence of authority of law in the matter of the liberty of the subject may now well be taken to be a normal feature of the rule of law. To quote from Halsbury's Laws of England, Third Edition, Vol. 7, para 416, the so-called liberties of the subject are really implications drawn from the two principles that the subject may say or do what he pleases, provided he does not transgress substantive law, or infringe the legal rights of others, whereas public authorities (including the Crown) may do nothing but what they are authorised to do by some rule of common law or statute. The essence of rule of law, according to Prof. Goodhart, is that public officers are governed by law, which limits their powers. It means government under law the supremacy of law over the government, as distinct from government by law-the mere supremacy of law in society generally - which would apply also to totalitarian States (see page 42 of Constitutional and Administrative Law by Hood Phillips, Third Edition).

561. I may mention that there has been an amendment of Article 359 inasmuch as clause (IA) has been added in that article. The effect of the insertion of that clause in Article 359 is that while an order made under clause (1) mentioning any of the rights conferred by Part III is in operation, nothing in that part conferring those rights shall restrict the power of the State to make any law or to take any executive action which the State would but for the provisions contained in that part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the order aforesaid ceases to operate, except as respects thing done or omitted to be done before the law so ceases to have effect. Clause (1A) thus protects laws and executives actions from any attack on validity on the score of being violative of the fundamental rights mentioned in the Presidential Order in the same way as Article 358 protects the laws and executive actions from being challenged on the ground of being violative of Article 19 during the period of emergency. If the existence of Article 358 did not have the effect of dispensing with the necessity for an executive action operating to the prejudice of the right of a citizen of the authority of law, the same must necessarily be the position after the insertion of clause (1A) in Article 359. It is significant that the language of clause (1A) of Article 359 in material respect is substantially the same as that of Article 358. The language of clause (1A) of Article 359 makes it clear that the protection which is afforded by that clause is to such law or executive action as the State would but for the provisions contained in Part III of the Constitution be competent to make or take. The word "competent" has a significance and it is apparent that despite the Presidential Order under Article 359(1), in the case of executive action the competence of the State to take such action would have to be established. Such competence would, however, be judged ignoring the restriction placed by the provisions of Part III of the Constitution. To put it in other words, clause (1A) of Article 359 does not dispense with the necessity of competence to make law or take executive action. The only effect of that clause is that during the period of emergency, the restriction placed upon the competence by fundamental rights would not be there. But it would still be necessary to establish the competence de hors the restrictions of the fundamental rights.

562. The matter can also be looked at from another angle. Before any public authority can deprive a person of his life or personal liberty, two requirements are to be satisfied :

> (1) Power must be conferred by law upon such authority to deprive a person of his life or liberty; and
>
> (2) Law must also prescribe the procedure for the exercise of such power.

Suspension of the right to move any court for the enforcement of the right under Article 21 can at the best impinge upon the second requirement; it cannot affect the first requirement which is a cardinal principle of the rule of law. I am conscious of the fact that though Article 21 refers to procedure established by law, there are observations in Gopalan's case that the article would also cover substantive law for affording protection to life and liberty. What Article 21 lay down is that no person shall be deprived of his life or personal liberty except according to procedure established by law. Procedure about the exercise of power of depriving a person of his life or personal liberty necessarily presupposes that the substantive power of depriving a person of his life or personal liberty has been vested in an authority and that such power exists. Without the existence of such substantive power, no question can rise about the procedure for the exercise of that power. It has, therefore, been held that though there is no reference to substantive power in Article 21, the said article would cover both the existence of the substantive power of depriving a person of his life and personal liberty as well as the procedure for the exercise of that power. The question with which we ar concerned is as to what is the effect of the suspension of the right to move a court for the enforcement of the right contained in Article 21. The effect, it may possibly be argued, is that consequent upon such suspension, if a person is deprived of his life or personal liberty under a law not satisfying the second requirement indicated above, he cannot seek judicial redress on that score. Would it, however, follow from the suspension of such right that no judicial remedy would be available if a person is deprived by an authority of his life or personal liberty even though such an authority has not been vested with the substantive power of deprivation of life and personal liberty. The answer to this question, in my opinion, should plainly be in the negative. The suspension of the right to move a court for the enforcement of the right contained in Article 21 cannot have the effect of debarring an aggrieved person from approaching the courts with the complain regarding deprivation of life or personal liberty by an authority on the score that no power has been vested in the authority to deprive a person of life or liberty. The presupposition of the existence of substantive power to deprive a person of his life or personal liberty in Article 21 even though that article only mentions the procedure, would not necessarily point to the conclusion that in the event of the suspension of the right to move any court for the enforcement of Article 21, the suspension would also dispense with the necessity of the existence of the substantive power. The coexistence of substantive power and procedure established by law for depriving a person of his life and liberty which is implicit in Article 21 would not lead to the result that even if there is suspension of the right regarding procedure, suspension would also operate upon the necessity of substantive power. What is true of a proportion need not be true of the converse of that proposition. The suspension of the right to move any court for the enforcement of the right contained in Article 21 may have the effect of dispensing with the necessity of prescribing procedure for the exercise of substantive power to deprive a person of his life or personal liberty, it can in no case have the effect of permitting an authority to deprive a person of his life or personal liberty without the existence of substantive power. The close bond which is there between the existence of substantive power of depriving a person of his life or personal liberty and the procedure for the exercise of that power, if the right contained in Article 21 were in operation, would not necessarily hold good if that right were suspended because the removal of compulsion about the prescription of procedure for the exercise of the substantive power would not do away with the compulsion regarding the existence of that power.

563. It is significant that there is a difference in the language of Article 21 and that of Article 31(1) wherein the farmers of the Constitution said that no one shall be deprived of his property save by the authority of law. In considering the effect of Presidential Order suspending the right of a person to move any court for enforcement of right guaranteed by Article 21, we should not treat the words

"except according to procedure established by law" to be synonymous with "save by authority of law".

564. The President can in exercise of powers conferred by Article 359(1) suspend when the proclamation of emergency is in operation, the right to move any court for the enforcement of such of the fundamental rights as may be mentioned in the order. On the plain language of Article 359(1), the President has no power to suspend the right to move any court for the enforcement of rights which are not fundamental rights conferred by Part III of the Constitution. Rights created by statutes are not fundamental rights conferred by Part III of the Constitution and as such enforcement of such statutory rights cannot be suspended under Article 359(1). Likewise, Article 359(1) does not deal with obligations and liabilities which flow from statutory provisions, and it would follow that an order under Article 359(1) cannot affect those obligations and liabilities arising out of statutory provisions. Nor can a Presidential Order under Article 359(1) nullify or suspend the operation of any statute enacted by a competent legislature. Any redress sought from a court of law on the score of breach of statutory provisions would be outside the purview of Article 359(1) and the Presidential Order made thereunder. The Presidential Order cannot put the detenu in a worse position than that in which he would be if Article 21 were repealed. It cannot be disputed that if Article 21 were repealed, a detenu would not be barred from obtaining relief under a statute in case there is violation of statutory provisions. Likewise, in the event of repeal of Article 21, a detenu can rightly claim in a court of law that he cannot be deprived of his life or personal liberty without the authority of law. Article 359(1) ousts the jurisdiction of the court only in respect of matters specified therein during the period of emergency. So far as matters not mentioned in Article 359(1) and the Presidential Order thereunder are concerned, the jurisdiction of the court is not ousted. A provision which has the effect of ousting the jurisdiction of the courts should be construed strictly. No inference of the ouster of the jurisdiction of the court can be drawn unless such inference is warranted by the clear language of the provision ousting such jurisdiction. I may in this context refer to the observations of the Constitution Bench of this Court in the case of K. Anandan Nambiar v. Chief Secretary, Government of Madras ((1966 2 SCR 406, 410 : AIR 1966 SC 657 : 1966 Cri LJ 586). Gajendragadkar, C.J. Speaking for the Constitution Bench observed (p. 410) :

> In construing the effect of the Presidential Order, it is necessary to bear in mind the general rule of construction that where an order purports to suspend the fundamental rights guaranteed to the citizens by the Constitution, the said order must be strictly construed in favour of the citizens' fundamental rights.

565. I am also unable to accede to the argument that though the position under law may be that no one can be deprived of his right to life or personal liberty without the authority of law, the remedy to enforce the right to life or personal liberty is no longer available during the period of emergency because of the suspension of right to move any court for enforcement of right conferred by Article 21. The basic assumption of this argument is that Article 21 is the sole repository of right to life and personal liberty. Such an assumption, as already stated above, is not well-founded. This apart, a Presidential Order under Article 359(1) cannot have the effect of suspending the right to enforce rights flowing from statutes, nor can it bar access to the courts of persons seeking redress on the score of contravention of statutory provisions. Statutory provisions are enacted to be complied with and it is not permissible to contravene them. Statutory provisions cannot be treated as mere pious exhortations or words of advice which may be abjured or disobeyed with impunity. Nor is compliance with statutory provisions optional or at the sufferance of the official concerned. It is the presence of legal sanctions which distinguishes positive law from other systems of rules and norms. To be a legal system a set of norms must furnish sanctions for some of its precepts. A legal sanction

is usually thought of as a harmful consequence to induce compliance with law. Non-compliance with statutory provisions entails certain legal consequences. The Presidential Order cannot stand in the way of the courts giving effect to those consequences. To put it differently, the executive authorities exercising power under a statute have to act in conformity with its provisions and within the limits set out therein. When a statute deals with matters affecting prejudicially the rights of individuals, the ambit of the power of the authorities acting under the statute would be circumscribed by its provisions, and it would not be permissible to invoke some indefinite general powers of the Executive. As observed by Lord Atkinson in the case of Attorney General v. De Keyser's Royal Hotel Ltd (1920 AC 508)., the constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the royal prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject. It is also not the result of the Presidential Order, as discussed elsewhere, that because of the suspension of the right to move any court for enforcement of right under Article 21, the remedy of a writ of habeas corpus ceases to be available against the State. The Presidential Order would not preclude a person from challenging the validity of a law or order on grounds other than violation of Articles 14, 19, 21 and 22. It may be pertinent to refer to a decision of this Court in the case of Jaichand Lall Sethia v. State of West Bengal (1966 Supp SCR 464 : AIR 1967 SC 483 : 1967 Cri LJ 520) wherein the Constitution Bench of this Court observed after referring to the case of Makhan Singh (supra) (pp. 467-468) :

> It was pointed out that during the pendency of the Presidential Order the validity of the ordinance or any rule or order made thereunder cannot be questioned on the ground that it contravenes Articles 14, 21 and 22. But this limitation cannot preclude a citizen from challenging the validity of the ordinance or any rule or order made thereunder on any other ground. If the appellant seeks to challenge the validity of the ordinance, rule or order made thereunder on any ground other than the contravention of Articles 14, 21 and 22, the Presidential Order cannot come into operation. It is not also open to the appellant to challenge the order on the ground of contravention of Article 19, because as soon as a Proclamation of Emergency is issued by the President under Article 358 the provisions of Article 19 are automatically suspended. But the appellant can challenge the validity of the order on a ground other than those covered by Article 358, or the Presidential Order issued under Article 359(1). Such a challenge is outside the purview of the Presidential Order. For instance, a citizen will not be deprived of the right to move an appropriate court for a writ of habeas corpus on the ground that his detention has been ordered mala fide. Similarly, it will be open to the citizen to challenge the order of detention on the ground that any of the grounds given in the order of detention is irrelevant and there is no real and proximate connection between the ground given and the object which the legislature has in view. It may be stated in this context that a mala fide exercise of power does not necessarily imply any moral turpitude as a matter of law. It only means that the statutory power is exercised for purposes foreign to those for which it is in law intended. In other words, the power conferred by the statute has been utilised for some indirect purpose not connected with the object of the statute or the mischief it seeks to remedy.

Similar view was expressed in the case of Durgadas Shirali v. Union of India ((1966) 2 SCR 573 : AIR 1966 SC 1078 : 1966 Cri LJ 812). In G. Sadanandan v. State of Kerala ((1966) 3 SCR 590 :

AIR 1966 SC 1925 : 1966 Cri LJ 1533) the Constitution Bench of this Court speaking through Gajendragadkar, C. J. struck down a detention order on the ground that it was mala fide.

566. Our founding fathers made Article 226 which confers power on the High Court to issue inter alia writs in the nature of habeas corpus an integral part of the Constitution. They were aware that under the U. S. Constitution in accordance with Article 1 Section IX the privilege of the writ of habeas corpus could be suspended when in cases of rebellion or invasion the public safety may require it. Despite that our founding fathers made no provisions in our Constitution for suspending the power of the High Court under Article 226 to issue writs in the nature of habeas corpus during the period of emergency. They had perhaps in view the precedent of England where there had been no suspension of writ of habeas corpus since 1881 and even during the course of First and Second World Wars. It would, in my opinion, be not permissible to bring about the result of suspension of habeas corpus by a strained construction of the Presidential Order under Article 359(1) even though Article 226 continues to remain in force during the period of emergency.

567. The writ of habeas corpus ad subjiciendum, which is commonly known as the writ of habeas corpus, is a process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. By it the High Court and the judges of that court, at the instance of a subject aggrieved, command the production of that subject, and inquire into the cause of his imprisonment. If there is no legal justification for the detention the party is ordered to be released. Release on habeas corpus is not, however, an acquittal, nor may the writ be used as a means of appeal (see Halsbury's Laws of England, Vol. 11, Third Edition, page 24).

568. In Greene v. Secretary of State for Home Affairs (1942 AC 284) Lord Wright observed :

> It is clear that the writ of habeas corpus deals with the machinery of justice, not the substantive law, except in so far as it can be said that the right to have the writ is itself part of substantive law. It is essentially a procedural writ, the object of which is to enforce a legal right ..... The inestimable value of the proceedings is that it is the most efficient mode ever devised by any system of law to end unlawful detainments and to secure a speedy release where the circumstances and the law so required.

569. Writ of habeas corpus was described as under by Lord Birkenhead in the case of Secretary of State for Home Affairs v. O' Brien (1923 AC 603, 609) :

> It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by courts of law as a check upon the illegal usurpation of power by the Executive at the cost of the liege.

570. The existence of the power of the courts to issue a writ of habeas corpus is regarded as one of the most important characteristics of democratic States under the rule of law. The significance of the writ for the moral health of the society has been acknowledged by all jurists. Hallam described it as the "principle bulwark of English liberty". The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasised. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for

such detention. Of course, this does not mean that prison doors may readily be opened. It does mean that explanation maybe exacted why they should remain closed. It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basis safeguard of freedom. The great writ of habeas corpus has been for centuries esteemed the best and sufficient defence of personal freedom (see Human Rights & Fundamental Freedoms by Jagdish Swarup, page 60).

571. As Article 226 is an integral part of the Constitution, the power of the High Court to enquire in proceedings for a writ of habeas corpus into the legality of the detention of persons cannot, in my opinion, be denied. Although the Indian Constitution, as mentioned by Mukherjea, C.J. in the case of Ram Jawaya Kapur (supra), has not recognised the doctrine of separation of powers in its absolute rigidity, the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The Executive can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered exercise judicial functions in a limited way. The Executive, however, can never go against the provisions of the Constitution or of any law. To quote the words of Dr. Ambedkar in the Constituent Assembly :

> Every Constitution, so far as it relates to what we call parliament democracy, requires three different organs of the State, the Executive, the Judiciary and the Legislature. I have not anywhere found in any Constitution a provision saying that the Executive shall obey the Legislature, nor have I found anywhere in Constitution a provision that the Executive shall obey the Judiciary. Nowhere is such a provision to be found. That is because it is generally understood that the provisions of the Constitution are binding upon the different organs of the State. Consequently, it is to be presumed that those who work the Constitution, those who compose the Legislature and those who compose the Executive and the Judiciary know their functions, their limitations and their duties. It is therefore to be expected that if the Executive is honest in working the Constitution, then the Executive is bound to obey the Legislature without any kind of compulsory obligation laid down in the Constitution.

Similarly, if the Executive is honest in working the Constitution, it must act in accordance with the judicial decisions given by the Supreme Court. Therefore my submission is that this is a matter of one organ of the State acting within its own limitations and obeying the supremacy of the other organs of the State. In so far as the Constitution gives a supremacy to that is a matter of constitutional obligation which is implicit in the Constitution itself.

It was further observed by him :

> No constitutional Government can function in any country unless any particular constitutional authority remembers the fact that its authority is limited by the Constitution and that if there is any authority created by the Constitution which is to decide between that particular authority and any other authority, then the decision of that authority shall be binding upon any other organ. That is the sanction which this Constitution gives in order to see that the President shall follow the advice of his ministers, that the executive authority the law made by the Parliament and that the Executive shall not give its own interpretation of the law which is conflict with the interpretation of the judicial organ created by the Constitution.

Article 226 of the Constitution confers power upon the High Courts of issuing appropriate writs in case it is found that the executive orders are not in conformity with the provisions of the Constitution and the law of the land. Judicial scrutiny of executive orders with a view to ensure that they are not violative of the provision of the Constitution and the laws of the land being an integral part of our constitutional scheme, it is not permissible to exclude judicial scrutiny except to the extent such exclusion is warranted by the provisions of the Constitution and the laws made in accordance with those provisions.

572. There is, as already mentioned, a clear demarcation of the spheres of function and power in our Constitution. The acceptance of the contention advanced on behalf of the appellants would mean that during the period of emergency, the courts would be reduced to the position of being helpless spectators even if glaring and blatant instances of deprivation of life and personal liberty in contravention of the statute are brought to their notice. It would also mean that whatever may be the law passed by the Legislature, in the matter of life and personal liberty of the citizens, the Executive during the period of emergency would not be bound by it and would be at liberty to ignore and contravene it. It is obvious that the acceptance of the contention would result in a kind of supremacy of the Executive over the legislative and judicial organs of the State, and thus bring about a constitutional imbalance which perhaps was never in the contemplation of the framers of the Constitution. The fact that the government which controls the Executive has to enjoy the confidence of the Legislature does not detract from the above conclusion. The Executive under our constitutional scheme is not merely to enjoy the confidence of the majority in the Legislature, it is also bound to carry out the legislative intent as manifested by the statutes passed by the Legislature. The Constitution further contemplates that the function of deciding whether the Executive has acted in accordance with the legislative intent should be performed by the courts.

573. The cases before us raise questions of utmost importance and gravity, questions which impinge not only upon the scope of the different constitutional provisions, but have impact also upon the basic values affecting life, liberty and the rule of law. More is at stake in these cases than the liberty of a few individuals or the correct construction of the wording of an order. What is at stake is the rule of law. If it could be the boast of a great English judge (Lord Mansfield in the case of James Sommersett, 1772 State Tr 1) that the air of England is too pure for a slave to breathe, cannot we also say with justifiable pride that this sacred land shall not suffer not suffer eclipse of the rule of law and that the Constitution and the laws of India do not permit life and liberty to be at the mercy of absolute power of the Executive, a power against which there can be no redress in courts of law, even if it chooses to act contrary to law or in an arbitrary and capricious manner. The question is not whether there can be curtailment of personal liberty when there is threat to the security of the State. I have no doubt that there can be such curtailment, even on an extensive scale, in the face of such threat. The question is whether the laws speaking through the authority of the courts shall be absolutely silenced and rendered mute because of such threat.

574. No one can deny the power of the State to assume vast powers of detention in the interest of the security of the State. It may indeed be necessary to do so to meet the peril facing the nation. The considerations of security of the State must have a primacy and be kept in the forefront compared to which the interests of the individuals can only take a secondary place. The motto has to be "Who lives, if the country dies". Extraordinary powers are always assumed by the government in all countries in times of emergency because of the extraordinary nature of the emergency. The exercise of the power of detention, it is well-settled, depends upon the subjective satisfaction of the detaining authority and the courts can neither act as courts of appeal over the decisions of the detaining authority nor can they substitute their own opinion for that of the authority regarding the necessity

of detention. There is no antithesis between the power of the State to detain a person without trial under a law of preventive detention and the power of the court to examine the legality of such detention. As observed by Lord Atkin in Rex v. Halliday (1917 AC 260, 272) while dealing with the argument that the Defence of Realm Consolidation Act of 1914 and the regulation made under it deprived the subject of his right under the several Habeas Corpus Acts, that is an entire misconception. The subject retains every right which those statutes confer upon him to have tested and determined in a court of law, by means of a writ of habeas corpus, addressed to the person in whose custody he may be, the legality of the order or warrant by virtue of which he is given into or kept in that custody. To quote the words of Lord Macmillan in the case of Liversidge v. Anderson (1942 AC 206) :

> It is important to have in mind that the regulation in question is a war measure. This is not to say that the court ought to adopt in wartime canons of construction different from those they follow in peacetime. The fact that the nation is at was is no justification for any relaxation of the vigilance of the courts in seeing that the law is duly observed, especially in a matter so fundamental as the liberty of the subject. Rather the contrary.

In dealing with an application for a writ of habeas corpus, the courts only ensure that the detaining authorities act in accordance with the law of preventive detention. The impact upon the individual of the massive and comprehensive powers of preventive detention with which the administrative officers are armed has to be cushioned with legal safeguards against arbitrary deprivation of personal liberty if the premises of the rule of law is not to lose its content and become meaningless. The chances of an innocent person being detained under a law providing for preventive detention on the subjective satisfaction of an administrative authority are much greater compared to the possibility of an innocent person being convicted at trial in a court of law. It would be opposite in this context to refer to the observations of Professor Alan M. Dershowitz :

> The available evidence suggest that our system of determining past guilt results in erroneous conviction of relatively few innocent people. We really do seem to practice what we preach about preferring the acquittal of guilty men over the conviction of innocent men.

But the indications are that any system of predicting future crimes would result in a vastly larger number of erroneous confinements - that is, confinements of persons predicted to engage in violent crime who would not, in fact, do so. Indeed, all the experience with predicting violent conduct suggests that in order to spot a significant proportion of future violent criminals, we would have to reverse the traditional maxim of the criminal law and adopt a philosophy that it is 'better to confine ten people who would not commit predicted crimes, than to release one who would. (See p. 313, Crime, Law and Society by Goldstein and Goldstein)

It would, therefore, seem to be a matter of melancholy reflection if the courts were to stay their hand and countenance laxity or condone lapses in relation to compliance with requirements prescribed by law for preventive detention.

575. In England there was no suspension of the power of the courts to issue a writ of habeas corpus during the First World War and the Second World War. In India also there was no absolute bar to approaching the courts during the Sino-Indian hostilities of 1962 and the Indo-Pak wars of 1965 and 1971. It has not been suggested that because of the existence of the powers of the court to issue

writs of habeas corpus war efforts were in any way prejudicially affected. The United Nations' Economic and Social Council endorsed the general agreement reached at the Baguio Seminar that the writ of habeas corpus or similar remedy of access to the courts to test the legality and bona fides of the exercise of the emergency powers should never be denied to the citizen.

It drew attention to the following passage from the report of the seminar :

> All members recognised that in times of emergency it might be necessary to restrict temporarily the freedom of the individual. But they were firmly of the view that, whatever temporary restrictive measures might be necessary, recourse to the courts through the right of habeas corpus or other similar remedy should never be suspended, Rather the legislature could, if necessary, subject to the well-defined procedures safeguarding human dignity, authorise the temporary detention of persons for reasons specified in the law. By that means the Executive can act as emergency may require but the ultimate judicial protection of individual liberty is preserved. Members hold strongly that it is a fundamental principle that the individual should never be deprived of the mean of testing the legality of his arrest or custody by recourse to judicial process even in times of emergency. If that principle is departed from, the liberty of the individual is immediately put in great peril.

576. I am, therefore, of the view that there is no sufficient ground to interfere with the view taken by all the nine High Courts which went into the matter, that the Presidential Order of June 27, 1975 did not affect the maintainability of the habeas corpus petitions to question the legality of the detention orders and that such petitions could be proceeded with despite that order.

577. We may now deal with the second question regarding the scope and extent of judicial scrutiny in petitions for writ of habeas corpus relating to persons detained under MISA. For this purpose it would be appropriate to first deal with the position under the above law so far as cases not covered by Section 16A are concerned.

578. According to Section 3(1) of MISA, the authorities specified in the sub-section may if satisfied with respect to any person (including a foreigner) that with a view to preventing him from acting in any manner prejudicial to (i) the defence of India, the relations of India with foreigner powers, or the security of India, or (ii) the security of the State or the maintenance of public order, or (iii) the maintenance of supplies and services essential to the community, it is necessary so to do make an order that such person be detained. The words "if satisfied" indicate that the satisfaction of the authority concerned is a condition precedent to the making of a detention order. Unless therefore the authority concerned is satisfied on the material before it that it is necessary to detain a person with a view to prevent him from indulging in any of the specified prejudicial activities, it has no power to make an order for his detention. Section 3 also contains an implied injunction that the said authority shall not detain a person under that section for reasons other than those specified therein. Although the satisfaction contemplated by the sub-section is the subjective satisfaction of the authority concerned, it is necessary that it should be arrived at in an objective manner. It is consequently essential that the facts on the basis of which the authority concerned reaches the conclusion that it is necessary to detain a person should have a rational nexus or probative value and be germane to the object for which such detention is allowed under Section 3(1) of MISA. In case the facts which are taken into account are extraneous, not germane or do not have any live link or reasonable connection with the object for which the detention order can be made, the order would be liable to be quashed. Even if one out of the many grounds on which a detention order is based is not germane

or legally not tenable, the detention order would be quashed because it is difficult to predicate that the detaining authority would have come to the requisite satisfaction even in the absence of that ground. It is plainly not possible to estimate as to how far the irrelevant or untenable ground operated on the mind of the appropriate authority and contributed to the creation of the satisfaction on the basis of which the detention order was made. To say that the other ground which still remains is quite sufficient to sustain the order would be to substitute an objective judicial test for the subjective decision of the executive authority which is against the legislative policy underlying the statute.

579. A law of preventive detention is not punitive but precautionary and preventive. The power of detention under such law is based on circumstance of suspicion and not on proof of allegation as is required at a regular trial for the commission of an offence. Such a power is exercised because of apprehension of future prejudicial activity on the part of the person ordered to be detained judged in the light of his past conduct and propensity. The order for preventive detention in such cases postulates prior restraint so that the mischief apprehended at the hands of the person ordered to be detained might not materialise. The consequences of waiting and declining to take action against that person till the mischief is actually done would quite often be disastrous and the nation may in some cases have to pay a heavy price for such abstention. The quantum of material available regarding the conduct and propensity of a person my not be sufficient to warrant his conviction in a court of law for an offence and yet if the material is germane to the object for which detention order can legally be made and the detaining authority is satisfied in view of that material regarding the necessity of making a detention order, such order made by that authority would be upheld as being in accordance with law. It is also not difficult to visualise a situation wherein serious crimes are committed in broad daylight and yet the witnesses to the crime are so much terrified and awestricken that they dare not depose against the culprits in a court of law. In such cases also because of the difficulty of securing the conviction of the culprits, the courts have upheld the detention orders, if the activities of the culprits are of such a nature as has a nexus with the object for which detention order can be made. In a petition for a writ of habeas corpus the courts do not normally question the veracity and sufficiency of the material on the basis of which the authority concerned arrives at the conclusion regarding the necessity of detention. In case of detenu challenges the correctness or truth of the allegations on the basis of which the detention order is made, he should normally do so by means of representation contemplated by clause (5) of Article 22. It is legitimate to expect that the authority concerned and the advisory board when the matter comes up before them shall take into account the stand taken by the detenu regarding those allegations. It would be also their function to give consideration to any fresh material which may be produced before them regarding the truth and correctness of those allegations. In a habeas corpus petition, if it becomes apparent on the record from the admission made by the detaining authority in the return or some other evidentiary material of unquestioned authenticity and probative value that some of the alleged facts upon the basis of which detention order is made are non-existent, the court would be well justified in quashing the detention order. A court apart from that cannot go behind the truth of the alleged facts. If the material is germane to the object for which detention is legally permissible and an order for detention is made on the basis of that material, the courts cannot sit as a court of appeal and substitute their own opinion for that of the authority concerned and hold that the authority concerned should not have arrived at the conclusion regarding the necessity of detention. At the same time, it is necessary that the authority concerned before deciding to detain a person should apply its mind to the facts before it in a fair and reasonable manner. If the conclusion arrived at is so unreasonable that no reasonable authority could ever come to it, the legitimate inference would be that the authority could ever come to it, the legitimate inference would be that the

authority concerned did not apply its mind to the relevant facts and did not honestly arrive at the conclusion. To use the words of Lord Halsbury in Sharpe v. Wakefield (1891 AC 172, 179) :

> ..... when it is said that something is to be done within the discretion of the authorities . . . . . that something is to be done according to the rules of reason and justice, not according to private opinion . . . . . according to law and not humour. It is to be, not arbitrary, vague, fanciful, but legal and regular.

Likewise, if there were no grounds, as observed by Lord Morton in Ross v. Papadopollos ((1958) 2 All ER 23, 33), on which the authority concerned could be satisfied, the court might infer either that the authority did not honestly form that view or that in forming it, the authority could not have applied its mind to the relevant facts. The courts would also interfere if the power of detention is exercised mala fide, not in good faith or for an ulterior purpose. It would follow from the above that if the power of detention is exercised for an improper purpose, i.e., a purpose not contemplated by the statute, the order for detention would be quashed.

580. Between malice in fact and malice in law, as observed by Viscount Haldane, L. C. in the case of Shearer v. Shields (1914 AC 808), there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far as the state of his mind is concerned, he acts ignorantly, and in that sense innocently. Malice in fact is quite a different thing; it means an actual malicious intention on the part of the person who has done the wrongful act, and it may be, in proceedings based on wrongs independent of contract, a very material ingredient in the question of whether a valid cause of action can be stated. The above principle was applied by this Court in detention matters in Bhut Nath Mete v. State of West Bengal ((1974) 3 SCR 315 : (1974) 1 SCC 645 : 1974 SCC (Cri) 300).

581. Normally, it is the past conduct or antecedent history of a person which shows a propensity or a tendency to act in a particular manner. The past conduct or antecedent history of a person can, therefore, be appropriately taken into account in making a detention order. It is indeed largely from the past events showing tendencies or inclinations of a person that an inference can be drawn that he is likely in the future to act in a particular manner. In order to justify such an inference, it is necessary that such part conduct or antecedent history should ordinarily be proximate in point of time. It would, for instance, be normally irrational to take into account the conduct and activities of a person which took place ten years before the date of his detention and say that even though after the said incident took place nothing is known against the person indicating his tendency to act in a prejudicial manner, even so on the strength of the said incident which is ten years old, the authority is satisfied that his detention is necessary. It is both inexpedient and undesirable to lay down an inflexible test as to how far distant the past conduct or the antecedent history should be for reasonably justifying the conclusion that the person concerned if not detained may indulge in prejudicial activities. The nature of the activity would have also a bearing in deciding the question of proximity. If, for example, a person who has links with a particular foreign power is known to have indulged in subversive activities when hostilities broke out with that foreign power and hostilities again break out with that foreign power after ten years, the authorities concern, if satisfied on the basis of the past activities that it is necessary to detain him with a view to preventing him from acting in a manner prejudicial to the security of India, might well pass a detention order in respect of that person. The fact that in such a case there is a time lag of ten years between the activities of the said person and the making of the detention order would not vitiate such an order.

Likewise, a remote prejudicial activity may be so similar to a recent prejudicial activity as may give rise to an inference that the two are a part of chain of prejudicial activities indicative of a particular inclination. In such an even the remote activity taken along with the recent activity would retain its relevant and reliance upon it would not introduce an infirmity. If, however, in a given case and in the context of the nature of activity the time lag between the prejudicial activity of a detenu and the detention order made because of that activity is ex facie long, the detaining authority should explain the delay in the making of the detention order with a view to show that there was proximity between the prejudicial activity and the detention order. If the detaining authority fails to do so, in spite of an opportunity having been afforded to it, a serious infirmity would creep into the detention order (see Rameshwar Singh v. District Magistrate, Burdwan ((1964) 4 SCR 921 : AIR 1964 SC 334 : (1964) 1 Cri LJ 257) and Sk. Abdul Munnaf v. State of West Bengal (AIR 1974 SC 2066 : (1975) 3 SCC 239 : 1974 SCC (Cri) 857).

582. One other requirement of a valid order of detention is that the grounds of detention which are communicated to the detenu should not be vague so that he may not be handicapped in making an effective representation against the detention order. Both Article 22(5) of the Constitution and Section 8(1) of MISA refer to such representation and provide that the detaining authority shall as soon as may be, and in any case not later than the prescribed period, communicate to the person detained the grounds on which the detention order has been made "and shall afford him the earliest opportunity of making representation against the order". In view of the Presidential Order suspending the right of a person to move any court for enforcement of specified fundamental rights, including the one under Article 22(5), it may with plausibility be argued that the vagueness of grounds of detention would not warrant the quashing of such detention order during the pendency of the Presidential Order on the score of violation of Article 22(5). The Presidential Order would, however, not stand in the way of the court quashing the detention order on the score of the infirmity of the vagueness of grounds of detention because of the contravention of Section 8(1) of MISA.

583. Every law providing for preventive detention contains certain procedural safeguards. It is imperative that there should be strict compliance with the requirements of those procedural safeguards to sustain the validity of detention. Detention without trial results in serious inroads into personal liberty of an individual. In such cases it is essential to ensure that there is no deviation from the procedural safeguards provided by the statute. In the matter of even a criminal trial, it is procedure that spells out much of the difference between the rule of law and the rule by whim and caprice. The need for strict adherence to strict procedural safeguards is much greater when we are dealing with preventive detention which postulates detention of a person even though he is not found guilty of the commission of an offence. To condone or allow relaxation in the matter of compliance with procedural requirements would necessarily have the effect of practically doing away with even the slender safeguards provided by the legislature against the arbitrary use of the provisions relating to preventive detention. The history of personal liberty, we must bear in mind, is largely the history of insistence upon procedure. I am, therefore, of the view that it would be wholly inappropriate to countenance any laxity in the matter of strict compliance with procedural requirements prescribed for preventive detention. The observations made in the case of Kishori Mohan v. State of West Bengal (AIR 1972 SC 1749 : (1972) 3 SCC 845 : 1973 SCC (Cri) 30) have relevance. It was observed by this Court in that case :

> The Act confers extraordinary power on the Executive to detain a person without recourse to the ordinary laws of the land and to trial by courts. Obviously, such power places the personal liberty of such a person in extreme peril against which he is provided with a limited right of challenge only. There can, therefore, be no doubt

> that such a law has to be strictly construed. Equally also, the power conferred by such a law has to be exercised with extreme care and scrupulously within the bounds laid down in such a law.

584. Question then arises as to how far are the recitals in the order of detention binding upon the cours, and upon whom and to what extent does the onus lie in a petition for a writ of habeas corpus relating to a detained person. In this respect I find that in the case of King Emperor v. Sibnath Banerji (72 IA 241 : AIR 1945 PC 156) the Judicial Committee, speaking through Lord Thankerton, approved the following observation of the learned Chief Justice of the Federal Court :

> It is quite a different thing to question the accuracy of a recital contained in a duly authenticated order, particularly where the recital purports to state as a fact the carrying out of what I regard as a condition necessary to the valid making of that order. In the normal case the existence of such a recital in a duly authenticated order ill, in the absence of any evidence as to its accuracy, be accepted by a court as establishing that the necessary condition was fulfilled. The presence of the recital in the order will place a difficult burden on the detenu to produce admissible evidence sufficient to establish even a prima facie case that the recital is not accurate.

The matter was considered by this Court by the Constitution Bench of this Court in the case of G. Sadanandan v. State of Kerala (supra) and it was observed as under (p. 598) :

> After all, the detention of a citizen in every case is the result of the subjective satisfaction of the appropriate authority : and so, if a prima facie case is made by the petitioner that his detention is either mala fide, or is the result of the casual approach adopted by the appropriate authority, the appropriate authority should place before the court sufficient material in the form of proper affidavit made by a duly authorised person to show that the allegations made by the petitioner about the casual character of the decision or its mala fides, are not well founded. The failure of respondent No. 1 to place any such material before us in the present proceedings leaves us no alternative but no accept the plea made by the petitioner that the order of detention against him on October 20, 1965, and more particularly, his continued detention after October 24, 1965, are totally invalid and unjustified.

The initial burden is on the detenu to show that his detention is mala fide or to in accordance with law. If the detenu makes out a prima facie case, the burden shifts on the State and it becomes essential for the State to file a good return. Once substantial disquieting doubts are raised by the detenu in the mind of the court regarding the validity of his detention, it would be the bounden duty of the State to dispel those doubts by placing sufficient material before the court with a view to satisfy it about the validity of the detention. In case the detenu fails to discharge the initial burden, his petition for writ of habeas corpus would be dismissed. Even if the detenu discharges the initial burden and makes out a prima facie case against the validity of his detention, but the State files a good return and adduces sufficient material before the court to show that his detention is valid, the detenu's petition would be dismissed. In case, however, the detenu discharges the initial burden and makes out a prima facie case against the validity of his detention and the State fails to file a good return and does not place sufficient material on the record to show that the detention is valid, a serious infirmity would creep into the State case as might justify interference by the court and release of the detenu. More than that, it is not necessary to say for everything in the final analysis would depend upon the individual facts of the case.

585. We may now turn to the newly added Section 16A of MISA. This section was inserted by Section 6 of Act 39 of 1975 with effect from June 29, 1975. Subsequently, there was a further amendment of Section 16A by Act 14 of 1976 which was published on January 25, 1976. According to sub-section (1) of Section (1) of Section 16A, the provisions of the section would have effect notwithstanding anything contained in MISA or any rules of natural justice during the period of emergency proclaimed on December 3, 1971 and June 25, 1975 or a period of 12 months from June 25, 1975 whichever period was the shortest. Sub-section (2) and (3) provide for the making of a declaration to that effect by the authorities concerned if they are so satisfied on consideration that it is necessary to detain a person for effectively dealing with the emergency. Sub-section (2) deals with cases of persons against whom orders of detention were made under the Act on or after June 25, 1975 but before the coming into force of this section, viz. June 29, 1975, while sub-section (3) deals with cases of detention in respect of persons against whom orders for detention were made after the coming into force of the section. The proviso to sub-section (3) provides for review and the necessity of confirmation within fifteen days of the declaration by the State Government in case such declaration is made by an officer subordinate to the State Government. Sub-section (2A) provides for deemed approval of a detention order made by an officer subordinate to the State Government in case the State Government makes a declaration that the detention of the person ordered to be detained is necessary for dealing effectively with the emergency. Sub-section (4) provides for reconsideration at intervals not exceeding four months of the necessity of detention of a person in respect of whom a declaration is made under sub-section (2) or (3). According to sub-section (5), in making any review, consideration or reconsideration under sub-section (2), (3) or (4), the appropriate Government or officer may act on the basis of the information and materials in its or his possession without communicating or disclosing any such information or materials to the person concerned or affording him any opportunity of making any representation against the making under sub-section (2), or the making or confirming under sub-section (3), or the non-revocation under sub-section (4), of the declaration in respect of him. Sub-sections (6) and (7) provide interalia that Sections 8 to 12 shall not apply in the case of a person detained under detention order to which the provisions of sub-sections (2) and (3) apply. Sub-section (8) authorities the Central Government whenever it considers it necessary so to do to require the State Government to furnish to the Central Government the information and materials on the basis of which declaration has been made or confirmed or not revoked and such other information and materials as the Central Government may deem necessary.

586. It would appear from what has been stated above that once a declaration is made with respect to a detenu under sub-section (2) or (3) of Section 16A of MISA, the provisions of Sections 8 to 12 of MISA would not apply to such a detenu. The result would be that the grounds of the order of detention would not be disclosed to the person affected by the order. There would also be no reference of the case of such a person to the Advisory Board.

587. We may now turn to sub-section (9) of Section 16A. According to this sub-section, notwithstanding anything contained in any other law or any rule having the force of law, the grounds on which an order of detention is made or purported to be made under Section 3 against any person in respect of whom a declaration is made under sub-section (2) or sub-section (3) and any information or materials on which such grounds or a declaration under sub-section (2) or a declaration or confirmation under sub-section (3) or the non-revocation under sub-section (4) of a declaration are based, shall be treated as confidential and shall be deemed to refer to matters of State and to be against the public interest to disclose and save as otherwise provided in this Act, no one shall communicate or disclose any such ground, information or material or any document containing such ground, information or material. According to clause (b) of sub-section (9), no person against

whom an order of detention is made or purported to be made under Section 3 shall be entitled to the communication or disclosure of any such ground, information or materials as is referred to in clause (a) or the production to him of any document containing such ground, information or material.

588. So far as the impact of Section 16A(9) is concerned on the extent of the power of judicial scrutiny in writs of habeas corpus relating to persons detained under MISA, I am of the view that the matter should not be gone into in these appeals for the following reasons.

589. Out of the nine High Courts which dealt with the question of maintainability of petitions for writs of habeas corpus, only two, namely, Rajasthan High Court and Nagpur Bench of Bombay High Court have gone into this aspect, while the other seven have not expressed any view in the matter. Both Rajasthan High Court and Nagpur Bench of the Bombay High Court have upheld the validity of Section 16A(9). While Rajasthan High Court has not read down the provisions of Section 16A(9), the Nagpur Bench of the Bombay High Court has expressed the view that it would be permissible for the High Court has expressed the view that it would be permissible for the High Court to call for an peruse the grounds in certain circumstances. The Nagpur Bench, it may be pointed out, dealt with the provisions of Section 16A(9) as they then existed before its amendment by Act 14 of 1976.

590. Before us arguments have been addressed on behalf of the respondents challenging the validity of Section 16A(9) on the ground that it is violative of Article 226 inasmuch as it prevents the High Court from effectively exercising the jurisdiction under that article to issue writs of habeas corpus. In my opinion, it would not be permissible in these appeals against orders disposing of preliminary objection to decide the question of validity of Section 16A(9). It is manifest that any decision on the question of the validity of Section 16A(9) would result either in upholding the validity of the provision or in striking it down. The latter course is out of question for it would be plainly impermissible to strike down the provision in appeal by the State when the validity of such provision has been upheld by the High Court. Likewise, it would be impermissible in these appeals to record a finding that the ambit of judicial scrutiny is greater than that found by the High Court even though this Court on consideration of the relevant provisions comes to that conclusion. There is no appeal before us by the detenu respondents. This Court in appeal by the State cannot enlarge the area of the unfavourable decision qua the State and make its position worse compared to what it was before the filing of the appeal. Procedural propriety in matters relating to appeals forbids such a course. The appeals before us are primarily against the orders of the High Court disposing of the preliminary objections relating to the maintainability of petitions under Article 226 for writs of habeas corpus in view of the Presidential Order. The question of extent of judicial scrutiny in the light of Section 16A should, in my opinion, be gone into when the whole matter is at large before us and we are not inhibited by procedural and other constraints from going into certain aspects which have a vital bearing. It is primarily for the High Courts before which the matters are pending to decide the question of area of judicial scrutiny in the light of Section 16A(9), as amended by Act 14 of 1976. A course which has the effect of bypassing the High Courts and making this Court in appeals from orders on preliminary objection to decide the matter even before the matter has been considered by the High Court in the light of Section 16A, as amended by Act 14 of 1976, should, in my opinion, be avoided.

591. The observations on pages 658 and 659 [SCC pp. 516, 517] in the case of J. K. Synthetics Ltd. v. J. K. Synthetics Mazdoor Union ((1972) 1 SCR 651 : (1971) 3 SCC 509) can be of no assistance in this case because what has been laid down there is that the respondent can support an award of an industrial tribunal on a ground not adopted by the tribunal so long as in the final result the amount

awarded is not exceeded. The observations in that case do not warrant the enlargement of the areas of unfavourable decision against an appellant in the absence of an appeal by the respondent. Nor does the decision justify adoption of a course which might conceivably lead to such result. Likewise, no assistance can be derived from clause (3) of Article 132 of the Constitution because of the fact that the appeal against the order of the Rajasthan High Court has been filed in pursuance of a certificate of fitness granted under that article. The only point on which the Rajasthan High Court has decided against the appellant is regarding the maintainability of the petition under Article 226. The effect of Article 132(3) would only be that it would be permissible to assail the order of the High Court on the question of maintainability of the petition under Article 226 not only on the ground relating to the question of law as to the interpretation of the Constitution mentioned in the order granting the certificate but also with the leave of this Court on other grounds. It is, however, not the effect of Article 132(3) that if the High Court in the impugned order decides two distinct preliminary issues, one in favour of one party and the other in favour of the opposite party, this Court in an appeal by only one party against that order of the High Court can also go into the correctness of the issue which has been decided in favour of the appellant. The fact that the respondents in these appeals have as a matter of abundant caution addressed arguments on sub-section (9) of Section 16A, so that the submissions of the appellants on that point may not remain unanswered, would not justify departure from the principle that this Court cannot, in the absence of an appeal by the respondent, adopt a course which might conceivably enlarge the area of unfavourable decision against the appellant.

592. I am, therefore, of the view that the appropriate occasion for going into the question of the constitutional validity of Section 16A(9) of MISA and its impact on the power and extent of judicial scrutiny in writs of habeas corpus would be when the State or detenu, whosoever is aggrieved, comes up in appeal against the final judgment in any of the petitions pending in the High Courts. The whole matter would then be at large before us and we would not be inhibited by procedural and other constraints referred to above. It would not, in my opinion, be permissible or proper to shortcircuit the whole thing and decide the matter by bypassing the High Courts who are seized of the matter.

593. I may now summarise my conclusions :

(1) Article 21 cannot be considered to be the sole repository of the right to life and personal liberty.

(2) Even in the absence of Article 21 in the Constitution, the State has got no power to deprive a person of his life or personal liberty without the authority of law. That is the essential postulate and basic assumption of the rule of law in every civilised society.

(3) According to the law in force in India before the coming into force of the Constitution, no one could be deprived of his life or personal liberty without the authority of law. Such a law continued to be in force after the coming into force of the Constitution in view of Article 372 of the Constitution.

(4) Startling consequences would follow from the acceptance of the contention that consequent upon the issue of the Presidential Order in question no one can seek relief from courts during the period of emergency against deprivation of life and personal liberty. If two constructions of the Presidential Order were possible, the court should

lean in favour of a view which does not result in such consequences. The construction which does not result in such consequences in not only possible, it is also pre-eminently reasonable.

(5) In a long chain of authorities this Court has laid stress upon the prevalence of the rule of law in the country, according to which the Executive cannot take action prejudicial to the right of an individual without the authority of law. There is no valid reason to depart from the rule laid down in those decisions, some of which were given by Benches larger than the Bench dealing with these appeals.

(6) According to Article 21, no one can be deprived of his life or personal liberty except in accordance with procedure established by law, Procedure for the exercise of power of depriving a person of his life or personal liberty necessarily postulates the existence of the substantive power. When Article 21 is in force, law relating to deprivation of life and personal liberty must provide both for the substantive power as well as the procedure for the exercise of such power. When right to move any court for enforcement of right guaranteed by Article 21 is suspended, it would have the effect of dispensing with the necessity of prescribing procedure for the exercise of substantive power to deprive a person of his life or personal liberty, it cannot have the effect of permitting an authority to deprive a person of his life or personal liberty without the existence of such substantive power.

(7) A Presidential Order under Article 359(1) can suspend during the period of emergency only the right to move any court for enforcement of the fundamental rights mentioned in the order. Rights created by statutes being not fundamental rights can be enforced during the period of emergency despite the Presidential Order. Obligations and liabilities flowing from statutory provisions likewise remain unaffected by the Presidential Order. Any redress sought from a court of law on the score of breach of statutory provisions would be outside the purview of Article 359(1) and the Presidential Order made thereunder.

(8) Article 226 under which the High Courts can issue writs of habeas corpus is an integral part of the Constitution. No power has been conferred upon any authority in the Constitution for suspending the power of the High Court to issue writs in the nature of habeas corpus during the period of emergency. Such a result cannot be brought about by putting some particular construction on the Presidential Order in question.

(9) There is no antithesis between the power of the State to detain a person without trial under a law of preventive detention and the power the court to examine the legality of such detention. In exercising of such power the courts only ensure that the detaining authority acts in accordance with the law providing for preventive detention.

(10) There is no sufficient ground to interfere with the view taken by all the nine High Courts which went into the matter that the Presidential Order dated June 27, 1975 did not affect the maintainability of the habeas corpus petitions to question the legality of the detention orders.

(11) The principles which should be followed by the courts in dealing with petitions for writs for habeas corpus to challenge the legality of detention are well-established.

(12) The appropriate occasion for this Court to go into the constitutional validity of Section 16A(9) of MISA and its impact on the power and extent of judicial scrutiny in writs of habeas corpus would been when the State or a detenu, whosoever is aggrieved, comes up in appeal against the final judgment in any of the petitions pending in the High Courts. The whole matter would hen be at large before this Court and it would not be inhibited by procedural and other constraints. It would not be permissible or proper for this Court to shortcircuit the whole thing and decide the matter by bypassing the High Courts who are seized of the matter.

594. Before I part with the case, I may observe that the consciousness that the view expressed by me is at variance with that of the majority of my learned brethren has not stood in the way of my expressing the same. I am aware of the desirability of unanimity, if possible. Unanimity obtained without sacrifice of conviction commends the decision to public confidence. Unanimity which is merely formal and which is recorded at the expense of strong conflicting views is not desirable in a court of last resort. As observed by Chief Justice Hughes Prophets with Honor by Alan Barth, 1974 Ed., pp. 3-6), judges are not there simply to decide cases, but to decide them as they think the should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice. A dissent in a court of last resort, to use his words, is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.

595. The appeals are disposed of accordingly.

ORDER

Order by Majority [Ed. : The certified copy so indicates but it is in fact an order of the Court having been signed by all the five Judges constituting the Bench. The order is based of course on the majority decision of Ray, C. J.and Beg, Chandrachud and Bhagwati,JJ.]

596. In view of the Presidential Order dated June 27, 1975 no person has any locus standi to move any writ petition under Article 226 before a High Court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by mala fides factual or legal or is based on extraneous considerations.

597. Section 16A(9) of the Maintenance of Internal Security Act is constitutionally valid.

598. The appeals are accepted. The judgments are set aside.

599. The petitions before the High Courts are now to be disposed of in accordance with the law laid down in these appeals.

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