CHAPTER VI

CONTROL IN THE LIGHT OF STATUTORY LIMITS DURING EMERGENCY

6.1 INTRODUCTION:

Study presented in the previous chapter has revealed that like English Courts, the Indian Supreme Court and High Courts have applied doctrine of ultra vires while controlling exercise of discretion in the light of statutory limits. A statute vesting discretionary power on the administrative authorities requires that these powers must be exercised in accordance with the substantive and procedural limits provided in it. The obligation to act within the statutory limits arises from the statute itself and any person affected by the exercise of discretion can enforce this obligation of the authority through a writ petition under Article 226; and if the case involves a fundamental right then he can enforce this obligation under Article 32 also. It may be noted however, that since the various grounds of control under the doctrine of ultra vires arise out of the statute, the person's right to challenge the exercise of discretionary power on the ground of ultra vires is independent of any fundamental right, and can be exercised even without invoking a fundamental right. Therefore, during the period of emergency, when
some of the important fundamental rights may be suspended, the control in the light of statutory limits, based on the doctrine of ultra vires acquires significance. In view of this it is attempted here to critically evaluate the approach of the courts towards the statutory limits during emergency. Since the Indian courts have adopted the doctrine of ultra vires from the English courts, it is proposed first to give a brief account of the approach of the English courts during emergency and then proceed to discuss the approach of the Indian courts.

6.2 APPROACH OF THE ENGLISH COURTS DURING EMERGENCY:

In England, during the two world wars, drastic discretionary powers were conferred on the Executive to interfere with the rights of property and person of people. This drastic interference with people's rights received judicial sanction in several cases, as the courts followed the policy of least interference with the executive. The theory underlying this restrictive approach of the courts is that when the country is engaged in a war of survival the people have to sacrifice their rights to some extent so that the State may live. If the state goes down, the people also go down. It may, however, be noted that least interference by courts did not mean that the basic principle of legality or ultra vires was given a complete go by. The courts conceded to the
person affected a right to challenge legality of an executive action on the grounds of *malafide* or ulterior purpose etc., provided he could establish them, though in fact it was very difficult for him to establish illegality as the courts refused to go into the grounds of subjective satisfaction of authority, nevertheless, these grounds of control did exist.

The approach of the English courts, towards the exercise of discretionary powers, during emergency, has been very well illustrated by the famous case of *Liversidge v. Anderson* (1943). This case was decided by the House of Lords during the Second World War, when England stood alone after the fall of France and was faced with war of survival. In the instant case the exercise of discretion in the matter of preventive detention under Regulation 18 B was challenged. Regulation 18 B which was framed under S.2(2) of the Emergency Powers (Defence) Act, 1939, provided: 'If the Secretary of State has reasonable cause to believe any person to be of hostile origin or association..... he may make an order against that person directing that he may be detained'. The whole question in this case turned on the meaning of the words "has reasonable cause to believe". In normal times these words mean that the reasonable cause must exist before the subjective satisfaction about exercising a power has been arrived and when challenged the authority must show
to the court that the reasonable cause existed. However in the special context of the war situation, prevailing at that time, the majority of the House of Lords held that if the Secretary of the State thinks that there is a reasonable cause then the requirement of the statutory provision is satisfied and the courts will not question his subjective satisfaction on the ground of reasonableness or relevancy of his grounds of belief. Lord Maugham said that though the prima facie meaning of words "if A.B. has reasonable cause to believe a certain circumstance:" was "if there is in fact reasonable cause to believe", yet in a special context "the words might well mean if A.B. acting on what he thinks is reasonable cause (and of course acting in good faith) believes the thing in question".

Thus the majority decision in Liversidge, refused to go into the question of relevancy of grounds and did not require the Secretary of the State to disclose the grounds before the court. However, on the ground of malafide or dishonest exercise of discretion, the judicial review was kept open, provided it has been proved by the person affected.

Lord Atkin who gave a strong and memorable dissenting judgement did not agree with the reasoning of the majority and held that the words "has reasonable cause to believe" had always
meant, if there was in fact a reasonable cause. He protested against a restrained construction put on the words with the effect of giving an uncontrolled power of imprisonment to the minister. Speaking on this point he made the following weighty observation

"I view with apprehension the attitude of judges, who on a mere question of construction, when face to face with claims involving liberty of the subject, show themselves more executive-minded than executive....! in a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute. In England, amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty....that the judges are no respecters 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"\(^6\).

Lord Atkin's view found favour in the subsequent legal opinions and post war cases; and the majority decision in \textit{Liversidge v. Anderson}, has been strictly limited to its own facts, namely to the existence of grim situation of war\(^7\).
6.3 APPROACH OF THE INDIAN COURTS DURING EMERGENCY:

In India Emergency was imposed three times. First it was imposed in 1962 in the wake of China War. Then it was imposed in 1971 during Indo Pakistan War. While the Emergency declared in 1971 was continuing, another Emergency was declared in June 25, 1975 on the ground of internal disturbances. Effect of these emergencies on the rights and interests of an individual, vis-a-vis administrative powers has been considered in various leading cases of the Supreme Court. The study of these cases reveals that the interpretation of the 1975 emergency, adopted by the Supreme Court, in a well known case decided in 1976\(^8\), differed from the previous interpretation of the emergency powers. Therefore the discussion on this topic has been divided into two parts, namely the approach of the courts before 1976 and the approach of the court in 1976 and after.

6.3.1 Approach of the Court before 1976:

During this period the Indian Supreme Court and High Courts following an approach similar to that of the English court, refused to compel the Government to produce the material for its satisfaction, but at the same time conceded that a person affected by exercise of discretionary power could challenge its legality on the ground of mala fide, non-application of mind or ulterior purposes. Thus the question of
legality on the ground of *ultra vires* was never suspended. This approach was based on the correct interpretation of emergency powers and the effect of suspension of fundamental rights. This may be evident from the following discussion.

In India a proclamation of emergency affects the fundamental rights of the people. Article 358 provides that while a proclamation of emergency is in operation, nothing in Article 19 shall restrict the power of the State to make any laws or to take any executive action which the State would, but for the provision of Article 19 be competent to make or take. Thus under Article 358, there is an automatic suspension of Article 19 as soon as the emergency is proclaimed and it ceases to restrain the legislative powers and the executive power of the Centre or a State taken in pursuance of legislation. In addition to it, under Article 359(1) when the proclamation of emergency is in operation, the President may by order declare that the right to move any court for enforcement of such of the fundamental rights as may be mentioned in the order, and all proceedings pending in any court for 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. During the period of emergency the question, often raised, was: What is the effect of suspension of fundamental
rights under Articles 359 and 358, or what is the scope of these two Articles? This question has been dealt with in various leading cases, decided by the Supreme Court in which it has been repeatedly held that Article 358 or a Presidential order under Article 359 does not affect the person's right to challenge the legality of the exercise of executive or administrative discretion because the obligation of the executive to act in accordance with the statute remains intact. Therefore an administrative order could be challenged if it was passed for an unauthorised purpose or if it was mala fide. The leading pronouncement on this point has been given by the Supreme Court in Makhan Singh v. State of Punjab (1964). This case which elaborately interpreted the scope of Article 359(1) was decided during the existence of emergency declared in 1962 due to China War under which an order was issued by the President suspending the enforcement of Articles 14, 21 and 22, by any person, if such person was deprived of any such rights under the Defence of India Act 1962 or Rules made under it. The circumstances under which the question of interpretation of Article 359 arose in this case were: several detenus detained under R.30(1)(b) had filed writ petitions before the High Courts of Bombay, Punjab and Allahabad under Section 491(b) of the Cr. P.C. (Old.)
The main contention raised by all the detenus was that S.3(2), 15(1) and 40 of Defence of India Act, 1962 and Rule 30(1)(b) made under the Act were invalid because they violated Articles 14, 21, 22(4), (5) and (6) therefore their detention was invalid. While the petitions before the Bombay and the Punjab High Courts were dismissed in view of the presidential order under Article 359, similar petitions before the Allahabad High Court were allowed. The appeals from the above decisions of the High Courts were placed before the special bench of the Supreme Court consisting of seven judges. The main contention involved raised the following two important questions:–

(i) What is the true scope of and effect of the Presidential order; and

(ii) Does the bar created by the Presidential order issued under Article 359(1) operate in respect of applications made by detenu under Section 491(1)(b) of Cr. P.C.

About the question No.1, namely the scope and effect of the Presidential Order under Article 359, Gajendragadkar, J. (speaking for himself, Sarkar, Wanchoo, Hidayatullah, Das Gupta and Shah, JJ.) observed that the answer to this question would depend upon a fair and reasonable construction
of Article 359(1) itself. Therefore, he proceeded to interpret Article 359(1) and held that Article 359(1) bars enforcement of fundamental rights in any court whether it is under Articles 32, 226 of the Constitution or S. 491(1)(b) of Cr. P.C. However, a bar under Article 359(1) does not cover the following challenges to exercise of power, because they do not involve a plea of violation of fundamental rights:

(i) a detenu may challenge his detention on the ground that he has been detained in violation of statutory provisions;

(ii) that the detention was *malafide*.

In addition he held that the law itself could be challenged on the ground of excessive delegation of legislative power and on the ground of colourable legislation, and as such challenges are not affected by Article 359(1).

In view of the above interpretation of Article 359(1) he had gone into the merits of contentions of excessive delegation and colourable legislation which were raised in some of the petitions and decided them against the detenu. Thus the holding of the Supreme Court in *Makhan Singh* on the point of scope of emergency powers under Article 359(1) constituted the ratio of the case, since the decision on this point was
the main issue, on which the ultimate decision was based.

Subba Rao, J. in his partly concurring and partly dissenting judgement took a very restrictive view of the scope of Article 359(1). He held that the Presidential order issued under Article 359(1) did not bar a detainee from challenging the validity of the statutory provision under Articles 14, 21 and 22 under S. 491(1)(b) of Cr. P.C. as it was an independent remedy. However, since the majority of the six judges did not agree with this extremely restrictive interpretation of Article 359(1) the ratio of the Makhan Singh case which defined the scope of Article 359(1) came to be like this: (1) any enforcement of fundamental rights suspended under Article 359(1) is prohibited during emergency, (ii) however, the legality of the exercise of administrative discretion can be challenged under a statute by the person affected if the action is not in accordance with the statute or for authorised purpose, or if it was malafide, because such grounds do not involve plea of violation of fundamental rights.

Thus, although the constitutionality of Defence of India Act and Rules could not be challenged under Article:14, 21 or 22, the non compliance with the statute could be challenged. Following the above ratio some orders of preventive
detention under the Defence of India Rule 30(1)(b) could be struck down on the grounds of unauthorised purpose, mala fides, non-application of mind by the detaining authority, or on illusory grounds, or lack of authority in detaining authority etc.

The above principle was also followed in other areas wherein it was held that mere suspension of Article 19 under Article 358 did not authorise the administration to proceed and act without the authority of law.

The above cases reveal that the Supreme Court and the High Courts followed a balanced approach ensuring the interest of the country on one hand, and protecting the interest of the individual in personal liberty and other rights on the other hand. The scope of the Article 359(1) itself was held to be limited and the question of statutory ultra vires or a challenge to legality of governmental action on several grounds of statutory ultra vires were not covered by it. Thus, although a very drastic statute could be passed during emergency which could do away with the necessity of giving grounds, necessity of advisory board etc. (as was in fact done in Defence of India Act); and it could not be subject to the question of unconstitutionality on the ground of Articles 21, 22 or Article 14, but the question of compliance
with statute, nevertheless, remained intact. From this view of the matter the phraseology of Presidential order (namely whether the suspension is with respect to any particular statute or a general suspension) becomes irrelevant. However, in a case, subsequent to Makhan Singh, a view was propounded by Subba Rao, J., that since the Presidential order was conditional and limited to Defence of India Act and Rules, it did not debar a person to come before the Supreme Court under Article 32 and challenge the exercise of power as violative of Article 21, because if an action was not in compliance with the Defence of India Act or Rules, it could not be covered by the Presidential order; and thus it could be challenged even under fundamental right of personal liberty. This argument, which was obviously propounded to permit the petitioner to come to the Supreme Court even under Article 32, seems to have blurred the clear ratio of Makhan Singh, which related to scope of Article 359(1), irrespective of the question of nature of presidential order under it. The conditional nature of the very power under 359(1), on which the judgement in Makhan Singh was based, came to be confused with the question of nature of the President's order. This confusion seems to have given rise to the curious ruling of the Supreme Court in A.D.M. Jabalpur v. Shukla, decided in April, 1976. The question arises what were the repercussions of this confusion on the question
of control over exercise of discretion during emergency.
The following discussion attempts to deal with this question
with the help of decided cases and views of some eminent
jurists of India.

6.3.2 Approach of the Court in 1976 and After:

On June 25, 1975, a Presidential order was issued
under Article 359(1) suspending enforcement of fundamental
rights of any person including a foreigner, under Articles 14,
21 and 22. Unlike the Presidential orders issued in 1962 or
1971 which had suspended enforcement of Articles 14, 21 and 22
only for the purpose of Defence of India Act and Rules, the
present Presidential order made a general suspension of enforce-
ment of these rights. The Maintenance of Internal Security
Act (MISA) was amended to give very drastic powers of preven-
tive detention to the authorities. Under these provisions
the Central or State Government, or the authorised officer
could make a declaration, along with the order of preventive
detention issued under this Act, that the detention of the
specified individual was necessary for dealing effectively
with emergency. If such declaration was made (which was
generally made in various cases) then he could be denied the
important safeguards of availability of grounds of detention,
of making representation, and of review by the advisory board. The only safeguard available to him was the administrative or the executive review and the good sense of the administration. Probably with a view to avoid judicial scrutiny into grounds of detention, for judging their relevancy to the purpose of the Act, a sub-section was added, which specifically provided that the grounds of detention and the information and material on which the grounds were based shall be treated as confidential and shall be deemed to refer to matters of State and it will be against public interest to disclose them. No one shall communicate or disclose any such grounds, information or material etc.

Armed with the above drastic powers the administrative authorities made several preventive detention arrests and various emergency excesses were being committed against detenus. During this period several writ petitions were filed before various High Courts challenging preventive detention on various grounds. Nine High Courts namely the High Court of Delhi, Karnataka, Bombay, Allahabad, Madras, Rajasthan, Madhya Pradesh, Andhra Pradesh, Punjab & Haryana, rightly held that despite the said Presidential order the petitions challenging legality of the administrative discretion under the statute were maintainable under Article 226. In view of
the Makhan Singh principle it was said that the Presidential order did not create an absolute bar to the judicial scrutiny into the validity of the detention order, K.M. Ghatate v. Union of India.\textsuperscript{20} Constitutes an important illustration of this approach of the High courts. In this case rejecting the argument of unconditional Presidential order under Article 359(1), the Bombay High Court held that the pleas of malafide etc. had been regarded as falling outside the scope of Article 359. Such pleas could not be affected, nor be brought within the scope of Article 359 by any Presidential order whatever its width. No Presidential order however comprehensive could affect a challenge to preventive detention on a ground falling outside 359. The court emphasised that even during emergency, an executive action must be supported by law and its validity is to be tested with reference to the law under which it is purported to be taken because during emergency rule of law is not suspended. The court also held that even inspite of a declaration issued under S.16-A of the MISA and its confirmation by the State Government, the legality or validity of the detention order under S.3 can be tested because the statute contemplates making of an order under S.3 independently of a declaration, which may be issued in addition to making of the relevant order. However, in such
a case the burden is upon the petitioner to make out a prima facie case. In view of this, the court did not go into the broader question whether the concept of personal liberty was solely based on Article 21, or existed outside Art. 21 in common law.

Appeals from the decisions of the High Courts, mentioned above came before the Supreme Court in A.D.M. Jabalpur v. Shukla where, by a majority of 4 to 1, the views expressed by the High Courts were overruled and the argument of unconditional Presidential order was accepted. A common order was passed by the majority consisting of Ray C.J., Beg, Bhagwati & Chandrachud, JJ. in the following words:

"In view of the Presidential order dated 27th June 1975 no person has any locus standi to move any writ petition under Art. 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 malafides factual or legal or is based on extraneous considerations."

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While arriving at this concluding order the majority also upheld S.16-A sub. S.(9) of MISA which prohibited the disclosure of grounds or material to courts by any person, as a valid rule of evidence.

The broad common basis for arriving at the above order were: (i) Article 21 is the sole repository of right to life and personal liberty; (ii) 'rule of law' for the period of emergency is contained in the emergency provisions and does not exist as an independent concept; (iii) Makhan Singh and other leading cases, were decided with reference to a conditional Presidential order, and therefore, did not apply to the unconditional Presidential order.

Justice Khanna, however, did not agree with the above view of the majority. In his strong and powerful dissent he refused to subscribe to the view that when right to enforce the fundamental right under Article 21 is suspended the result would be that there would be no remedy against deprivation of person's life and liberty even though such deprivation is without the authority of law or even in flagrant violation of law. He observed that

"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,..... 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"23 (emphasis supplied).

He also rejected the dubious argument that though 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 suspension of Article 21 and made following weighty observation:
"... 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 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 exhortations or words of advice which may be abjured or disobeyed with impunity."24 (emphasis supplied).

The above interpretation of Article 359(1) was based on the following grounds that: (i) Article 21 is not the sole repository of right to life and personal liberty. 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. 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. It's real effect was to ensure that a law under which a person can be
deprived of his life or liberty should prescribe a procedure for such deprivation or that such law should be a valid law not violative of fundamental rights guaranteed by Part III of the Constitution\(^{25}\), (ii) the concept of rule of law, which requires that executive or administrative authority must act in accordance and within the limits of statute, has been recognised as one of the fundamental principles, on which our Constitution is based\(^{26}\), (iii) the principle of separation of power recognised by our Constitution, which provides for a system of Parliamentary democracy and defines the respective functions of the three organs of the State, requires that executive must exercise its power in accordance with the statute. Article 226 of the Constitution confers power upon the High Court of issuing appropriate writs not only in cases where it is found that the executive orders are not in conformity with the provisions of the Constitution, but also in the cases where the executive or administrative orders are not in conformity with the statute. Thus the power of the High Court to enquire in a proceedings for a writ of *habeas corpus* into legality of the detention of person remains intact and cannot be denied\(^{27}\), (iv) the principle that no one shall be deprived of life or personal liberty flows from the statute itself and can be enforced by a person as a statutory right. While pointing out the consequences of the extreme argument
of the State that during emergency a person who has been illegally detained has no *locus standi* to come before the court and challenge the illegal executive action, even though it may be violative of statute or ultra vires, Khanna, J. observed:

"There is ..... a clear demarcation of the spheres of functions and power in our Constitution. The acceptance of the contention advanced on behalf of the appellant 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 contemplation of the framers of the Constitution".28.

Thus the dissenting judgment of Khanna, J. rightly stated that the courts cannot be reduced to be helpless
spectators to the glaring illegalities and blatant instances of deprivation of life and liberty. However, as the majority judges, through their final order gave unlimited powers to the executive during emergency by enlarging the scope of Article 359(1) to an extent which was neither intended by the language of this Article nor warranted by the fundamental principles of rule of law and separation of powers on which the Constitution is based, the courts were in fact rendered to helpless spectators to the emergency excesses committed with respect to life and personal liberty.

Since the majority ruling in A.D.M. Jabalpur v. Shukla (also known as Habeas Corpus case, Shukla's case or MISA CASE) was patently wrong, it invited severe criticism from eminent jurists in India.

While characterising the Shukla ruling as startling which strikes at the very foundations of administrative law in India, Dr. M.P. Jain rightly points out that it is at the basis of Indian jurisprudence that if executive derives powers under a statute, then it is subject to the doctrine of ultra vires and this doctrine is applicable in all cases whether involving fundamental rights or ordinary rights and is independent of any fundamental rights. The root case in this respect is Makhani Singh and there the (seven judges of the) Supreme Court has stated clearly that the pleas of
malafide etc. fell outside Article 359(1). From this view of the matter the phraseology of the Presidential Order of 1975 really becomes irrelevant. The only effect of the general suspension of Article 21 ought to be that while a detenu cannot come before the Supreme Court under Article 32 as he has no right to personal liberty, he could go to the High Court under Article 226 as he is challenging exercise of administrative power by invoking principles of administrative law. To challenge an order of detention on the basis of ultra vires is not an enforcement of the right to personal liberty but of the basic norm that the executive must act within the bounds of law. As the pleas of malafide, improper purpose, or irrelevant considerations are merely pleas of ultra vires they must be available to the detenu even during emergency. While agreeing with the dissenting opinion of Khanna, J. the learned author pointed out that this was the only way through which a balance could be drawn between the exigencies of State action during emergency and individual liberty and rule of law29.

The powerful dissent of Khanna, J. has also been characterised as giving the correct view of the law by Shree H.M. Seervai. In addition he has rightly demonstrated that the majority judgements in Shukla's case were self contradictory and constituted bad authority which should be
overruled. The main grounds of his argument are as follows:

(1) That the three out of four judges constituting majority, namely, Beg, Chandrachud and Bhagwati, JJ. accepted the proposition in their judgements that inspite of the Presidential order, a detenu can successfully maintain a habeas corpus petition if the order of preventive detention is ex facie bad that is invalid and void; and an order is ex facie invalid and void if one looks at the order and at the provision of the Act under which it is passed, and it becomes obvious that the order violates the requirements of the Act. Thus when the Act requires an order of preventive detention to be (a) signed (b) by a person authorised to do so, (c) to be based on one or more of the grounds specified in S. 3(1). An order which is not signed, or is signed by an unauthorised person or is based on an unauthorised ground is ex facie invalid and void because it is not in compliance with the Act. Therefore, the final order passed by the judges, which stated that '.....no person has locus standi to move any writ petition under Art. 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 malafides factual or legal or is
vitiated by malafides factual or legal or is based on extraneous considerations', is in conflict with the position accepted by the three judges in their separate judgements. This contradiction between the judgements and final order is enough to invalidate the majority judgements\textsuperscript{31}.

(ii) The three judges (Beg, Chandrachud and Bhagwati, JJ.) did not stop to consider the necessary consequences of the accepted position that ex facie invalid or void order could be challenged. Mainly the necessary and logical consequences of this proposition were that any executive interference with life or personal liberty must be supported by the authority of law; and that the Right of a person to move any court to enforce the fundamental rights conferred by Article 21 is a distinct and separate right from his right to move a court to order his release on the ground that the law authorising his detention has not been complied with. For, on no other ground can a detention order ex facie invalid or void be set aside and the detenu released on a habeas corpus\textsuperscript{32}. These necessary consequences are contradictory and shatter the premises of the majority that Art. 21 is the sole repository of life and personal liberty and the final order arrived at it.

(iii) The majority judgement failed to notice that the
whole emphasis of Articles 358 and 359 is on 'law'. These Articles require that the executive or administrative action must be taken under the authority of law (although such a law, if passed during emergency, cannot be challenged as violative of fundamental rights mentioned in the Article 358 or an order under 359, and thus can be very stringent). In other words, even during a proclamation of emergency, executive action taken without the authority of a valid law can be successfully challenged.

(iv) When the illegality can be challenged, on the ground that the detention order was not signed, or was signed by unauthorised person or was not based on the grounds mentioned in the section, then it could also be challenged on the ground of malafide, because there is no principle on which court can say in respect of an illegal order "thus far and no further".

(v) The decision in Makhan Singh, interpreting the scope of Article 359(1) was not obiter, as question of pleas open to the petitioner in view of suspension of certain fundamental rights under this article was one of the main issues on which the final decision in the case was based.

While speaking about inter-relation between fundamental rights and the statutory rights, Seervai rightly points
out that simply because an additional protection has been given to a person or citizen under a fundamental right with respect to his statutory rights, it does not mean that his statutory rights loose their independent existence and get merged into the fundamental right. Thus a person can enforce his statutory right that he should be detained legally in accordance with the statute even during the emergency.

Seervai also deals with another anomaly of the majority judgement wherein the argument of the respondent that a logical consequence of holding Art. 21 as the sole repository of life and liberty will be that the provision of the Indian Penal Code and Cr. P.C., dealing with life and personal liberty would also be suspended during emergency, was rejected; and it was held by the majority judges that the enforcement of Penal laws are not suspended, because they relate to public wrong or wrong to society and thus these rights arise from the respective statutes and not from Art. 21. Besides questioning the applicability argument based on a distinction between public wrong and private wrong in this case, he points out the absurdity resulting from such a stand of the Court. He observes that if Indian Penal Code is enforceable during emergency then the right of self defence under it also would be available to a person who is sought to be illegally or capriciously detained or harmed by an officer. It would be
surprising if a person could secure his life and personal liberty by taking law in his own hands and meeting force with force, and yet he should not be able to approach a court to obtain redress in due course of law from unlawful or illegal detention.\textsuperscript{37}

Inspite of the fact that the majority judgement given by four judges out of five in the Shukla's case was clearly wrong in its interpretation of the scope of the emergency powers; and was against the ratio of Makhan Singh laid down by the Constitution bench of seven judges, the High Courts could not directly disregard it. However, they tried to limit the scope of this ruling only to the matters which directly involved enforcement of personal liberty and refused to apply it to other areas of exercise of administrative discretion. A few illustration of this approach of High Courts are given below:

In Om Oil & Oil seeds Exchange Ltd. v. Union of India\textsuperscript{38} (decided on 19.1.1977) Delhi High Court rejected the contention on behalf of the Union of India that during emergency arbitrary exercise of discretionary power could not be questioned in view of suspension of right to enforce Article 14. This petition arose as a result of ruling by the Supreme Court which had struck down an order which was passed by the Administration of Delhi under R-422 framed under the Indian Telegraph
Act, on the ground that it was arbitrary because it was not in accordance with the statutory provisions. As a result of this ruling several persons were given back the telephone connections. Petitioner, whose telephone was disconnected by the same common order, was also entitled to the benefit of the Supreme Court ruling though he was not a party before the Supreme Court. Therefore he applied to administration for restoration of his telephone connection and as the administration refused to give him the connection he approached the High Court for enforcement of his right. While conceding that the petitioners were entitled to get their connections back on merits by virtue of the Supreme Court judgement, the counsel for Union of India contended that the petition was liable to be dismissed without reference to merit, inter alia, on the ground that in view of the suspension of the fundamental rights contained in Article 14 during emergency, an executive action could not be challenged as arbitrary. Relying on the Habeas Corpus case, it was argued that Article 14 is the repository not only of the fundamental right against hostile discrimination but of all legal rights in relation to arbitrary executive action as well; and that the arbitrary action is justiciable in India only because it contained the germ of hostile discrimination and would therefore, militate
against the fundamental guarantee of equality incorporated in Article 14 of the Constitution. Thus, as Article 14 was the repository of all rights in relation to equality and arbitrary executive action, none of these rights survived the suspension of fundamental right. Rejecting this argument as unfortunate and wholly misconceived, H.L. Anand, J. speaking for the court pointed out that although it is true that in their anxiety to extend the area of judicial review under Article 32 of the Constitution an attempt has been made in some of the decisions of the Supreme Court to extend the scope of Article 14 not only to discriminatory laws or discriminatory executive action, but to all arbitrary actions, on the ground that such arbitrary action contained the virus of hostile discrimination, but that does not mean that arbitrary action cannot be challenged independently of Article 14. An arbitrary action is justiciable independently of any of the fundamental rights because of the concept of 'Rule of Law' that every executive action must have legal sanction behind it.

About the argument of similarity of Article 14 and Article 21, H.L. Anand, J. further pointed out: it is no doubt true that Articles 14 and 21 are both part of the Fundamental Rights Chapter of the Constitution but the similarity
ends there. What has been stated by the Supreme Court about
Article 21 and the extent and foundation of the right of
personal freedom is not necessarily true of Article 14 in
relation to arbitrary action. 'In my view arbitrary execu-
tive action must stand on its own legs and must be tested at
the touch stone of the Rule of Law'.

Speaking about the concept of Rule of Law during emer-
gency he observed:

"In the system in which Rule of Law prevails
it is the law that rules, even though through
the instrumentality of man, and not the man
independently of or above the law. In such a
system all executive action must be based on
legal sanction and there is no place for
executive action that springs from individual
whim, malice or caprice..... Rule of Law ..... is much wider in its scope and ambit than the
fundamental rights.....Neither the declaration
of emergency nor the suspension of the funda-
mental right can.....be destructive of Rule of
Law. Any of these provisions, however, may
have the effect of limiting, during the ope-
ration of the emergency, the scope and opera-
tion of the Rule of Law". (emphasis supplied).

Thus by distinguishing Shukla's case on the ground
that it related only to Article 21 and matters of personal
liberty, the Delhi High Court held that the concept of Rule of Law, which cannot be destroyed even during emergency requires that every executive action must have legal sanction behind it. Therefore an arbitrary executive action which has not been in accordance with the relevant statutory provisions can be challenged even during emergency; and justiciability of such an illegal or arbitrary executive action is independent of the fundamental right contained in Article 14. In view of this the impugned order was quashed and the Government was directed to restore the telephone connection of the petitioner.

In another case of *Mohinder Singh v. Union of India* \(^{41}\), (decided on 14-10-1975) it was held by the same judge of the Delhi High Court that any state action which is prejudicial to the interests of a person is liable to be struck down even during emergency on the ground of non-observance of the rule of *audi alteram partem*, or fair play, because the obligation of the State to act in just and fair manner exists independently of any fundamental right.

The decision of the Madras High Court in *K.T.M.S. Abdul Cader v. Union of India* \(^{42}\) (decided on 23-3-1977) constitutes an another interesting illustration of the attitude of the High Courts towards the majority decision of the Supreme Court
in Shukla's case. In this case the petitioners challenged the validity of certain proclamation issued by the Chief Metropolitan Magistrate ordering attachment of the petitioners' property under S.82(1) of Cr. P.C. read with S.7(1)(C) of COPEPOSA. It was argued by the petitioner that as the detention order was not in accordance with the provisions of the statute, the proclamation based on this order was also invalid. In reply to this argument it was contended on behalf of the State that in view of the decision of the Supreme Court in A.D.M. v. Shukla, it was not open to the petitioner to question the validity of detention order. Therefore the proclamation based on it could not be challenged as illegal. This contention of the State Government was rejected by a full bench of the Madras High Court (consisting of P. Govindan Nair, C.J., Koshal & Ramanujam, J.J.). Speaking for the court Ramanujam, J. held that Shukla's case only held that it is not open to the petitioners to seek to enforce their personal freedom by challenging the validity of the detention orders on the ground that they violated their fundamental right. However in these cases the question is whether the petitioner's properties could be proceeded against under S. 82(1) of Cr. P.C. Though in dealing with this question the court has to necessarily go into the question whether
detention orders are invalid, but in doing so it is not enforcing the petitioner's right to personal liberty which alone is prohibited by the Presidential order. Quoting from Bhagwati, J's judgement in Shukla's case he further observed that even the ruling in Shukla's case recognised that the other claims put forward by the detenu apart from the claims of personal liberty are not taken away. Thus he concluded that even in view of the Supreme Court's decision in Shukla, Presidential Order under Article 359(1) does not operate as a blanket ban on court's power of going into validity of detention orders; if consideration of validity of detention order is necessary in order to decide a question relating to property right of a person courts can certainly go into this question.

The decision of the Bombay High Court in Shridhar Mahadeo Joshi v. The State of Maharashtra (decided on Dec. 7, 1976) constitutes another important authority depicting as to how the High Court could give relief to a person against the illegal exercise of discretionary power, even within the very restrictive scope of judicial review permitted by the decision of the majority in A. D. M. v. Shukla. It may be recalled that in Shukla's case all the four majority judges held that the Presidential Order under Article 359(1) did not operate as a ban to enforcement of Penal statutes.
By applying this ratio of the majority a division bench of the Bombay High Court (consisting of Tulzapurkar and Gadgil, JJ.) struck down an illegal and arbitrary order of the State Government forfeiting eleven issues of 'Sadhana' and ordering closure of Sadhana Press. The facts giving rise to the impugned order were: 'Sadhana' a Marathi Weekly published certain statements of leading persons like Sane Guruji, Vinoba Bhave, Rabindranath Tagore; and interviews of certain eminent leaders, during emergency. These statements were critical of press censorship and emergency. Due to this the State Government forfeited the concerned eleven issues and ordered closure of 'Sadhana' Press under R. 47 of the Defence and Internal Security of India Rules. This action of the Government was challenged as ultra vires the statute mainly on the ground that the concerned authorities failed to apply their mind to relevant considerations and misdirected itself in law. It was argued that under the relevant statute an issue could be forfeited only if it contained any 'prejudicial report' or related to matters relating to 'Security of India' or 'Defence of India' etc., and as most of the proscribed issues did not contain any 'prejudicial report' or any matter relating, either directly or indirectly, to the 'Security of India' and 'Civil Defence' and/or 'public safety', and or 'internal security' and/or 'maintenance of public order'.
their forfeiture and consequent penalty of closure were illegal and not supportable by the empowering statute. The petition was opposed by the Government on two preliminary grounds (i) that the petition was not maintainable because the petitioner was enforcing his right to freedom of speech and expression under Art. 19(1)(a) of the Constitution which was not enforceable in view of proclamation of emergency, and the Presidential Order issued on 8th January 1976 under Article 359(1) prohibiting any person to move any court for enforcement of right conferred by Article 19, (ii) that on parity of the reasoning adopted by the Supreme Court in the case of A.D.M. v. Shukla the petitioner could have no locus standi to challenge legality of the executive order on any ground, short of an ex facie vitiation. Speaking for the court Tulzapurkar, J. rejected the contention of the State Government; held that the sole purpose of the petitioners was to obtain relief of doing away with the penalties visited upon them by the State Government under K.47 on the ground that no contravention whatsoever, as alleged had been committed by them, and therefore, the petition could not be regarded as petitions for enforcement of fundamental rights conferred by Article 19(1)(a). While admitting that it was true that the result of quashing the impugned orders would be that the
proscribed and forfeited issues would become free for sale and distribution and the Sadhana Press would become free from closure, he pointed out that these were only the incidental and ancillary results which might flow from quashing of the impugned orders, but because of these ancillary results it could not be said that the petitioners were seeking to enforce their fundamental right of freedom of speech and expression.

Also, speaking about the argument based on Supreme Court's decision in *A.D.M. v. Shukla*\(^49\), Tulzapurkar J. observed that the Supreme Court in *Shukla's case* has clearly laid down that the right of an accused person to defend criminal proceedings launched against him is clearly outside the purview of the Presidential order; and as the present petitions are in substance and in form for the purpose of doing away with, or getting rid of penalties of proscription and forfeiture of eleven issues of 'Sadhana'; and closure of Sadhana Press, it could be compared with a criminal proceedings. Therefore the petition is not barred by the Presidential order. Thus rejecting the preliminary objection, he went through each and every proscribed issue and the alleged 'prejudicial' paras and held on merit that none of the issue contained 'prejudicial report' and therefore the impugned order was illegal.
and arrived at without application of mind. For arriving at this conclusion he proceeded on the legal basis that the constructive criticism of the policies, measures and actions of Government or Ministers and/or public officials, who for time being are engaged in carrying on the administration, which is within the permissible limits, does not amount to "prejudicial act" or prejudicial report. The term "prejudicial act" or "prejudicial report" only covers the criticism intended to create dissatisfaction towards "Government estab-
lished by law". The expression "Government established by law" cannot be equated with but must be distinguished from Ministers and/or the persons for the time being engaged in carrying on the administration. Therefore while criticising the policies and measures of Government, even if some oblique motives are attributed to Minister or persons formulating such policies the same cannot be equated with criticism of Government established by law.

Discussion of the above cases reveals that the Supreme Court's decision in Shukla's case which refused to recognise that illegal exercise of administrative discretion could be struck down in the light of statutory limits in the absence of availability of fundamental right to personal liberty under Article 21, was confined by the High Courts to the matters di-
rectly seeking enforcement of personal liberty; and was not
extended to other areas of exercise of discretionary powers. In addition, it may also be important to note that the controversy regarding the availability of any of the grounds of statutory ultra vires against illegal administrative action during emergency has arisen only in the matters where safeguards of fundamental rights as well as the safeguard of statutory ultra vires, could be availed of in the normal situations; and no such controversy has arisen with respect to the matters which could be covered by the safeguard of statutory ultra vires alone, and no question of fundamental rights was involved in them. For example in a matter relating to exercise of discretionary powers under S. 17(4) of the Land Acquisition Act, where no question of safeguard under any fundamental right was involved, an important and leading ruling was given by the Supreme Court during the period of emergency in the famous case of Narayan v. State of Maharashtra (decided on 11-10-1976) wherein Beg, J. (speaking for himself, Ray C.J. and Jaswant Singh, J.) held that the court could go into the question whether the subjective satisfaction of the administrative authority was arrived by proper application of mind to relevant considerations or that the power was exercised for proper purpose and not mala fide; and it was for administration to show that it acted legally by complying
with these requirements. It may be noted that out of the three judges constituting the bench two judges, namely Beg, J. and Ray, C.J. were the judges who constituted majority in the Shukla’s case, and yet they did not follow the restrictive approach, but applied the doctrine of statutory ultra vires with its full vigour against executive. The reason for this difference in approach was that in this case no confusion was created by the question of suspension of fundamental rights.

6.4 CONCLUDING REMARKS:

It has been shown in above discussion that in the beginning i.e. during 1962 and 1971 emergencies there has been no doubt about the applicability of the principle that the administrative authorities must act legally or in accordance with law or within the statutory limits. Although in view of suspension of certain fundamental rights more stringent statutes could be passed, giving drastic powers to the authorities, but the obligation to act in accordance with these statutes still remained intact. This legal approach, which was similar to that of English Courts, was based on the correct interpretation of the scope of emergency provisions contained in Articles 359(1) and 358 by the Supreme Court in Makhan Singh and subsequent leading cases, wherein it was held that what can not be suspended during emergency under
Articles 359 and 358 are pleas based on fundamental rights; and not pleas based upon the statute. In view of this question of scope of Articles 359 and 358 which themselves confer conditional power had nothing to do with the nature of Presidential Order suspending fundamental rights, namely, whether it was conditional or non-conditional. Thus, even during emergency a petitioner could get relief under Article 226 from High Courts against any illegal executive action and could come in appeal to the Supreme Court also. In a leading preventive detention case, however, the conditional nature of the Presidential Order was emphasised by Subba Rao, J. for purpose of enabling a petitioner to come before the Supreme Court under Article 32 also. It was held by him that since Article 21 was suspended conditionally i.e. only with respect to the Defence of India Act or Rules, a detention order which was beyond the power conferred by this Act could not be covered by it; and therefore it could be struck down as violative of Article 21 also. It may however, be noted that there was nothing in this case to suggest that relief against illegal action could only be obtained under Article 21 and not under statutory limits.

Subsequently the purpose of this approach was forgotten and the question of scope of Articles 359 and 358 was confused with the question of nature of Presidential Order; and when
a general Presidential Order was proclaimed in 1975 suspending enforcement of Articles 14, 21 and 22, which was not limited to any particular enactment, unlimited powers to arrest and preventively detain any person on any ground was conceded to the administration by the Supreme Court in *A.D.M. v. Shukla* (decided on 28-4-1975). In this case overruling the decision of nine High Courts it was held by a majority of 4 judges that as Article 21 was the sole repository of right to life and personal liberty, a detenu has no *locus standi* to challenge illegality of the detention order on the ground of malafide, or extraneous purpose or non compliance with the statutory provisions. For arriving at this conclusion the majority judges distinguished *Makhan Singh* and other leading cases on the ground that they related to conditional Presidential Order. However, in his powerful dissenting judgement H.R. Khanna, J. agreed with the nine High Courts and held that an illegal administrative order could be challenged on the ground of statutory *ultra vires*, even during emergency. While approving Khanna, J.'s dissent as giving a correct position of law, the eminent jurists Dr. M.P. Jain and Shree H.M. Seervai have rightly pointed out that the majority view was based on misconception of law relating to emergency powers under Articles 358 and 359 and of fundamental rights.
Besides, the concluding order arrived at by all the majority judges was contradictory to the judgements of three of the judges, Bhagwati, Beg & Chandrachud and thus it constituted a bad authority.

Although the High Courts were bound to follow the Shukla ruling, they tried to distinguish it as far as possible; and limited it only to the area of preventive detention where a direct enforcement of personal freedom was involved. For example the argument of Article 14 being the sole repository of arbitrariness was rejected by Delhi High Court.

In addition, it may be noted that the declaration of emergency did not affect the approach of the Supreme Court towards the question of legal control over exercise of discretion under the doctrine of ultra vires in the cases where no question of safeguard of fundamental right, besides the statutory safeguard was involved.

Thus, although unlimited discretionary powers were conceded to the executive in the area of preventive detention during emergency of 1975, this did not result in a general suspension of legal control in the light of statutory limits.

Nevertheless, the situation prevailing during emergency, did enable the executive to lower the morale of the country to its lowest ebb by subjecting its people to fear psychosis,
because it held the most drastic power to detain any person at its will. This curious position has been remedied by the Janata Party in 1978 by 44th Amendment, due to which now a declaration of emergency can only be made in case of threat of war or external aggression or in the case of armed rebellion and not in case of mere internal disturbances as was the case before. Even during this emergency fundamental rights under Articles 20 and 21 can no more be suspended under Article 359. It may be noted, however, that despite the 44th Amendment the above discussion of scope of legal control during emergency remains important and relevant because it draws attention to a very significant aspect of the law relating to control of discretion and that is: Although control over the exercise of discretionary power in the light of constitutional limits of fundamental rights and in the light of statutory limits may overlap in some cases, one should not be confused with the other. Control in the light of statutory limits through the doctrine of ultra vires has its own existence, which is based upon the concept of 'Rule of Law' and separation of powers recognised by the Indian Constitution which provide for a system of Parliamentary democracy and responsible Government. If these two modes of control are confused, serious repercussions may follow on a person's important statutory
rights. Although there have been a few observations by some of the Supreme Court judges which recognised fundamental rights as well as the statutory limits as a source of control, independent of each other, what is needed is a recognition of this legal position by the judiciary, generally.

FOOT NOTES


2. Even the very restrictive approach adopted by the House of Lords in Liversidge v. Anderson (1941) All E.R. 338 conceded that Legality of executive action could be challenged at least on the ground of malafide.

3. Ibid


5. (1941) 3 All E.R. 338 at p.345.

6. Ibid at p.351


10. A.I.R. 1964 S.C. 381

11. Ram Manohar Lohia v. State of Bihar, A.I.R. 1966 S.C. 740; For facts of this case, see supra Ch.V (5.2.2.1)

12. G. Sadanandan v. State of Kerala, A.I.R. 1966 S.C. 1925. For facts this case, see supra Ch.V (5.2.2.8)


20. A.I.R. 1975 Bom. 324


22. Ibid, at p.1392

23. Ibid, at p. 1265

24. Ibid, at p. 1265-1266

25. Ibid, at p. 1256

26. Ibid, at p. 1262

27. Ibid, at p.1257-1266

28. Ibid, at p. 1258

29. M.P. Jain, op.cit. pp.589 & 590

30. H.M. Seervai, op.cit. pp.1021-1048

31. Ibid, at pp.1021-1023

32. Ibid, at p.1023
33. Ibid, at pp.1024-1025
34. Ibid, at p.1040
35. Ibid, at pp.1041-1047
36. Ibid, at pp.1025-1031
37. Ibid, at p.1039
38. A.I.R. 1977 Del 132
39. Ibid, at p.138
40. Ibid, at p.137
41. A.I.R. 1977 Del 156
42. A.I.R. 1977 Mad 386
43. See S.3 of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974
44. A.I.R. 1976 S.C. 1207
45. A.I.R. 1977 Mad. 386 at p.393
46. 79 N.L.R. (1977) p.289
47. A.I.R. 1976 S.C. 1207
48. Ibid
49. Ibid
50. For other cases of similar approach of the High Courts see P.N. Awasthi v. State of U.P., A.I.R. 1976 All 414, wherein the Allahabad High Court held that suspension of right to enforce Art. 21 did not mean that the detenu could not apply for maintenance of his relatives under R. 51(1) of U.P. security prisoners rules (1972). In such a case he was not enforcing his right of personal liberty and a mandamus was granted to consider his application on merit; Similarly see N.Venkat Ramani v. The State of A.P., A.I.R. 1977 A.P. 209, wherein the Andhra Pradesh High Court held that S.16-A(9) of MISA only prohibited disclosure of grounds, however if grounds were already with the detenu, the court could go into them, by following this approach the detention order was quashed as based on irrelevant grounds. For other important High Court decisions on this point, see Anil B. Divan, 'Courts & Emergency', in Public Law in India (Ed)

51. A.I.R. 1977 S.C. 183

52. See Article 359 (1) & (1 A) of the Constitution as amended by 44th Amendment.

53. See for example, the judgement of the Supreme Court in P.J. Irani v. State of Madras (1962) 2 S.C.R. 169, wherein Rajagopala Ayyangar J. observed that if Article 14 may not be available to the petitioner he can challenge the administrative action, not following the guiding policy or purpose of statute even under the doctrine of statutory ultra vires (however, in this case the ultimate decision was based on Article 14). Also see the judgement of Khanna, J. in A.D.M. v. Shukla, A.I.R. 1976 S.C. 1207, wherein he has clearly demonstrated that the control through statutory limits is independent of any fundamental rights. The recent Supreme Court judgement, wherein the Supreme Court (consisting of A.P. Sen, Venkataramaiah & R.B. Misra, JJ.) has struck down an order of demolition passed against the Express News Papers building and has passed stricture against Jaymonan (then Lieutenant Governor of Delhi), also indicates that the control under statutory limits is regarded as independent of fundamental rights. In this case A.P. Sen, J. while holding the executive action as malafide also relied upon the fundamental right under 19(1)(a). But Venkataramaiah and R.B. Misra, JJ. in their concurring judgements did not feel it necessary to rely upon the fundamental right under Article 19(1)(a) and based it entirely upon the statutory limit of malafide. This shows that the control under statutory limits can operate independent of fundamental rights (See Indian Express, Bombay edition, Oct. 7 1985 pp. 1 & 9).