Chapter-II

Habeas Corpus Suspension of the Fundamental Rights in Emergency
Chapter-II

HABEAS CORPUS SUSPENSION OF THE FUNDAMENTAL RIGHTS IN EMERGENCY

(ADM Jabalpur v. S. Shukla)\(^1\)
(Maintainability of Petition for Habeas Corpus During Emergency - MISA)

The Proclamation of Emergency in the Country - Mrs. Indira Gandhi virtually made hash of Article 32 as without consulting the cabinet colleagues, she forced the President to sign the proclamation of emergency documents and under duress and in Gross violation of the provisions of Article 452 of the Constitution of India.

Mrs. Indira Gandhi wrote top secret letter to the Hon'ble President of India which is on record of the Rashpati Bhawan and is herewith being reproduced below. It does not having any correspondence number:

New Delhi
June 25, 1975

Dear Rashtrapati Ji,

As already explained to you a little while ago, information has reached us which indicates that there is an imminent danger to the security of India being threatened by internal disturbance. The matter is extremely urgent.

I would have liked to have taken this to Cabinet, but unfortunately this is not possible tonight. I am, therefore, condoning or permitting a departure from the Government of India\(^2\) as amended up-to-date by virtue of my powers under 12 thereof. I shall mention the matter to the Cabinet first thing tomorrow morning.

---

1. AIR 1976 SC 1207
2. Transaction of Business Rules 1961
In the circumstances and in case you are so satisfied, a requisite Proclamation order under Art. 352 (1) has become necessary. I am enclosing a copy of the draft Proclamation for your consideration. As you are aware, under Art. 352 (3) even when there is an imminent danger of such a threat as mentioned by me, the necessary Proclamation under Art. 352 (1) can be issued.

I recommend that such a Proclamation should be issued tonight, however late, it may be, and all arrangements will be made to make it public as early as possible thereafter.

With kind regards,

Yours sincerely,

Sd/-

(INDIRA GANDHI)

Proclamation of Emergency

In exercise of powers conferred by cl. (1) of Art. 352 of the Constitution, I, Fakhruddin Ali Ahmad, President of India, by this Proclamation declare that a grave emergency exists whereby the security of India is threatened by internal disturbance.

New Delhi

President

June 25, 1975

The proclamation of Emergency was an appeal of the right of person liberty. My learned teacher Dr. M. Ghous commenting on the majority judgement in the habeas corpus case has criticised the judgment in the following words:

"The emergency - jurisprudence on personal liberty brings into focus the fact that the Supreme Court was the guardian of democracy while nine of our High Courts performed the role of sentinel on the qui vive, so far as individual rights were concerned. These High Courts had only followed
the decisions of Supreme Court which the majority in Shukla's case was unwilling to follow and unable to overrule. These very decisions are enough to discredit and to discard Shukla.”

Brief Facts of the Case were as under:

Consequent on the Pakistani aggression, the President issued a Proclamation of Emergency on 3.12.1971 on the ground that the security of India was threatened by external aggression. By an order dated 5.12.1971 issued u/Art. 359 (1) of the Constitution, the right of ‘foreigners’ to move any Court for the enforcement of rights conferred by Arts. 14, 21 & 22 was suspended.

In September 1974 the MISA was amended by Ordinance 11 of 1974 to include sub-section (c) in Sec. 3 (1) by which the right to detain was given as against smugglers and offenders under the Foreign Exchange Regulation Act, 1947. On 16.11.1974 the President issued a Declaration u/Art. 359 (1) suspending the right of persons detained u/s 3 (1) (c) of the MISA to move for enforcement of the rights conferred by Arts. 14, 21 and Cls. (4), (5), (6), (7) of Art. 22 of the Constitution.

On 25/6/1975 in exercise of powers conferred by Cl. (1) of Art. 359 the President declared that the right of any person including a foreigner to move any court for the enforcement of the rights conferred by Arts. 14, 21 & 22 and all proceedings pending in any Court for the enforcement of the above mentioned rights shall remain suspended for the period during which the Proclamations of Emergency made under Article 352 (1) on 3.12.1971 and on 25/6/1975 are both in force. The Presidential order of 27.6.1975 further stated
that the same shall be in addition to and not in derogation of any order made before the date of the aforesaid order u/Article 359 (1).

The President promulgated the amending Ordinances No. 4 & 7 of 1975, were replaced by the Maintenance of Internal Security (Amending Act), 1975 introducing a new Sec. 16-A and giving a deemed effect to Sec. 7 of the Act was on 25.6.1975. A new Sec. 18 was also inserted w.e.f. 25.6.1975.

By the Constitution (Thirty-eighth Amendment) Act, 1975, Article 123, 213, 239 (b), 352, 356, 359 & 368 were amended. Cls. (4) & (5) were added in Article 352. The above Amendment renders the satisfaction of the President or the Governor in the relevant Articles final and conclusive and to be beyond any question in any Court on any ground. The Constitution (Thirty-ninth Amendment) Act was published on 10.8.1975, amending Arts. 71, 329 & 329 (A) and added Entries after Entry 86 in the 9th Schedule and also the Maintenance of Internal Security Act, 1971 as item 92 in the above Schedule. All the amendments made by the Ordinance were given retrospective effect for the purpose of validating all acts done previously. On 25.1.1976 the said Ordinances were published as the Maintenance of Internal Security (Amendment) Act 1976.

Various persons detained u/s 3 (1) of MISA filed petitions in different HCs for the issue of the writ of Habeas Corpus. Also challenged the vires of the Ordinance issued by the President on 27.6.1975, as unconstitutional and inoperative in law and prayed for setting aside of the order and for directing their release immediately. In some of the cases, the petitioners challenged the validity of the Thirty-eighth and Thirty-ninth Constitution Amendment Acts.
When those petitions came up for hearing, the Government raised a preliminary objection to their maintainability on the ground that in asking for release by issuance of a writ of habeas corpus the detenus were in substance claiming that they had been deprived of their personal liberty in violation of the procedure established by law, which plea was available to them u/Article 21 only. The right to move for enforcement of the right conferred by the Article having been suspended by the Presidential order dated 27.6.1975 the petitions, according to the Government were liable to be dismissed at the threshold.

The preliminary objections have been rejected for one reason or another by the HCs of Allahabad, Bombay, Delhi, Karnataka, M.P., Punjab and Rajasthan. Broadly, these HCs have taken the view that despite the Presidential order it is open to the detenus to challenge their detention on the ground that it is ultra vires, as e.g., by showing that the order on the face of it is passed by an authority not empowered to pass it, or it is in excess of the power delegated to the authority, or that the power has been exercised in breach of the conditions prescribed in that behalf by the Act. Some of these HCs have further held that the detenus can attack the order of detention on the ground that it is mala fide, as for example, by showing that the detaining authority was influenced by irrelevant considerations, or that the authority was actuated by improper motives.

Being aggrieved by the finding recorded by these HCs on the preliminary point, the State Govts. and the Govt. of India have filed these appeals, some under certificates granted by the HCs and some by special
leave granted by this Court. The HCs of A.P., Kerala and Madras have upheld the preliminary objection.

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

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

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

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

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

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

6. Common law rights as well as statutory rights to personal liberty can be enforced through writ petitions filed u/Article 226, despite the Presidential order issued u/Article 359 (1). Similarly, contractual rights, natural rights and non-fundamental constitutional rights like those u/Articles 256, 265 & 361 (3), can be enforced u/Article 226. Article 226 empowers the HCs to issue writs and directions for the enforcement of fundamental rights, “and for any other purpose”.
7. The essence of the inquiry in a *Habeas Corpus* petition is whether the detentions justified by law or is *ultra vires* the law. Such an inquiry is not shut out by the suspension of the right to enforce fundamental rights.

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

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

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

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

12. Section 16A (9) of the MISA is u/Article 226 by creating a presumption that the ground on which the order of detention is made and any information or material on which the grounds are based shall be treated as confidential and shall be deemed to refer to matters of State, so that it will be against the public interest to disclose the same.

13. Section 18 of MISA as amended by Act 39 of 1975 which came into force w.e.f. 25.6.1975 cannot affect the maintainability of the present petitions which were filed before the Amendment.

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

15. If the detenus are denied any forum for the redress of their grievances, it would be open to the Executive to whip the detenus to starve them, to keep them in solitary confinement and even to shoot them, which would be a startling state of affairs in a country governed by a written Constitution having in it a Chapter on Fundamental Rights. The Presidential order cannot permit the reduction of Indian citizens into slaves.
The validity of the 38th and 39th Constitution (Amendment) Acts were not challenged by the respondents.

Questions involved:

1. Whether, in view of the Presidential order dated 27.6.1975, under Cl. (1) of Article 359, any writ petition is maintainable u/Article 226, before a HC for Habeas Corpus to enforce the right to personal liberty of a person detained under the MISA on the ground that the order of detention or the continued detentions, for any reason, not under or in compliance with MISA?

2. If such a petition is maintainable, what is the scope or extent of judicial scrutiny, particularly, in view of the aforesaid Presidential order which covers, inter alia, Cl. (5) of Article 22, and also in view of sub-section (9) of Section 16-A of the MISA?

Per majority: A.N. Ray, CJ., M.H. Beg., Y.V. Chandrachud and P.N. Bhagwati, JJ allowed the appeal of the ADM, Jabalpur with the following observations:

The jurisdiction of the Court in times of emergency in respect of detention under the Act is restricted by the Act because the Government is entrusted with the task of periodical review. Even if the generality of the words used in Section 3 (1) of the Act may not be taken to show an intention to depart from the principle in ordinary times that the Courts are not deprived of the jurisdiction where bad faith is involved, there are ample indications in the provisions of the Act, viz., Section 16-A (2), proviso to Section 16-A (3), Section 16-A (4), Sections 16-A (5), 16-A (7) (ii) & 16-A (9) of the Act to bar a challenge to the detention on the basis of malafides. This Court said that an action to decide the order on the grounds of mala fides does not lie because under the provisions no action is maintainable for the purpose. This Court also referred to the decision in the Liversidge case where the Court held...
that the jurisdiction of the Court was ousted in such way that even questions of bad faith could not be raised.

The production of the order which is duly authenticated constitutes a pre-emptory answer to the challenge. The onus of showing that the detaining authority was not acting in good faith is on the detenu. This burden cannot be discharged because of the difficulty of proving bad faith in the exercise of subjective discretionary power vested in the administration.

So long as the authority is empowered by law action taken to realise that purpose is not \textit{mala fide}. When the order of detention is on the face of it within the power conferred, the order is legal.

The width and amplitude of the power of detention u/s 3 of the Act is to be adjudged in the context of the emergency proclaimed by the President. The Court cannot compel the detaining authority to give the particulars of the grounds on which he had reasonable, cause to believe that it was necessary to exercise this control. An investigation into facts or allegations of facts based on \textit{mala fides} is not permissible because such a course will involve advertence to the grounds of detention and materials constituting those grounds which is not competent in the context of the emergency.

Conclusion:

1. In view of the Presidential Order dated 27.6.1975 under Cl. (1) of Article 359 of our Constitution no person has \textit{locus standi} to move any writ petition u/Article 226 before a HC for \textit{Habeas corpus} or any other writ or order or direction to enforce any right to personal liberty of a person detained under the Act on the grounds that the order of
detention or the continued detention is for any reason not under or in compliance with the Act or is illegal or *mala fide*.

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

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

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

**Result:**

The appeals are accepted. The judgements of the High Courts are set aside.

**Justice Khann’s dissent:**

A dispassionate analysis of the *habeas corpus* case reveals that the quintessence of the case lies with the dissent of Khanna J. and the decisions of the nine High Courts. Certainly the dissenting opinions will serve to the posterity as beacon lights in their strides towards the search and maintenance of the rule of law *viz-a-viz* rule of men. Shri Jayaprakash Narain had commented that the judgment in the *habeas corpus* case had put out the last flickering candle of individual liberty. Shri M.C. Chagla characterised the decision as “the worst in the history of Indian Supreme Court”. Shri V.M. Tarkunde, a former judge of the Bombay High Court and a leading member of the Supreme Court Bar labelled it as “judicial suicide”. The majority could
have taken a different view as was done by nine High Courts and the dissent of Shri Justice Khanna when they upheld the right of personal liberty and ruled that even in the absence of Fundamental Rights, "the state has got no power to deprive a person of his life and personal liberty without the authority of law. That is the essential postulate and the basic assumption of the rule of law in every civilised society". Justice Khanna's dissent aroused international interest in view of its importance and far-reaching impact on the biggest democracy of the world. The foreign press and jurists acclaimed his dissent. The New York Times commented that 'it deserved to be engraved in letters of gold'. A typical view was expressed by the same Newspaper as follows:

"Indian democrats are likely to remember in infamy the four judges who obediently overturned the decisions of more than half a dozen lower (High) courts who had ruled in defiance of the Government that the writ of the habeas corpus could not be suspended even during emergency ......But they will long cherish the lonely grounds, but it could have exposed in a limited way the procedural laxity, the arbitrary manner and the partisan motivations which appear by all accounts to have accompanied the mindless exercise of the draconian powers of detention".

It should not be difficult to agree with the above views because in the absence of Article 21 in the Constitution, it would not mean that people of India have no right to live which is a natural right. Article 21 merely lays down that this right can be taken away by the State only according to law. If the State is allowed the arbitrary decision in this matter then the very purpose of incorporating it in the Constitution will stand self-defeated. Analysing and appreciating Justice Khanna's Judgement, Professor Raghavan commented:

3. AIR 1976 SC 1241-1277
“the path breaking tone of the dissent is refreshing not only for the reason that it affirms the continuing validity of the Makhan Singh decision of the court inspite of the fact that the Presidential Order of June 1975 was in terms unconditional or absolute, but it sets our vision high enough to permit a wider and more informed perspective of the Constitutional commitment to defend basic freedoms.”  

With this dissenting judgement, like Lord Atkin’s dissent in the famous English case, Justice Khanna has come to be placed in the galaxy of celebrated judges who had always held dear the rule of law as against the pressures and temptations of the Government. It is well known that this judgement cost him the Chief Justiceship of the country. It can, therefore, be correctly assumed that this dissent will serve as a trend-setter in the Indian Administrative law and democratic jurisprudence.

The appeals decided by the Sup. Cl. in the Habeas Corpus Case arose out of habeas corpus applications filed by several detenus who prayed for their release from illegal preventive detention. A preliminary objection was raised by the Union and/or the State (“the State”) that in view of the President’s Order under Article 359 suspending the right of any person (including a foreigner) to move any court for the enforcement of his fundamental rights under Articles 14, 19, 21 and 22, the petitioners had no locus standi to maintain the petition, because, in substance, the detenus were seeking to enforce their fundamental right under Article 21, namely, that they should not be deprived of their personal liberty except by procedure established by law. The High Courts of Allahabad, Andhra Pradesh, Bombay, Delhi, Karnataka, Madras, Madhya Pradesh, Punjab and Haryana and Rajasthan, rejected this contention and held that though the petitioners could not move

the Court to enforce their fundamental right under Article 21, they were entitled to show that the order of detention was not under or in compliance with the law or was *mala fide*. The consensus of judicial opinion was against the view of the four judges of the Sup. Ct. in the Habeas corpus case. But that consensus was brushed aside. Chandrachud J. found that the trouble with the High Court judges was that they lacked judicial detachment. He did not put it as bluntly as that; he administered his rebuke in sweet, soothing syrup:

> "But at the back of one's mind is the facile distrust of executive declarations which recite threat to the security of the country, particularly by internal disturbance. The mind then weaves cobwebs of suspicion and the Judge without the means to knowledge of full facts, covertly weighs the pros and cons of the political situation and substitutes his personal opinion for the assessment of the Executive ....A frank and unreserved acceptance of the proclamation of emergency, even in the teeth of one's own pre-disposition, is conducive to a more realistic appraisal of the emergency provisions".

In other words, judges in the nine High Courts did not show the judicial detachment required from judges. Their minds were enmeshed in cobwebs of suspicion and they substituted their personal opinions for the assessment of the executive. By reversing their judgements Chandrachud J. reminded them of their judicial duty in a judgement which enforced that duty by precept and example.

Anyone who reads and re-reads the four judgements - for they occupy 306 pages of the Sup. Ct. Reports - will be filled with amazement that the four judges should not have asked the central question raised by the *Habeas Corpus Case* and, even more, that they should have failed to realize the implications of the first question which the Att. Gen. formulated, and the concession

6. 1976 Supp. SCR at p.380 (76) ASC at p. 1325
which he made in answering that question. We will, therefore, consider the question raised by the *Habeas Corpus Case* independently of the discussion in the four judgements, and will refer to those judgements in the light of our independent discussion.

Therefore it remains to add that the *Habeas Corpus Case* is the most glaring instance in which the Supreme Court of India has suffered most severely from a self-inflicted wound.\(^7\)

The judgement in the Habeas Corpus case was totally illegal and arbitrary and it proves that our Supreme Court failed to protect the innocent citizens of India. This judgement is anti-democratic and has been widely criticised by the jurists.

---