Upholding Rule of Law during Emergency

Additional District Magistrate, Jabalpur v. Shivakant Shukla

(1976)2SCC521

Hon'ble Judges/Coram:
A. N. Ray, C.J., H. R. Khanna, M. Hameedullah Beg, P. N. Bhagwati and Y. V. Chandrachud, JJ.

JUDGMENT

H.R. Khanna, J.

137. Law of preventive detention, of detention without trial is an anathema to all those who love personal liberty. 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 a 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.

140. 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.

163. 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 daring 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 stiff 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 one 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 right are life, liberty, and the pursuit of happiness. The Second Amendment to the US Constitution refers inter alia to security of person, while the Fifth Amendment prohibits inter alia deprivation of life and Bberty 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 derived of his: life or liberty without the

authority of law The International Commission of Jurists, which is affiliated of 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 achievement was the Declaration of Delhi, 1959. This resulted from a Congress held m 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.).

164. 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 ased 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, as 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 self indeed such liberty could ever exist, or even amount to anything more than nothing at all.

165. 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 scarified to these of the ruler. Accordingly^ in the Laws he modified his position and urged the acceptance of the "second best", namely government under law. Since 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 egotism of men and the 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 in, 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 Ors.). 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 be attained by the existence of independent courts which can hold the balance between citizen and State and compel Governments to conform to the law.

166. Sanctity of life and liberty was not something new when the Constitution was drafted. It represented a fact 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 principle that no one shall be deprived of his life and liberty without the authority of law are 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 thinkers 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 or 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 are 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).

167. To use the words of Justice Brandeis Olmstead v. United States, 277 U. S. 438(1928) 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 evil-minded persons. Greatest danger to liberty lies in insidious encroachment by men of zeal, well-meaning but lacking in due deference for the rule of few.

168. 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 force 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 un-equivocally repelled. In the case of James Sbmmersett [1772], 16 Cr. pract.289 Lord Mansfield dealt with a case of a negro named Sommersett,: who was being taken in a ships to Jamaica for sale in a slave market. When the ships-anchored at 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 inconveniences, 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.

169. 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 coining into force of the Constitution.

171. Preventive detention, though not strictly punishment, is akin to punishment, because of the evil consequences of being deprived of 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 haying 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 out penal laws no one is empowered to deprive a person of his life or liberty without the authority of law.

172. 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.**

173. 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 CrPC 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 he Constitution Bench in the case of Director of Rationing and Distribution v. The Corporation of Calcutta and Ors. MANU/SC/0061/1960 : 1960CriLJ1684 , include not only the statutory law but also custom or usage haying 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 that 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.**

174. 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 interpretation warrants such an inference. Section 491 of the CrPC 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 of enforceable 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 CrPC 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 CrPC continued to be 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 CrPC, 1973, the same remedy is still available under Article 226 of the Constitution.

176. 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 half way house in between. So let us examine the consequences 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 any 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 order 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.

178. 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 no 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.

179. 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.

182. 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 Friedman on page 500 of Law in 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 a 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 principal 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 officials 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).

183. 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 must have the sanction of some law. This principle has now been well settled in a chain of authorities of this Court.

184. In the case of Rai Sahib Ram Jawaya Kapur and Ors. v. The State of Punjab MANU/SC/0011/1955 : [1955]2SCR225 Mukherjea C.J. speaking for the Constitution Bench of this Court observed:

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.

185. The above attribute of the rule of law has been specially highlighted in the decision of this Court1 in the case of State of Madhya Pradesh and Anr. v. Thakur Bharat Singh MANU/SC/0043/1967 : [1967]2SCR454 . 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 Clauses (ii) and (iii) of the order invalid on the ground that Clauses (b) and (c) of Section 3 (i) of the Madhya Pradesh Public Security Act on which they were based contravened Article 19. On appeal this Court held that Section 3 (i) (b) violated Article 19 and as it was a pre-emergency enactment, it must be deemed to be void when enacted. Section 3 (i) (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 if Section 3 (i) (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. Shah J. (as he then was) speaking for the Court observed :

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 may 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 excludes the existence of arbitrariness, of prerogative or even of wide discretionary authority on the part of 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 polities now and again reminds English readers that wherever there is discretion there is room for arbitrariness, and that in a republic no less than under a monarchy discretionary authority on the part of the government must mean insecurity for legal freedom ion 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.

191. 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.

202. The President can in exercise o 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 hereunder. 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 statutory4 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 has 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.

203. 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.

204. Our founding fathers made Article 226 which confers power on the High Court to issue inter alia writes in the nature of habeas corpus an integral part of the Constitution. They were aware that under the US 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 provision in our Constitution for suspending the power of the High Courts under Article 226to 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 Article359(1) even though Article 226 continues to remain in force during the period of emergency.

205. 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 or 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).

206. In Greene v. Secretary of State for Home Affairs [1942] A.C. 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.

207. 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] A.C. 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.

208. The existence of the power of the courts to issue a writ of habeas corpus is regarded as one of the most important characteristic 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 "principal 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 others remethes 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 may be exacted why they should remain closed. It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic 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).

209. 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 CJ. 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 quota 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 any 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 I 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 has to decided 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 shall not exceed in its executive authority the law made by Parliament and that the executive shall not give its own interpretation of the law which is in 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 laws of the land. Judicial scrutiny of executive orders with a view to ensure that they are not violative of the provisions 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.

210. 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.

211. 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) 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 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.**

212. 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 meat 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 cart only take a secondary place. The motto has to be "Who lives, if the country these". 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.

In dealing with an application for a writ of habeas corpus, the court 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 apposite in this context to refer to the observations of Professor Alan M. Dershowite :

The available evidence suggest that our system of deter mining 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 Gold-stein) .

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.

213. 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 to 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 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 means 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".

214. 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.

231. I may now summaries 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 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 is not only possible, it is also preeminently 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 of the court to examine the legality of such detention. In exercising 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 of 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 be 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 then be at large before this Court and it would not be inhibited by procedural and other con straits. It would not be permissible or proper for this Court to short circuit the whole thing and decide the matter by by-passing the High Courts who are seized of the matter.

232. Before I part with the case, I may observe that the conscious ness 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 ex pressing the same. I am aware of the desirability of unanimity, if possible. Unanimity obtained without sacrifice of conviction comments 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 Earth 1974 Ed. p. 3-6 judges are not there simply to decide cases, but to decide them as they think they should be decided, and while if 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.

233. The appeals are disposed of accordingly.

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