HABEAS CORPUS CASE AND ITS CULMINATION*

By Justice Satya Poot Mehrotra,

Former Judge, Allahabad High Court

The present Article seeks to examine various aspects pertaining to ***Additional District Magistrate, Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207: (1976)2 SCC 521 (popularly known as Habeas Corpus Case)*** and its culmination in ***Justice K.S. Puttaswamy (Retd.) and Another v. Union of India and Others, AIR 2017 SC 4161: (2017) 10 SCC 1 (popularly known as Right to Privacy Case).***

INTRODUCTORY:

It will be useful to note certain basic points before coming to the main topic.

A. Under Article 32 of the Constitution of India (in short "the Constitution"), an affected person can directly file Writ Petition before the Supreme Court for enforcement of Fundamental Rights conferred by Part III of the Constitution. Under Article 226 of the Constitution, an affected person can file Writ Petition before a High Court for enforcement of Fundamental Rights conferred by Part III of the Constitution as well as for enforcement of other Constitutional Rights conferred by the Constitution as also for enforcement of Legal Rights conferred by Ordinary Laws. Thus the scope of Article 226 of the Constitution is wider than that of Article 32 of the Constitution.

B. Article 32 of the Constitution is itself a Fundamental Right while Article 226 is a Constitutional Right.

***Published in AIR 2018 Journal Section 203**

C. Under Article 352 of the Constitution, if the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by ***"war or external aggression or armed rebellion***, he may, by Proclamation, make a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation. It is to be noted that prior to the Constitution (44th Amendment) Act, 1978, the words "internal disturbance" were mentioned in Article 352 instead of the words "armed rebellion". ***By 44th Constitutional Amendment, 1978, the words "armed rebellion" were substituted for the words "internal disturbance". The said amendment came into force with effect from 20.6.1979.***

D. When Emergency under Article 352 of the Constitution is declared by the President, the provisions of Article 19 of the Constitution stand automatically suspended under Article 358 of the Constitution, and remain so suspended during the entire period of Emergency. Therefore, during the period of Emergency, any law may be made or any executive action may be taken even though such law or executive action is contrary to the provisions of Article 19 of the Constitution.

However, as regards other Fundamental Rights conferred by Part III of the Constitution, Article 359 of the Constitution provides that when Emergency under Article 352 of the Constitution is declared by the President, the President may be Order declare that ***"the right to move any Court for the enforcement of such of the Rights conferred by Part III (except Articles 20 and 21)*** as may be mentioned in the order" shall remain suspended. Such suspension may be for the entire period of Emergency or for such shorter period as may be specified in the Order. It is pertinent to mention that prior to 44th Constitutional Amendment, 1978, the right to move any Court for the enforcement of any of the Fundamental Rights conferred by Part III of Constitution could be suspended by the President

under Article 359 of the Constitution. However, ***by 44th Constitutional Amendment, 1978, Article 359 of the Constitution was amended, and Articles 20 and 21 of the Constitution were excluded from the purview of Article 359. Therefore, while the President may by Order suspend the right to move any Court for the enforcement of the Fundamental Rights conferred by Part III of the Constitution when Emergency is declared under Article 352 of the Constitution, he cannot suspend the right to move any Court for the enforcement of Fundamental Rights contained in Articles 20 and 21 of Constitution. The said amendment in Article 359 of the Constitution came into force with effect from 20.6.1979.***

E. As on declaration of Emergency under Article 352 of the Constitution, Article 19 itself stands automatically suspended under Article 358, therefore, any action taken in contravention of the said Article during Emergency cannot be called in question by any citizen after the Emergency is over. This is because, the rights conferred by Article 19 stand suspended.

However, as under Article 359 of the Constitution, the President could issue Order suspending the right to move any Court for the enforcement of any of the other Fundamental Rights on declaration of Emergency, it was open to the affected person to question in a court of law any action taken in contravention of the Fundamental Rights mentioned in the Presidential Order after the Emergency was over. This view was based on the premise that while Article 358 suspended rights conferred by Article 19, Article 359 suspended only remedy and not the rights. (See: ***Makhan Singh v. State of Punjab, AIR 1964 SC 381: (1964) 4 SCR 797).*** In order to avoid this possibility, Clause (1A) was inserted in Article 359 of the Constitution by 38th Constitutional Amendment, 1975 retrospectively. The effect of insertion of Clause (1A) in Article 359 is that there cannot be post-Emergency challenges for the action taken during Emergency in infringement of Fundamental Rights, the enforcement of which was suspended under Article

359 during Emergency. Thus suspension of Enforcement of Fundamental Rights conferred by Part III of the Constitution by Presidential Order under Article 359 is at par with the automatic suspension of Rights conferred by Article 19 of the Constitution under Article 358.

POSITION PRIOR TO HABEAS CORPUS CASE

On 8th September, 1962, China attacked the northern border of India. On 26th October, 1962, the President issued a proclamation under Article 352 of the Constitution declaring that a grave emergency existed whereby the security of India was threatened by external aggression. On the same day, the Defence of India Ordinance No. 4 of 1962 was promulgated by the President. This Ordinance was amended by Ordinance No.6 of 1962 promulgated on November 3, 1962. On November 6, 1962, the rules (Defence of India Rules, 1962) framed by the Central Government were published. On December 6, 1962, Rule 30 as originally framed was amended and Rule 30-A was added. On December 12, 1962, the Defence of India Act, 1962 came into force. Section 48(1) of the Act provided for the repeal of the Ordinances Nos. 4 and 6 of 1962. Section 48(2) provided that "notwithstanding such repeal, any rules made, anything done or any action taken under the aforesaid two Ordinances shall be deemed to have been made, done or taken under this Act as if this Act had commenced on October 26, 1962". Thus , the Rules made under the Ordinance continued to be the Rules under the Act.

In the meantime, on November 3, 1962, the President issued an Order under Article 359(1) of the Constitution, which was amended by another Order issued on November 11, 1962 under Article 359(1) of the Constitution. As a result of the said two Presidential Orders issued under

Article 359(1) of the Constitution (as it then existed), the right of any person to move any court for the enforcement of the rights conferred by Articles 14, 21 and 22 of the Constitution was suspended.

In ***Makhan Singh v. State of Punjab, AIR 1964 SC 381: (1964) 4 SCR 797 (supra)*** (and connected cases), the persons were detained under Rule 30(1)(b) of the Defence of India Rules, 1962. Detenues approached various High Courts. Both Punjab and Bombay High Courts took view against the Detenues. However, the Allahabad High Court took a contrary view.

The matters came up before the Supreme Court. The Supreme Court considered the scope and effect of the Presidential Order issued under Article 359(1) of the Constitution during Proclamation of Emergency.

From the view of the majority of Judges speaking through Justice Gajendragadkar , the following principles followed. The proceedings which were barred by the Presidential Order issued under Article 359(1) of the Constitution were proceedings taken by persons for the enforcement of such of rights conferred by Part III as might be mentioned in the Order. If a person moved any Court to obtain a relief on the ground that his fundamental rights specified in the Order had been contravened, that proceeding was barred. In determining the question as to whether a particular proceeding fell within the mischief of the Presidential Order or not, what had to be examined was not so much the form which the proceeding had taken, or the words in which the relief was claimed, as the substance of the matter and consider whether before granting the relief claimed by the person, it would be necessary for the Court to enquire the question whether any of his specified fundamental rights had been contravened. If any relief could not be granted to the person without

determining the question of the alleged infringement of the said specified fundamental rights, that was a proceeding which fell under Article 359(1) of the Constitution and, therefore, would be hit by the Presidential Order issued under the said Article. The sweep of Article 359(1) and the Presidential Order issued under it was thus wide enough to include all claims made by persons in any court of competent jurisdiction when it was shown that the said claims could not be effectively adjudicated upon without examining the question as to whether the person is in substance seeking to enforce any of the said specified fundamental rights. This position would apply to Article 32 as well as Article 226 of the Constitution. Further, the prohibition contained in Article 359(1) of the Constitution and the Presidential Order would apply to proceedings under Section 491(1) (b) of the Code of Criminal Procedure (Old) just as it applied to Article 32 and Article 226 of the Constitution.

Having laid down the above principles, the Majority decision further considered the question as to what were the pleas which were open to the persons to take in challenging the legality or the propriety of their detentions either under Section 491(1) (b) of the Code of Criminal Procedure (Old), or Article 226 of the Constitution despite proclamation of Emergency and the Presidential Order suspending right of any person to move any court for enforcement of specified fundamental rights.

Majority opined that if in challenging the validity of his detention order, the detenu was pleading any right outside the rights specified in the Presidential Order, his right to move any court in that behalf was not suspended, because it was outside Article 359(1) and consequently the Presidential Order. To illustrate the said proposition, several situations were mentioned in the Majority decision:

(a) Where a detenu was detained in violation of the mandatory provisions of the Preventive Detention Law, the detention order could be challenged on the ground that it was in contravention of the mandatory provisions of the Preventive Detention Law.

(b) Where the detention order was ordered malafide, the detenu could challenge the same on the ground that a malafide order was outside the scope of the Preventive Detention Law.

(c) If the detention under the Preventive Detention Law could be ordered on certain specified grounds, and the detention order was passed on a ground not covered in such specified grounds, the detenu could challenge his detention on the said ground.

(d) Where the Preventive Detention Law under which detention order was issued suffered from the vice of excessive delegation, the detenu could challenge his detention on the said ground.

Thus, the legal position which emerged from the Majority decision in ***Makhan Singh v. State of Punjab case (supra)*** was that in case the Presidential Order was issued under Article 359 of the Constitution pursuant the Proclamation of Emergency under Article 352 of the Constitution, and the right of a person to move any court for enforcement of specified fundamental rights conferred by Part III of the Constitution was suspended, it was not open to a detenu to move the Supreme Court under Article 32 or a High Court under Article 226 of the Constitution, seeking to enforce the specified fundamental rights. However, if a right falling outside the scope of specified fundamental rights was sought to be enforced, a detenu could move a High Court under Article 226 of the Constitution for enforcement of such right. In other words, a

detenu could challenge his detention on the ground that his right falling outside the scope of specified fundamental rights was violated.

In ***State of Maharashtra v. Prabhakar Pandurang Sanzgiri, AIR 1966 SC 424: (1966) 1 SCR 702,*** Prabhakar Pandurang Sanzgiri was detained by the Government of Maharashtra under Rule 30(1) (b) of the Defence of India Rules, 1962, in the Bombay District Prison in order to prevent him from acting in a manner prejudicial to the defence of India, public safety and maintenance of public order. Prabhakar wrote, with the permission of the said Government a book in Marathi under the title "Anucha Antarangaat" (Inside the Atom). In September, 1964 the detenu applied to the State of Maharashtra seeking permission to send the manuscript out of the jail for publication, but the State Government, by its letter dated 27th March, 1965 rejected the request. Prabhakar again applied to the Superintendent, Arthur Road Prison for sending the manuscript out, but that too was rejected. Thereafter, Prabhakar filed a petition under Article 226 of the Constitution in the Bombay High Court for directing the State of Maharashtra to permit him to send out the manuscript of the book written by him for its eventual publication. The High Court of Bombay held that the book was purely of scientific interest and it could not possibly cause any prejudice to the defence of India, public safety or maintenance of public order. The High Court further held that the civil rights and liberties of a citizen were in no way curbed by the order of detention and that it was always open to the detenu to carry on his activities within the conditions governing his detention. It further held that there were no rules prohibiting a detenu from sending a book outside the jail with a view to get it published. In that view the High Court

directed the Government to allow the manuscript book to be sent by the detenu to his wife for its eventual publication.

The State of Maharashtra preferred appeal before the Supreme Court against the said order of the High Court.

The Supreme Court speaking through Subba Rao, J. dismissed the appeal filed by the State of Maharashtra, and held that the order of the Bombay High Court was correct.

The following principles, amongst others, were laid down by the Supreme Court:

A. Article 358 of the Constitution suspends the provisions of Article 19 of Part III of the Constitution during the period the proclamation of emergency is in operation. But the order passed by the President under Article 359 (as it then stood) suspended the enforcement, inter-alia, of Article 21 during the period of the said emergency. However, the right to move the High Court or the Supreme Court remained suspended if such person had been deprived of his personal liberty under the Defence of India Act, 1962, or any rule or order made thereunder. If a person was deprived of his personal liberty not under the Act or a rule or order made thereunder but in contravention thereof, his right to move the Court in that regard would not be suspended.

B. In the present case the liberty of Prabhakar was restricted in terms of the Defence of India Rules whereunder he was detained. The question for consideration was whether the restriction imposed on the personal liberty of Prabhakar was in terms of the relevant provisions of the Defence of India Rules subject to conditions determined in the manner prescribed in Sub-rule (4) of Rule 30

thereof. If it was in contravention of the said Rules, he would have the right to approach the High Court under Article 226 of the Constitution.

C. As there was no condition prohibiting a detenu from writing a book or sending it for publication, the State of Maharashtra infringed the personal liberty of Prabhakar in derogation of the law whereunder he was detained. The State of Maharashtra, therefore, acted contrary to law in refusing to send the manuscript book of the detenu out of the jail to his wife for eventual publication.

It followed from the above decision that in case there was no condition in the relevant Rules/Conditions prohibiting a particular activity, then even the detenu under the Preventive Detention law could not be restrained from pursuing such activity. Here the activity in question was publication of a book which was manifestation of the Fundamental Right guaranteed under Article 19 (1) (a) of the Constitution (i.e., freedom of speech and expression). It is note-worthy that Article 19 automatically stood suspended on the proclamation of emergency.

Extending the principle to the case of a person who was not as yet detained, it would follow that there was no prohibition on him to perform any activity which was not covered under the grounds for detention laid down under the Preventive Detention law or the Rules/Orders framed/issued thereunder, even though such activity might be in furtherance of any of the Fundamental Rights guaranteed under Article 19 of the Constitution which stood suspended during proclamation of emergency. If such a person was

detained on account of performance of such activity, he could challenge his detention under Article 226 of the Constitution.

DEVELOPMENTS LEADING TO HABEAS CORPUS CASE

First Emergency declared under Article 352 of the Constitution on 26.10.1962 remained in force during the Indo-Pakistan conflict in 1965 and was revoked on January 10, 1968.

Second Emergency was declared under Article 352 of the Constitution on 3 December, 1971 when Pakistan attacked India and was lifted in March 1977. The ground for declaration of Emergency was threat to security of India on the ground of external aggression.

While the Second Emergency was still in operation, the President declared ***Third Emergency*** under Article 352 of the Constitution on 25/26 June, 1975 on the ground that security of India was threatened due to ***"internal disturbance".*** As noted earlier, one of the grounds mentioned in Article 352 of the Constitution for declaration of Emergency prior to 44th Constitutional Amendment was "internal disturbance". The words "internal disturbance" were substituted by the words "armed rebellion" by 44th Constitutional Amendment.

On June 27, 1975 the President issued an Order under Article 359(1) of the Constitution declaring that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Articles 14, 21 and 22 would remain suspended for the period during which the

Proclamation of Emergency made under Clause (1) of Article 352 on the 3rd December, 1971 and 25th June, 1975 would remain in force.

The Maintenance of Internal Security Act (MISA) was passed by Parliament in 1971 giving, inter-alia, extraordinary powers of Preventive Detention. During the operation of Third Emergency, MISA was amended, and provisions were made for detention of persons without trial were made more stringent. MISA was repealed in 1977.

HABEAS CORPUS CASE…..DOCTRINE OF ARTICLE 21 BEING SOLE REPOSITORY OF RIGHT TO LIFE AND PERSONAL LIBERTY VIS-A-VIS DOCTRINE OF INALIEANABLE AND NATURAL RIGHT TO LIFE AND PERSONAL LIBERTY

After the imposition of the Third Emergency while the Second Emergency continued to remain in operation, a number of persons were detained under the Maintenance of Internal Security Act, 1975 (MISA).

A number of detenus filed Petitions under Article 226 of the Constitution in various High Courts, inter-alia, challenging the

legality and validity of their detentions and seeking issuance of writs in the nature of habeas corpus.

The State raised a preliminary objection that in view of suspension of the detenus right to enforce any of the rights conferred by Articles 14, 21 and 22 of the Constitution by the Presidential Order dated 27th June, 1975 issued under Article 359 of the Constitution and in view of the automatic suspension of Article 19 of the Constitution by virtue of Article 358 of the Constitution, there was a bar at the threshold for the detenus to invoke the jurisdiction of the High Court under Article 226 of the Constitution and ask for writs of habeas corpus.

The High Courts of Allahabad, Bombay (Nagpur Bench), Delhi, Karnataka, Madhya Pradesh, Punjab and Rajasthan held that notwithstanding the continuance of emergency and the Presidential Order suspending the enforcement of Fundamental Rights conferred by Articles 14, 21 and 22 of the Constitution, the High Courts could examine whether an order of detention was in accordance with the provisions of Maintenance of Internal Security Act, 1971 (MISA), which constitute the conditions precedent to the exercise of powers thereunder, or whether such detention was malafide, or whether such detention was not based on relevant materials by which the detaining authority could have been satisfied that the order of detention was necessary.

The State filed appeals before the Supreme Court. Matter was heard before a Five-Judge Bench of the Supreme Court.

Four Judges of the Bench constituting majority (A.N. Ray, C.J., M.H. Beg, J,, Y.V. Chandrachud, J. and P.N. Bhagwati, J.)

in their separate Judgments laid down the ***Doctrine of Article 21 being the Sole Repository of the Right to Life and Personal Liberty (in short the Doctrine of Article 21 being Sole Repository)***, while H.R. Khanna, J. in his dissenting Judgment laid down the ***Doctrine of Inalienable and Natural Right to Life and Personal Liberty.***

The Majority decision, in essence, was that Article 21 of the Constitution was the sole repository of the Right to Life and Personal Liberty, and therefore, on whatsoever ground the detention were to be challenged, the same in effect amounted to enforcement of Article 21 of the Constitution, and as the enforcement of Article 21 was suspended, the detention could not be questioned on any ground whatsoever. This is the ***Doctrine of Article 21 being Sole Repository.***

Thus, ***A.N. Ray, C.J.*** concluded that in view of the Presidential Order dated 27 June, 1975 under clause (1) of Article 359 of the Constitution, no person had locus standi to move any writ petition under Article 226 before a High Court for habeas corpus or any other writ or order of direction to enforce any right to personal liberty of a person detained under MISA on the grounds that the order of detention or the continued detention was for any reason not under or in compliance with MISA or was illegal or malafide. It was further concluded that Article 21 was the sole repository of rights to life and personal liberty against the State. Any claim to a writ of habeas corpus was enforcement of Article 21 and, was, therefore, barred by the Presidential Order.

Beg,J. expressed the view that the whole object of guaranteed Fundamental Rights was to exclude another control or to make the Constitution the sole repository of ultimate control over those aspects of human freedom which were guaranteed there. The intention could never be to preserve something concurrently in the field of Natural Law or Common Law. Beg, J. further opined that anything of the nature of a writ of habeas corpus or any power of a High Court under Article 226 could come to the aid of a detenu when the right to enforce a claim to personal freedom, sought to be protected by the Constitution, was suspended. The High Court could not enquire into the validity of vires of detention order on the ground of either mala fides of any kind or of non-compliance with any provision of the Maintenance of Internal Security Act in Habeas Corpus proceedings.

Chandrachud, J. opined that the right to personal liberty was the right of the individual to personal freedom, nothing more and nothing less. That right along with certain other rights was elevated to the status of a fundamental right. It therefore did not make any difference whether any right to personal liberty was in existence prior to the enactment of the Constitution, either by way of a natural right, statutory right, common law right or a right available under the law of torts. Whatever might be the source of the right and whatever might be its justification, the right in essence and substance was the right to personal liberty. That right having been includd in Part III of the Constitution, its enforcement would stand suspended if it was mentioned in the Presidential Order issued under Article 359(1) of the Constitution.

Bhagwati, J. expressed the view that when the principle of rule of law that the executive could not deprive a person of his liberty except by authority of law, was recognised and embodied as a fundamental right and enacted as such in Article 21 of the Constitution, it was difficult to comprehend how it could continue to have a distinct and separate existence, independently and apart from the said Article in which it had been given constitutional vesture. Therefore, the principle of rule of law, that the executive could not interfere with the personal liberty of any person except by authority of law, was enacted in Article 21 of the Constitution and it did not exist as a distinct and separate principle conferring a right of personal liberty, independently and apart from that Article. Consequently, when the enforcement of the right of personal liberty conferred by Article 21 was suspended by a Presidential Order, the detenu could not circumvent the Presidential Order and challenge the legality of his detention by falling back on the supposed right of personal liberty based on the principle of rule of law. Bhagwati, J. accordingly concluded that the Presidential Order dated June 27, 1975 barred maintainability of a petition for a writ of habeas corpus where an order of detention was challenged on the ground that it was vitiated by Mala fides, legal or factual, or was based on extraneous considerations or was not in compliance with it.

On the other hand, H.R. Khanna, J. in his dissenting judgment opined that Article 21 of the Constitution

could not be considered to be the sole repository of the right to life and personal liberty. Every human being in a civilised society had an inalienable and natural right to life and personal liberty independent of Article 21 of the Constitution and, therefore, despite suspension of Article 21 in Emergency, a person could approach the High Court under Article 226 of the Constitution to challenge the legality of his detention. This is the ***Doctrine of Inalienable and Natural Right to Life and Personal Liberty.***

It was pointed out by H.R. Khanna, J. that the American Declaration Independence (1776) laid down that "all men are created equal, and among their inalienable rights are life, liberty, and the pursuit of happiness." The right to life and personal liberty was the most precious right of human beings in civilised societies governed by the rule of law. Rule of law is the antithesis of arbitrariness. 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 civilised existence. Likewise, the principle that no one would 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 would be deprived of his life and liberty without the authority of law were essentially two facets of the same concept. Khanna, J. observed: *"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 exited 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 to be the sole repository of that right."

Khanna, J. further pointed out that as Article 226 was 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 could not be denied.

The Order by the Majority of the Constitution Bench accordingly, inter-alia, held that in view of the Presidential Order dated 27 June, 1975 no person had any locus standi to move any writ petition under Article 226 of the Constitution 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 was not under or in compliance with the Maintenance of Security Act or was illegal or was vitiated by malafides factual or legal or was based on extraneous consideration. The appeals were allowed and the judgments of the High Courts were set-aside.

REVOCATION OF EMERGENCY

Proclamations of Emergency of 1971 and 1975 were revoked in early 1977. Before considering the effect of 44th Constitutional

Amendment, 1978, it will be relevant to note ***certain other developments which were taking place in the field of Constitutional Law***.

DOCTRINE OF ABSENCE OF ARBITRARINESS OR DOCTRINE OF FAIRNESS AND REASONABLENESS

For two decades since the enforcement of Constitution in 1950, Article 14 became identified with the Doctrine of Reasonable Classification. However, in ***E.P. Royappa v. State of Tamil Nadu, AIR 1974 SC 555: (1974) 4 SCC 3,*** the Supreme Court expanded the scope of Article 14 of the Constitution, and laid down ***the Doctrine of Absence of Arbitrariness or the Doctrine of Fairness and Reasonableness.*** It was held that "Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14." Article 14 strikes "at arbitrariness in State action."

In ***Maneka Gandhi v. Union of India, AIR 1978 SC 597: (1978) 1 SCC 248,*** a Seven-Judge Bench of the Supreme Court consisting of M.H.Beg, C.J., Y.V. Chandrachud, J., P.N. Bhagwati, J., V.R. Krishna Iyer, J., N.L. UNTWALIA, J., S. Murtaza Fazal Ali, J. and P.S. Kailasam, J. , inter-alia, considered the validity of impounding of Pass-port of the

Petitioner, and Vires of various provisions of the Passport Act, 1967. Leading Judgment for the Majority was delivered by Bhagwati, J. (for himself, Untwalia, J. and Fazal Ali, J.). Beg, C.J. , Y.V. Chandrachud, J. and Krishna Iyer, J. delivered their separate Judgments concurring with the Judgment of Bhagwati, J. Kailasam, J. gave his dissenting Judgment. Various Principles/Doctrines concerning the field of Constitutional Law were laid down in this case.

Doctrine of Absence of Arbitrariness or Doctrine of Fairness and Reasonableness, as laid down in ***E.P. Royappa v. State of Tamil Nadu (supra),*** was reiterated by the Supreme Court in ***Maneka Gandhi v. Union of India (supra).*** In his leading Judgment in ***Maneka Gandhi v. Union of India (supra),*** Bhagwati, J. referred to the view expressed in ***E.P. Royappa v. State of Tamil Nadu (supra),*** as mentioned above, and observed: “Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which logically as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.”

Hence, the State, as defined in Article 12 of the Constitution, which includes Legislature (Parliament as well as State Legislatures), Executive (Union as well as State), Local Authorities as well as Other Authorities, cannot act arbitrarily. State must act fairly and reasonably. Any State action, which is arbitrary or is not fair and reasonable, would be violative of Article 14 of the Constitution, and as such, unconstitutional and ultra vires.

DOCTRINE OF EFFECT OR CONSEQUENCE ON FUNDAMENTAL RIGHTS

In A. K. Gopalan v. State of Madras, AIR 1950 SC 27, the Supreme Court laid down ***the Doctrine of Object and Form of the State action.*** According to this Doctrine***, the object and form of the State action (legislative or executive) (i.e., the subject-matter of the State action) alone would determine the extent of protection that could be claimed by an individual and the effect of the State action on the fundamental right of the individual was irrelevant .***

This Doctrine of Object and Form of the State action was finally rejected i***n R.C. Cooper v. Union of India, (1970) 1 SCC 248: AIR 1970 SC 564 (Bank Nationalisation Case). In R.C. Cooper v. Union of India (supra),*** the Supreme Court laid down ***the Doctrine of Effect or Consequence on Fundamental Rights.*** According to this Doctrine, ***it is not the object of the authority making the law impairing the right of a person nor the form of action that determines the protection he can claim; it is the effect of the law and of the action upon the fundamental right of a person which would be relevant for deciding as to whether there has been infringement of such fundamental right. Hence, the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights. The direct operation of the State action (legislative or executive) upon the fundamental rights forms the real test.***

In Bennett Coleman Co. v. Union of India, (1972) 2 SCC 788: AIR 1973 SC 106 (News-Print Case), the Majority reiterated ***the Doctrine of Effect or Consequence on Fundamental Rights, and laid down that the true test was the "direct effect" of the impugned State***

action on a particular fundamental right. The Court is required to see as to what is the direct operation of the State action upon the fundamental rights. By direct operation is meant the direct consequence or effect of the State action upon the fundamental rights. The word "direct" goes to the quality or character of the effect and not to the subject-matter of the impeached law or action. The impugned State action may have a direct effect on a fundamental right although its direct subject matter may be different. If the direct consequence or effect of a State action (legislative or executive) is infringement of a fundamental right then such State action would be unconstitutional and ultra vires.

In Maneka Gandhi v. Union of India (supra), the Supreme Court followed ***the Doctrine of Effect or Consequence on Fundamental Rights as laid down in the aforesaid decisions in R.C. Cooper case (supra) and Bennett Coleman Co. case (supra). In his leading Judgment in Maneka Gandhi case (supra), Bhagwati, J. referred to various decisions of the Supreme Court and clarified that what was really intended to be laid down in the said decision in R.C. Cooper case (supra) [which was followed in Bennett Coleman Co. case (supra)] was the test of "direct and inevitable" effect or consequence of State action on Fundamental Rights. It was pointed out that the word "inevitable" would avoid vagueness which could arise by the use of the word "direct" only. Hence, the test to be applied was as to what is the direct and inevitable consequence or effect of the impugned State action on the fundamental right of a person.*** It is possible that in a given case the object and subject-matter of the State action may deal with a particular fundamental right but its direct and inevitable effect may be on another fundamental right and in that case, the State action would have to meet

the challenge of the latter fundamental right. In testing the validity of the State action with reference to fundamental rights, what the Court must consider is the direct and inevitable consequence of the State action. Otherwise, the protection of the fundamental rights would be eroded.

DOCTRINE OF INTER-RELATIONSHIP OF FUNDAMENTAL RIGHTS

In A. K. Gopalan v. State of Madras, AIR 1950 SC 27, the Supreme Court laid down the Doctrine of Mutual Exclusivity of Fundamental Rights. According to this Doctrine, ***the Fundamental Rights conferred by Part III of the Constitution (such as, Articles 19, 21, 22 and 31) were distinct and mutually exclusive—each article enacting a code relating to the protection of distinct rights. Hence, if the State action satisfied the limits of interference with a particular Fundamental Right, the State action would not be required to meet the challenge of another Fundamental Right.*** To illustrate***, as per the Doctrine of Mutual Exclusivity of Fundamental Rights, Article 22 of the Constitution was a self-contained Code in regard to preventive detention. Therefore, if a Preventive Detention law satisfied the requirements of Article 22 of the Constitution, then the validity of such law could not be assailed on the ground that the law violated the provisions of Article 19(1) or Article 14 of Article 21 of the Constitution.***

This ***Doctrine Mutual Exclusivity of Fundamental Rights was*** finally over-ruled ***in R.C. Cooper v. Union of India, (1970) 1 SCC 248: AIR 1970 SC 564 (Bank Nationalisation Case). In R.C. Cooper v. Union of India (supra),*** the Supreme Court laid down ***the Doctrine of Inter-Relationship of Fundamental Rights.*** It was held in ***R.C. Cooper***

v. Union of India (supra) that it was not correct to assume that Fundamental Rights guaranteed in Part III of the Constitution were mutually exclusive. "Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights." Thus, Fundamental Rights given in Part III of the Constitution were inter-related. Consequently, even if a State action satisfied the requirements a particular Fundamental Right, but violated the requirements of another Fundamental Right, then such State action would be unconstitutional and ultra vires. This is the Doctrine of Inter-Relationship of Fundamental Rights. ***For instance, a law relating to deprivation of life and personal liberty falling under Article 21of the Constitution would be required to meet the requirements of Article 19. Hence, even where a person was detained in accordance with the procedure prescribed by law, as mandated by Article, the protection conferred by the various clauses of Article 19(1) did not cease to be available to him and the law authorising such detention would have to satisfy the test of the applicable freedom under Article 19, clause (1). This would clearly show Articles 19(1) and 21 were not mutually exclusive.***

In Maneka Gandhi v. Union of India (supra), the Supreme Court followed ***the Doctrine of Inter-Relationship of Fundamental Rights as laid down in the aforesaid decision in R.C. Cooper case (supra) and certain subsequent decisions.***

In his leading Judgment, ***Bhagwati, J. laid down that "the fundamental rights conferred by Part III are not distinct and mutually exclusive rights. Each freedom has different dimensions and merely because the limits of interference with one freedom are satisfied, the law is not freed from the necessity to meet the challenge of another***

guaranteed freedom." It was observed: ***"Each freedom has different dimensions and there may be overlapping between different Fundamental Rights." Referring to Article 21 and Article 19(1),*** the Doctrine of Inter-Relationship of Fundamental Rights was explained by Bhagwati, J. by holding that ***"it is not a valid argument to say that the expression 'personal liberty' in Article 21 must be so interpreted as to avoid overlapping between that Article and Article 19 (1). The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19."*** Bhagwati, J. further observed: ***"The law must, therefore, now be taken to be well settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving person of "personal liberty" and there is consequently no infringement of the fundamental right conferred by Article 21, such law, in so far as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that Article."***

Krisha Iyer, J. in his unique style ***explained the Doctrine of Inter-relationship of Fundamental Rights by observing: "Be that as it may, the law is now settled, as I apprehend it, that no Article in Part III is an island but part of a continent, and the conspectus of the whole part gives the directions and correction needed for interpretation of these basic provisions. Man is not dissectible into separate limbs and, likewise, cardinal rights in an organic constitution, which make man human have a synthesis. The proposition is indubitable, that Article 21 does not, in a given situation, exclude Article 19 if both rights are breached."***

COMPLEMENTARY NATURE OF THE DOCTRINE OF EFFECT OR CONSEQUENCE ON FUNDAMENTAL RIGHTS AND THE DOCTRINE OF INTER-RELATIONSHIP OF FUNDAMENTAL RIGHTS

It will be noticed that ***the earlier Doctrine of Object or Form of State action*** and ***the earlier Doctrine of Mutual Exclusivity of Fundamental Rights*** were complementary to each other. ***The Object or Form of State action (legislative or executive) (i.e., the subject-matter of the State action) alone*** was seen to pin-point the ***particular Fundamental Right*** to which the State action pertained. Once the particular Fundamental Right was so identified, other Fundamental Rights would stand excluded. Thereafter, the only thing to be seen was as to whether the State action infringed the particular Fundamental Right so identified. It there was no such infringement, the State action would be valid ***even if such State action violated any other Fundamental Right.***

Similarly, ***the subsequent Doctrine of Effect or Consequence on Fundamental Rights*** and ***the Doctrine of Inter-Relationship of Fundamental Rights*** are also complementary to each other. Accordingly, ***the direct and inevitable effect of the State action (legislative or executive) on Fundamental Rights*** will have to be seen***. In case the State action has direct and inevitable effect on more than one Fundamental Rights,*** the validity of State action would depend on the question as to whether it ***does not violate the requirements of any of such Fundamental Rights.*** In case there is violation of any of such

Fundamental Rights, the impugned State action would be unconstitutional and ultra vires.

ARTICLE 21 AND ARTICLE 14

In R.C. Cooper v. Union of India, as noted above***, the Doctrine of Inter-Relationship of Fundamental Rights*** was laid down. It was pointed out that ***a law relating to deprivation of life and personal liberty falling under Article 21of the Constitution would be required to meet the requirements of Article 19.*** In other words***, Article 21 and Article 19 were not mutually exclusive, but were inter-related.*** This was reiterated by the Supreme Court in certain subsequent decisions including ***Maneka Gandhi v. Union of India (supra).***

In Maneka Gandhi v. Union of India (supra), Bhagwati, J. in his leading Judgment laid down that ***just as Article 21 and Article 19 were inter-related, so also Article 21 and Article 14 were inter-related.*** Hence, just as a law relating to deprivation of life and personal liberty falling under Article 21 of the Constitution would be required to meet the requirements of Article 19 of the Constitution, so also a law relating to deprivation of life and personal liberty falling under Article 21 of the Constitution would be required to meet the requirements of Article 14 of the Constitution. In other words, “procedure established by law” which is required to be followed for depriving a person of his “life” or “personal liberty”, must meet the requirements of Article 14 of the Constitution. ***Bhagwati, J.*** observed***: “If a law depriving a person of 'personal liberty' and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given***

situation, ex hypothesis it must be liable to be tested with reference to Article 14."

Now, as noted earlier, ***Article 14 of the Constitution incorporates the Doctrine of Absence of Arbitrariness or the Doctrine of Fairness and Reasonableness.*** Hence, the "procedure established by law" for depriving a person of his "life" or " personal liberty", must not be arbitrary. Such procedure must be fair and reasonable.

Bhagwati, J. observed : ***"Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it should be no procedure at all and the requirement of Article 21 would not be satisfied."***

It is note-worthy that over the years, Judicial Decisions have considerably widened the scope of the words "life" and "personal liberty" thereby including within the ambit of Article 21 of the Constitution, a number of aspects of human life, human personality and human dignity, basic human needs such as shelter, livelihood, pollution-free environment, reputation, education, speedy trial etc. Therefore, deprivation of any such right to life or right to personal liberty in its wider sense would require that fair and reasonable procedure established by law be followed.

Now what is the reasonable and fair procedure which would meet the requirements of Article 21 of the Constitution. This would evidently depend, inter-alia, on the nature of right to life or right to personal liberty

involved in a particular case, and the extent and manner of deprivation of such right by the State action.

Normally, if the procedure established by law is in keeping with the Principles of Natural Justice, then it would be fair and reasonable. Even if the Statute is silent regarding the applicability of the Principles of Natural Justice, still the applicability of these Principles may be implied keeping in view the nature of State action and its effect on the right to life or right to personal liberty. However, it is open to the Legislature to exclude the applicability of the Principles of Natural Justice in a Statute, expressly or by necessary implication. In such a situation, if the Statute pertains to deprivation of right to life or right to personal liberty, then the provisions of such Statute will have to be examined to find out as to whether despite non-applicability of the Principles of Natural Justice, the provisions of Statute provide for a fair and reasonable procedure to be followed before deprivation of right to life or right to personal liberty by a State action. If the answer is in the affirmative, then there would be no violation of Article 21 of the Constitution.

It is also pertinent to note that in certain cases, the nature of right to life or right to personal liberty may be such that merely following the Principles of Natural Justice before the State action depriving such right may not meet the requirements of fairness and reasonableness of procedure as contemplated in Article 21 of the Constitution, and further positive action on the part of State may be necessary to minimise the sufferings of the person/persons affected so as to ensure fairness and reasonableness of procedure. Examples of such rights may be right to shelter, right to livelihood, etc.

Again, there may be yet another category of cases where nature of right to life or right to personal liberty may be such which would require deprivation in certain circumstances and subject to certain limitations as

may be laid down in the Statute. In such cases, the circumstances in which and the limitations subject to which deprivation is permissible must satisfy the requirements of Article 14 of the Constitution regarding fairness and reasonableness. Further, before taking any State action depriving a person of such right to life or right to personal liberty, fair and reasonable procedure should be followed. This would be done by following the Principles of Natural Justice so that the person affected may be heard on the question of the existence/non-existence of the circumstances in which and the limitations subject to which deprivation of such right to life or right to personal liberty of such person/persons may be done.

There may be yet another category of cases where in public interest, a Statute makes it mandatory for persons covered by the Statute to make certain compliances or make certain disclosures, thereby depriving such persons of their "right to life" or "right to personal liberty" in larger sense of these expressions. In such a situation, the Statute must lay down necessary fair and reasonable procedural safe-guards in order to ensure that the deprivation of such right to life or right to personal liberty may be minimal and only to extent the same is necessary, and further ensure that the details supplied and the disclosures made by the persons affected are not misused to cause harassment to the persons affected. In case the Court feels that the safe-guards provided in the Statute are deficient, the Court itself, if it considers appropriate, may lay down necessary guide-lines which must be followed to make good such deficiency in the Statute.

DOCTRINE OF POST-DECISIONAL HEARING

As noted above, in view of Article 14 of the Constitution, the "procedure established by law" for depriving a person of his "life" or " personal liberty" as required under Article 21 of the Constitution, must not be arbitrary. Such procedure must be fair and reasonable. Further,
as seen above, normally, if the procedure established by law is in keeping with the Principles of Natural Justice, then it would be fair and reasonable. It is well-known that there are two basic Principles of Natural Justice, namely, Rule against Bias and Right of Hearing. ***We are concerned here with Right of Hearing.*** This requires that before a person is deprived of his "life" or "personal liberty", as understood in the wider sense of these expressions, by any State action, it is necessary that such person must be given hearing. In other words, if any decision is to be taken against a person whereby such person is deprived of his "life" or "personal liberty", then pre-decisional hearing must be given to such person as the same would ensure fairness and reasonableness. ***This is Pre-Decisional Hearing.***

However, there may be a situation of extreme urgency or emergency where immediate preventive or remedial decision/action is required to be taken as any delay would frustrate purpose of decision/action to be taken. In such a situation, pre-decisional hearing is not feasible and, therefore, cannot be insisted upon. ***For such situations, Doctrine of Post-Decisional Hearing*** has been laid down in ***Maneka Gandhi v. Union of India (supra)*** which was a case of impounding of pass-port without pre-decisional hearing. According to ***the Doctrine of Post-Decisional Hearing, where such a situation of extreme urgency or emergency comes up which requires immediate preventive or remedial decision/action, pre-decisional hearing need not be given before taking decision/action which deprives a person of his "life" or "personal liberty" in the larger sense of these expressions . However, after the***

decision/action required to meet the extreme urgency or emergency has been taken, the person affected by such decision/action should be given hearing so that the person affected may place his version before the concerned authority, and appropriate orders may be passed. Test for invoking ***the Doctrine of Post-Decisional Hearing is existence of situation of extreme urgency or emergency requiring immediate preventive or remedial action.***

POST-EMERGENCY DEVELOPMENTS - 44TH CONSTITUTIONAL AMENDMENT, 1978 AND ITS EFFECT

Reverting now to the main topic of the present Article, it may be recalled that after the Emergency was revoked in early 1977, General Elections to Lok Sabha were held, and Janata Party came to power at the Centre.

On 25th January, 1978, the Supreme Court gave its decision in ***Maneka Gandhi v. Union of India (supra),*** which has already been referred to above in detail. It is note-worthy that even though Emergency had been revoked in early part of 1977, ***Beg, C.J***. in his separate judgment in ***Maneka Gandhi case (supra),*** while concurring with Bhagwati, J. , reiterated ***the Doctrine of Article 21 being sole-repository*** as laid down by the Majority in Habeas Corpus Casse, when Beg, C.J. observed : *"….what I myself consider to be the correct view: that natural law rights were meant to be converted into our Constitutionally recognised fundamental rights, at least so far as they are expressly*

mentioned, so that they are to be found within it and not outside it. To take a contrary view would involve a conflict between natural law and our Constitutional law. I am emphatically of opinion that a divorce between natural law and our Constitutional law will be disastrous. It will defeat one of the basic purposes of our Constitution. The implication of what I have indicated above is that Article 21 is also a recognition and declaration of rights which inhere in every individual."

Then came 44th Constitutional Amendment, 1978 with effect from 20th June, 1979. As noted earlier, ***by 44th Constitutional Amendment, 1978, Article 359 of the Constitution was amended, and Articles 20 and 21 of the Constitution were excluded from the purview of Article 359. Therefore, while the President may by Order suspend the right to move any Court for the enforcement of the Fundamental Rights conferred by Part III of the Constitution when Emergency is declared under Article 352 of the Constitution, he cannot suspend the right to move any Court for the enforcement of Fundamental Rights contained in Articles 20 and 21 of Constitution. The said amendment in Article 359 of the Constitution, as mentioned above, came into force with effect from 20.6.1979.***

Now what was the consequence of 44th Constitutional Amendment, 1978. The consequence was that the **EFFECT** of the Majority Decision in Habeas Corpus was taken away by putting Articles 20 and 21 beyond the purview of Article 359. However, the **RATIO** of the Majority Decision laid down in the form of ***the Doctrine of Article 21 being sole-repository*** still continued to hold the field.

RIGHT TO PRIVACY CASE [JUSTICE K.S. PUTTASWAMY (RETD.) AND ANOTHER v. UNION OF INDIA AND OTHERS, AIR

2017 SC 4161: (2017) 10 SCC 1] …OVER-RULING THE DOCTRINE OF ARTICLE 21 BEING SOLE-REPOSITORY LAID DOWN BY MAJORITY IN HABEAS CORPUS CASE

In ***Justice K.S. Puttaswamy (Retd.) and Another v. Union of India and Others, AIR 2017 SC 4161: (2017) 10 SCC 1 (popularly known as Right to Privacy Case),*** a Nine-Judge Bench of the Supreme Court has held that the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as part of the freedoms guaranteed by Part III of the Constitution.

In deciding the question regarding the Right to Privacy, the correctness of the Majority Decision of the Supreme Court in ***Habeas Corpus case*** laying down the Doctrine of Article 21 being sole-repository, came up for consideration.

Six Judges in the Nine-Judge Bench of the Supreme Court, which decided the Right to Privacy case, expressly over-ruled the Majority decision of the Supreme Court in ***Habeas Corpus case*** [***Additional District Magistrate, Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207: (1976)2 SCC 521].***

Thus, Dr. D.Y. Chandrachud, J. in his Judgment in Right to Privacy case, delivered for himself and on behalf of J.S. Khehar, C.J., R.K. Agarwal, J. and S. Abdul Nazeer, J., laid down: ***"ADM Jabalpur must be and is accordingly overruled."*** (Para 121 of AIR: Para 139 of SCC. Also see Para 122 of AIR: Para 140 of SCC).

R.F. Nariman, J. held: ***"We, therefore, expressly overrule the majority judgments in ADM Jabalpur (AIR 1976 SC 1207) (supra)."***(Para 371 of AIR: Para 534 of SCC).

S.K. Kaul, J. opined: ***"I fully agree with the view expressly overruling the ADM Jabalpur case which was an aberration in the constitutional jurisprudence of our country and the desirability of burying the majority opinion ten fathom deep, with no chance of resurrection."*** (Para 497 of AIR: Para 649 of SCC).

Thus majority of Judges constituting Nine-Judge Bench have expressly over-ruled the Majority decision in Habeas Corpus case. ***Hence, the Doctrine of Article 21 being the Sole Repository of the Right to Life and Personal Liberty, as laid down in the Majority decision in Habeas Corpus case, has finally been over-ruled. Consequently, the minority decision of Khanna, J. laying down the Doctrine of Inalienable and Natural Right to Life and Personal Liberty stands upheld, and the said decision now occupies the field.***

Thus, Dr. D.Y. Chandrachud, J. in his Judgment observed: *"The judgments rendered by all the four Judges constituting the majority in ADM Jabalpur are seriously flawed. Life and personal liberty are inalienable to human existence. These rights are, as recognised in Keshavananda Bharti, primordial rights. They constitute rights under natural law. The human element in the life of the individual is integrally founded on the sanctity of life. Dignity is associated with liberty and freedom. No civilized State can contemplate an encroachment upon life and personal liberty without the authority of law. Neither life nor liberty are bounties conferred by the State nor does the Constitution create these rights. The right to life has existed even before the advent of the Constitution. In recognising the right, the Constitution does not become the sole repository of the right. It would be preposterous to suggest that a democratic Constitution without a Bill of Rights would leave individuals governed by the State without either the existence of the right to live or the means of enforcement of the right. The right to life being inalienable to each individual, it existed prior to the Constitution and continued in force under Article 372 of the Constitution. Justice Khanna was clearly right in holding that the recognition of the right to life and personal liberty under the Constitution does not denude the existence of that right, apart from it nor can there be a fatuous assumption that in adopting the Constitution the people of India surrendered the most precious aspect of the human persona, namely, life, liberty and freedom to the State on*

whose mercy theses rights would depend. Such a construct is contrary to the basic foundation of the rule of law which imposes restraints upon the powers vested in the modern State when it deals with the liberties of the individual. The power of the Court to issue a Writ of Habeas Corpus is a precious and undeniable feature of the rule of law." (Para 119 of AIR: Para 136 of SCC).

It was further observed by Dr. D.Y. Chandrachud, J. in his Judgment: *"A constitutional democracy can survive when citizens have an undiluted assurance that the rule of law will protect their rights and liberties against any invasion by the State and that judicial remedies would be available to ask searching questions and expect answers when a citizen has been deprived of these, most precious rights. The view taken by Justice Khanna must be accepted, and accepted in reverence for the strength of its thoughts and the courage of its convictions."* (Para 120 of AIR: Para 137 of SCC).

CONSEQUENCES

It will be interesting to consider the Consequences of the **Culmination** of the ***Doctrine of Article 21 being the Sole Repository of the Right to Life and Personal Liberty*** and its **Replacement** by the ***Doctrine of Inalienable and Natural Right to Life and Personal Liberty,*** as also ***44th Constitutional Amendment, 1978 made in Article 359 of the Constitution:***

(1) Various situations mentioned in the Majority decision in ***Makhan Singh v. State of Punjab, AIR 1964 SC 381: (1964) 4 SCR 797 (supra)*** when a detenu could challenge his detention under Article 226 of the Constitution before a High Court despite suspension of

right to enforce Article 21 of the Constitution under Article 359 of the Constitution during operation of Emergency under Article 352 of the Constitution, would be available to a detenu in view of culmination of the Doctrine of Article 21 being the Sole Repository of the Right to Life and Personal Liberty. However, this consequence is of academic importance as now in view of amendment made in Article 359 of the Constitution by the 44th Constitutional Amendment, it is no longer open to suspend the right to enforce Article 21 even when Emergency declared under Article 352 of the Constitution is operative.

(2) As now in view of 44th Constitutional Amendment, 1978 made in Article 359 of the Constitution, suspension of right to enforce Article 21 of the Constitution is not permissible even when Emergency declared under Article 352 of the Constitution is operative, Article 21 would continue to remain operative even during such Emergency. Therefore, a detenu may challenge his detention not only under Article 226 of the Constitution before the High Court, but also directly before the Supreme Court under Article 32 of the Constitution on the ground that his Fundamental Right under Article 21 of the Constitution has been violated for varied reasons, such as, there is no procedure established by law for depriving a person of his personal liberty, or the procedure provided in law is arbitrary and is not fair and reasonable, or the procedure established by law has not been followed, etc.

(3) In case a Preventive Detention law is made as contemplated in Article 22 of the Constitution, such law must satisfy the requirements of Article 21 read with Article 14 of the Constitution, namely, the procedure laid down in the Preventive Detention law

must be fair and reasonable. This is because, as noted earlier, Fundamental Rights are inter-related.

(4) In regard to Consequence No. (3), as mentioned above, one more aspect needs to be considered. Suppose Emergency is declared by the President under Article 352 of the Constitution on account of threat to the security of India or any part of India on account of war or external aggression or armed rebellion. As a result, Article 19 of the Constitution stands automatically suspended under Article 358 of the Constitution. Further, suppose the President by Order under Article 359 of the Constitution suspends right to enforce Fundamental Right guaranteed under Article 14 of the Constitution. Now a person is detained under Preventive Detention law. Will it be open to such a detenu to contend that the procedure provided in law for depriving a person of his personal liberty is arbitrary and is not fair and reasonable? The answer is evidently in affirmative for following reasons:

A. Just as right to life and personal liberty are natural rights and inalienable to human existence, and their existence is not dependent on the provisions of the Constitution, so also the existence of Rule of Law is a must in any civilised society, and is not dependent on its recognition under Article 14 of the Constitution. Therefore, even if a Presidential Order under Article 359 of the Constitution suspends right to enforce Article 14 of the Constitution, the Rule of Law will continue to exist. One of the implications of Rule of Law is absence of arbitrariness. Hence, despite suspension of Article 14 of the Constitution by a Presidential Order under Article 359 of the Constitution, the procedure established by law for depriving a person of his personal liberty must not be

arbitrary. Therefore, the detenu may challenge the Preventive Detention law framed a per the provisions of Article 22 is arbitrary, and as such, violative of Article 21 of the Constitution which continues to remain in force during Emergency in view of 44th Constitutional Amendment, 1978.

B. In ***Keshavanand Bharti v. State of Kerala [AIR 1973 SC 1461: (1973) 4 SCC 225] (popularly known as the Fundamental Rights case)***, the Supreme Court laid down ***the Doctrine of Basic Structure of the Constitution***. Accordingly, while in exercise of its amending power under Article 368 of the Constitution, Parliament can amend any part of the Constitution, but Parliament cannot alter or destroy the Basic Structure or Basic Features of the Constitution. Rule of Law has been held to be a Basic Feature of the Constitution. [See: ***P. Sambamurthy v. State of A.P., (1987) 1 SCC 362: AIR 1987 SC 663***]. Evidently, therefore, Parliament has no power to amend the Constitution so as to alter or destroy the Concept of Rule of Law. Consequently, the power of President to issue Order under Article 359 suspending right to enforce Fundamental Right guaranteed in Part III of the Constitution (except Articles 20 and 21) cannot be so construed as to alter or destroy the Concept of Rule of Law. Hence, the procedure laid down in the Preventive Detention law for depriving a person of his personal liberty must not be arbitrary, as the same would be against the Concept of Rule of Law.

(5) In regard to Consequence No. (3), as mentioned above, yet another aspect needs to be considered. Suppose Emergency is declared by the President under Article 352 of the Constitution on account of

threat to the security of India or any part of India on account of war or external aggression or armed rebellion. As a result, Article 19 of the Constitution stands automatically suspended under Article 358 of the Constitution. Further, suppose the President by Order under Article 359 of the Constitution suspends right to enforce Fundamental Rights guaranteed under Article 14 and Article 22 of the Constitution. Now a person is detained under Preventive Detention law. Will it be open to such a detenu to contend that the procedure provided in law for depriving a person of his personal liberty is arbitrary and is not fair and reasonable? The answer is evidently in the affirmative for the reasons mentioned in Consequence No. (4) above.

(6) As noted earlier, in view of Judicial Decisions, the scope of the words "life" and "personal liberty" occurring in Article 21 of the Constitution has been considerably expanded, and these words cover a number of facets of human life. During operation of Emergency declared under Article 352 of the Constitution, and even in normal times, situations of extreme urgency or emergency may arise where immediate preventive or remedial decision/action is required to be taken as any delay would frustrate purpose of decision/action to be taken. In such situations, pre-decisional hearing is not feasible and, therefore, cannot be insisted upon. For such situations, Doctrine of Post-Decisional Hearing may be invoked, and persons affected by the decision/action may be given post-decisional hearing so that their version may be considered and appropriate orders may be passed in order to ensure fairness and reasonableness.