My feeling and that of some of my colleagues was that the height of eloquence to which Palkhivala rose on that day had seldom been equalled and never [been] surpassed in the history of the Supreme Court.

It would be a matter of fascinating research for a future historian to find out whether there was, on record, any judicial order or application on the basis of which the Full Bench of 13 judges was constituted. As far as is known, there was no order by which the Bench was dissolved.

As one perceptive observer light-heartedly remarked, both Palkhivala and Justice Krishna Iyer unwittingly contributed to the imposition of the 1975 emergency!

• THE EMERGENCY PROVISIONS—CONSTITUTIONAL BACKGROUND

Before dealing with the experience of the use of emergency powers, it would be interesting to refer to the debates on the emergency provisions that took place in the Constituent Assembly prior to the framing of the Constitution.

In the draft Constitution prepared by the Constitutional Adviser for the benefit of the Assembly, the emergency provisions were contained in Part XI (draft arts 275 to 280, which corresponded to the present arts 352 to 359). When they were first debated on 2 August 1949, they provoked strong sentiments from several members who thought they represented an unacceptable assault on civil liberties. One such member, H V Kamath, attacked the draft Articles in the following words:

I find no parallel to this Chapter of Emergency Provisions in any of the other Constitutions of democratic countries in the world. The closest approximation to my mind is reached in the Weimar Constitution of the Third Reich which was destroyed by Hitler, taking advantage of the very same provisions contained in that Constitution.

It has been recognised by students of politics that the very provisions in the Weimar Constitution ... contributed to the rise of Herr Hitler and paved the way to f/s/\ his dictatorship. Compared to that art 48 of the Weimar

... Even if the whole State pounces on him, he has one guarantee as a citizen of the land to approach the Supreme Court for protection and relief ... I submit, Sir, that the principle involved in the article under discussion is very pernicious. I, for one, cannot vote for it. Even if the whole House agrees to arm the government with such powers, even in the case of emergency, I, for
one, wish to bring it on record that I am opposed to this now and ever (Hear! Hear!) ... And having in view the poor training of political parties in their practice of democracy, I am inclined to profess that we should not be surprised if individuals are ordered to be hanged for flimsy reasons of their not seeing eye to eye with the powers that be. All this will be done in the name of Emergency.  

Concern was also voiced over the same article by Professor K T Shah in the following words:

The moment you introduce a provision like this in our Constitution, the moment you provide that the right to move the Supreme Court which has been guaranteed by a previous article shall be suspended by an Order of the President, by an Order of the Executive, that moment you declare that your entire Constitution is of no effect.

Faced with these strong sentiments, the Chairman of the Drafting Committee, Dr B R Ambedkar, held over the draft article, but it surfaced again later on and was passed without any substantial amendments that would have met the criticism. H V Kamath wound up the debate on 20 August 1949 on a note of despondency. He said: 'This is a day of sorrow and shame. May God help the Indian people.'  

Mr Kamath's attack on the emergency provisions turned out to be prophetic, as the events of 1975-77 (the Internal Emergency) revealed 25 years later. He said on the debate on 20 August 1949 in words which suggest that he has powers of prescience bordering on prophecy:

We the Founding Fathers have tried to found the Constitution - on what I would call the 'Grand Affirmation' of fundamental rights. We have tried to build on that the edifice of democracy but I find surmounting that edifice is the arch of the 'Great Negation'. First, the 'Grand Affirmation', then that edifice, at any rate that facade of democracy and surmounting that edifice or facade is the great negation of Part XI, the notorious negation of Part XI, and art 280 (present art 359) is to my mind the keystone of this arch of autocratic reaction.

... As an autocratic negation of liberty, this art takes the palm over all other Constitutions of the World.

... I hope for the good of India for the good of our fellow men and women who have just emerged from the darkness of slavery into the light of freedom, we shall do something for their happiness and not merely be content with strengthening the hands of a group of people, a tiny coterie or caucus in power. That is not the idea which the Father of the Nation had in mind.

It was unfortunate that the warnings given by Mr Kamath, Shibban Lai Saksena, Prof K T Shah and Mahavir Tyagi fell on deaf ears and India had to suffer the traumatic experience of that emergency.

The reason why Dr Ambedkar and others failed to heed those warnings appeared to be the fear of a weak Central authority particularly after the horrendous events surrounding the partition of India. Leaders of stature like Jawaharlal Nehru, Vallabhbhai Patel, C Rajagopalachari and Rajendra Prasad created a sense of confidence that such dire predictions would not come true. Subsequent events have, alas, shown that such confidence was clearly misplaced.

**THE EMERGENCY POWERS**

The Constitution of India, one of the longest documents of its kind, came into force on 26 January 1950. Unlike those of its counterparts in many Asian, African and South American countries, the Indian Constitution has not been abrogated or jettisoned by revolutionary events such as a military coup, or a one-party government, or the absence of free elections. And yet constitutional government and the rule of law have been severely tested in India. During the above-mentioned emergency, there was every danger that the democratic foundations of the Constitution would be permanently subverted. Happily, due to a combination of fortuitous events leading up to March 1977, the ballot-box achieved in India what other nations have had to achieve through civil war, violence or a resort to arms.

8 ibid, at 193.
9 ibid, at 196.
10 ibid, at 554.
11 ibid, at 533, 535, 537 (emphasis supplied).
12 It was the longest Constitution in the world until 1974, when that honour was taken away by the then newly-enacted Yugoslavian Constitution.
13 The Preamble to the Constitution and a few other articles had been brought into force earlier (26 November 1949).
Articles 352 to 360 of the Indian Constitution deal with emergency powers. Broadly speaking, three types of emergency situations were contemplated by the constitutional draftsmen. First, a grave emergency whereby the security of India or any part thereof is threatened by war, external aggression or internal disturbance (art 352). The effects of such an emergency are laid down in arts 353, 354, 358 and 359. Secondly, a situation where there is a failure of the constitutional machinery in a State (art 356), a phenomenon popularly known as the imposition of 'President's Rule.' And thirdly, a financial emergency, whereby the financial stability or credit of India or any part of its territory is threatened (art 360). This essay will confine itself to the first type of emergency.

The effects of a Proclamation of Emergency, at the time of the coming into force of the Constitution, were as follows:

I. Enlargement of the power of Parliament to legislate on all subjects, thereby temporarily eclipsing the federal principle;

II. Temporary enlargement of the legislative and executive power of Parliament by automatic suspension of the fundamental right guaranteed by art 19;

III. Likely suspension of the right to move any court for the enforcement of any of the other other fundamental rights, whether in pending or future proceedings;

It may be noted that, even in an emergency, the executive government was not empowered to interfere with the property or other rights of persons without the authority of enacted law.

14 These articles have been grouped together under Part XVIII ('Emergency Provisions').
15 By the Constitution (44th) Amendment Act 1978, the words 'internal disturbance' were deleted and the words 'armed rebellion' substituted for them.
16 Article 353(b). Likewise, the power of the Central executive was also enlarged (Art 353(a)).
17 Article 358.
18 Article 359. Under this article, the President (acting under advice from the government) may order such suspension.

O THE FIRST EMERGENCY

The first occasion when the emergency powers were invoked came in
1962, following an armed conflict with China. The Chinese aggression occurred on 8 September 1962 and a Proclamation of Emergency was issued on 26 October 1962. That Proclamation, under art 352, declared that a grave emergency existed whereby the security of India was threatened by external aggression. On the same day, the government promulgated a Defence of India Ordinance and the Defence of India Rules. By two other Presidential Orders, both issued under art 359(1), the fundamental right of any person to move any Court under arts 14, 21, 22, were suspended. Several individuals were detained without trial under the Defence of India Act and Rules, and the scope for judicial review under those laws soon came up for consideration before the Supreme Court in the leading case of Makhan Singh v Union of India.

This case was heard by a bench of seven Judges, and by a majority judgment, delivered on 2 September 1963, the court held that:

I. The Presidential Orders did not affect the jurisdiction of the court but only the enforcement of the named fundamental rights;

II. The bar on enforcement of fundamental rights would apply to any proceeding, whether in the Supreme Court or in a High Court, and whether it had been brought under art 226 of the Constitution or under Section 491 of the Criminal Procedure Code;

III. The bar would apply if, in substance, the petition attempted to invoke a fundamental right.

The court, however, clearly stated that a detention order could still be challenged:

22 The right to equality before the law and the equal protection of laws.
23 The right to life and personal liberty.
24 Protections against arbitrary arrest and detention.
25 The Presidential Order covering Arts 21 and 22 were issued on 3 November 1962, while the one covering art 14 was issued on 11 November 1962.
26 AIR 1964 SC 381.
27 This section gave the High Courts powers to issue directions in the nature of habeas corpus in cases where the court was of the opinion that a person had been illegally or improperly detained.
service to deal with it. That conflict, too, ended quite soon, but the
government failed to revoke the emergency. It was only after sustained
public protests that the emergency was eventually brought to an end on
10 January 1968.

Q THE SECOND EMERGENCY

The second occasion for invocation of emergency powers came in
December 1971 following the outbreak of fresh hostilities between India
and Pakistan arising out of the movement to establish 'Bangladesh'.
When Pakistan launched a massive land and air attack on Indian
territory on 3 December 1971, the President, acting on instructions from
the government, issued a Proclamation of Emergency under art 352, this
time on the grounds that the security of India had been threatened by
external aggression.

This emergency also saw the enactment of special legislation in the
form of the Defence of India Act 1971 and Rules, and the use of another
law which authorised preventive detention that had been passed a few
months previously, viz. the Maintenance of Internal Security Act 1971
(MISA). The government also, for good measure, later enacted a
separate law, the Conservation of Foreign Exchange and Prevention of
Smuggling Activities Act 1974 (COFEPOSA), to preventively detain
alleged economic offenders.) Although the special powers were, by and
large, invoked fairly responsibly, this emergency saw the detention of tens
of thousands of persons, including communist leaders, students, peasants
and industrial workers. In addition, several thousand prisoners-of-war
were also captured and interned during this period.

The hostilities with Pakistan ended on 17 December 1971, and this
was soon followed by diplomatic moves to normalise relations between

the two countries, which culminated in a peace accord in July 1972. The
Proclamation of Emergency was, however, not revoked, despite
increasingly strident calls from Opposition politicians, lawyers, journalists
and other public figures. On the contrary, it was, inexplicably, reinforced
on 16 November 1974 by a Presidential Order, issued under art 359,
suspending the right of any person who had been detained under the
MISA to move the courts for the enforcement of fundamental rights
under arts 14, 21 and 22 of the Constitution.

This emergency also saw some judicial challenges, most of them
unsuccessful, to the laws authorising preventive detention. In Haradhan
Saha v State of West Bengal? the Supreme Court refused to accept that
the MISA was violative of arts 14, 19, 21 and 22, although the court did
not hesitate to grant relief to individuals who had become victims of
illegal or over-broad detention orders passed under the Act. In
Khudiram Das v State of West Bengal? the court rejected another
challenge to the MISA, this time based on the argument that the
subjective satisfaction of the detaining authority should be amenable to
judicial review. The court did, however, recognise that it was within its
power to examine the existence, as opposed to the sufficiency, of such
satisfaction, and that, where, for example, the detaining authority had
not applied his mind at all, the order of detention could be struck down.

THE THIRD EMERGENCY

On 12 June 1975, the then Prime Minister, Indira Gandhi, was unseated

29 This Act, a non-emergency piece of legislation, was passed on 2 July
1971, to replace the Preventive Detention Act 1950 which had lapsed on
31 December 1969, following the government's inability to muster
enough support in Parliament to extend its life.

30 Some 20,000 railway workers were reported to have been detained under
the MISA following a strike call by the country's powerful rail unions.

31 AIR 1974 SC 2154.

32 The 'seven freedoms' article which guaranteed, to every citizen, the rights
to freedom of speech and expression; to assemble peaceably and without
arms; to form associations or unions; to move freely within the territory of
India; to reside or settle down anywhere in India; to practice any
profession or carry on any occupation, trade or business; and to acquire,
hold and dispose of property.

33 eg in Ram Bahadur Rai v State of Bihar AIR 1975 SC 223, the court
struck down a detention order which authorised the incarceration of the
petitioner on the grounds that he had attended a meeting which decided
to launch a 'Gujarat-type agitation' against the government.

34 AIR 1975 SC 550.
as a Member of Parliament by the Allahabad High Court following a successful election petition in which she was accused of electoral malpractices. As described above, in a vacation sitting of the Supreme Court in which Mrs Gandhi was represented by Nani Palkhivala as her counsel, she was only granted a conditional stay against the High Court’s order. This stay deprived her of the right to vote or to speak in the Lok Sabha.35

Earlier in the evening of 12 June, the ruling Congress Party was comprehensively defeated at the polls in the State of Gujarat (a previous stronghold of the Congress) and an Opposition coalition government called Janata Morcha had been voted to power.

Faced with these setbacks, Mrs Gandhi, on the night of 25 June 1975, advised the President to issue another Proclamation of Emergency under art 352 on the grounds that the security of India had been threatened by ‘internal disturbance’. This emergency, which lasted until March 1977, was marked by extensive abuse of power and widespread violation of human rights on an unprecedented scale—abuses which were investigated and documented meticulously by an official commission of inquiry headed by a distinguished former Chief Justice of India, Mr Justice J C Shah, soon after the termination of the emergency.36 Those abuses can conveniently be grouped under three heads:

- The attack on the Opposition and the press.
- The assault on the Judiciary.
- The subversion of the Constitution.

ATTACK ON THE OPPOSITION AND THE PRESS

As noted earlier, the emergency saw the arrest and detention of vast numbers of Opposition politicians and anyone deemed ‘unfriendly’ to

Mrs Gandhi and the ruling Congress party. The Presidential Order suspending the enforcement of several fundamental rights—including the right to life and personal liberty—gave a handle to the government to resist all court actions and to deny the maintainability of petitions for 

35 Smt Indira Gandhi v RajNarain AIR 1975 SC1590.

habeas corpus. In addition, censorship of a sweeping kind was imposed on the press. Attempts were made to attach and take over independent and fearless newspapers. The Censor tried routinely to block the publication of court judgments which were unfavourable to the government. A new law was passed to prevent the publication of 'objectionable' matter, which included anything defamatory of the Prime Minister, and which authorised the government to impose a wide range of harsh sanctions against those deemed to be violating its provisions.37 The Press Council, which had been established as an independent watchdog in 1965, was abolished,38 and a law allowing fair and accurate reports of parliamentary proceedings to be published without fear of legal sanctions, was repealed.39

Parliament became a rump and far-reaching constitutional amendments and laws were enacted within a few days without any debate in the House or outside.

- ASSAULT ON THE JUDICIARY

The High Courts, by and large, behaved with fearless independence during the emergency. Nine of them upheld their right to entertain petitions for 
habeas corpus in the teeth of strenuous arguments to the contrary from government lawyers, with one of the Chief Justices observing that, 'if the arguments of Government were accepted, the ghost of Hitler would stalk the land.' The Delhi High Court struck down an order of preventive detention against a well known journalist, Kuldip Nayar. In another case, the Bombay High Court refused to countenance an order of the city's Police Commissioner refusing permission for a private meeting of lawyers wishing to debate the emergency.40

38 The Press Council (Repeal) Act 1976.
However, when the matters were carried to the Supreme Court in appeal, in *ADM Jabalpur v Shivakant Shukla*, the High Courts were reversed. By a majority of four to one (Khanna J dissenting), the Supreme Court held that the citizen had no remedy against arbitrary detention as *habeas corpus* petitions were not maintainable for as long as the Presidential Order suspending the enforcement of fundamental rights remained in force. Lawyers and laymen alike were shocked: how could the court overrule so many eminent judges of the High Courts? If there was any doubt, surely it should be resolved in favour of the liberty of the citizen. The import of the Supreme Court's ruling was that no one who opposed a dictatorial executive was safe anymore. They could be detained without trial and could be tortured or even killed in the absence of a legal remedy. This judgement was widely criticised. The best indictment of the majority judgement was contained in the dissenting judgement of Justice Khanna who, quoting Friedmann, noted that:

> In a purely formal sense ... even the organised mass murders of the Nazi Regime [would] qualify as law ...
> What is at stake is the rule of law ... The question is not whether there can be curtailment of personal liberty when there is threat to the security of the State. I have no doubt that there can be such curtailment, even on an extensive scale, in the face of such threat. The question is whether the laws speaking through the authority of the Courts shall be absolutely silenced and rendered mute because of such threat.  

H M Seervai, an eminent authority on constitutional law, was scathing in his comments on the *habeas corpus* judgement:

> The four judgements were delivered in the darkest hour of India's history after Independence, and they made the darkness complete ... Ordinary men and women could understand Satan saying 'evil be thou my good' but they were bewildered and perplexed to be told by four learned judges of the Supreme Court that, in substance, the founding fathers had written in to the Emergency Provisions of our Constitution, 'Lawlessness be thou our law.'

In May 1976, the High Court Judiciary was targeted for harassment. One independent Additional Judge of the Bombay High Court, Justice U R Lalit, who was due for either an extension or confirmation as a permanent judge, received neither, as a result of which he had to leave his post. Another Additional Judge, Justice Aggarwal, was similarly denied confirmation in the Delhi High Court and had to return to his post as a District Judge. A judge of the Delhi High Court, Rangarajan J, who had granted a writ of *habeas corpus* in the case involving the journalist Kuldip Nayar, was transferred to the Assam High Court, situated in the north-eastern corner of India. Many other independent and fearless judges were similarly punitively transferred. One judge of the Bombay High Court, Justice Mukhi, who had a cardiac condition, asked for a postponement of his transfer to Calcutta, but this request was refused. The judge soon died of shock. Two judges of the Gujarat High Court, Chief Justice B J Divan and Justice S H Sheth, were transferred to the Andhra Pradesh High Court. One of them, Justice Sheth challenged the transfer, and a Full Bench of the Gujarat High Court upheld his challenge. The government took the matter to the Supreme Court by way of an appeal, but before the appeal could be heard, snap general elections were called, in which Mrs Gandhi and her ruling Congress party were resoundingly defeated, and the emergency brought to an end.

**SUBVERSION OF THE CONSTITUTION**

The emergency saw a number of constitutional amendments—some of them involving radical changes—being rushed through Parliament without debate or discussion. Most of the Opposition MPs had been held in preventive detention. Parliamentary proceedings were censored. Even members of the ruling party were under surveillance by intelligence agencies. The rule of law had all but collapsed. The effect of these amendments on the judiciary was as under:

I. The power of the Supreme Court to decide election disputes was taken away by the insertion of a new art 329-A which conferred that power on such an "authority" as may be prescribed by Parliament. The immediate aim of this amendment was to preempt the Supreme Court from hearing Mrs Gandhi's own
II. The power of judicial review to pronounce upon the validity of statutes was almost completely destroyed by the addition of over 100 Central and State laws to the Ninth Schedule to the Constitution. These laws included not only the dreaded Maintenance of Internal Security Act 1971 (MISA)—which was mostly used for detaining political opponents, journalists, labour leaders and suppressing all dissent—but also laws which gave sweeping economic powers to the government, including the power to take-over the ownership or management of industrial undertakings. Thus detention without trial and without the safeguard of judicial review, far from being constitutionally prohibited, became constitutionally 'enshrined'!

III. The High Courts' powers of judicial review under art 226 of the Constitution were severely curtailed, even in cases involving the review of purely administrative orders.

IV. A novel provision was introduced to the effect that no law could be declared constitutionally invalid by a High Court or the Supreme Court without a two-thirds majority of the judges hearing the case.

V. The constitutional amendments were themselves put beyond judicial review.

VI. Judicial review was excluded in respect of laws which purported to provide for the prohibition or control of 'anti-national activities' or of 'anti-national association-s'. These phrases were so vague and nebulous as to be capable of suppressing all political opposition and dissent and to make the courts powerless to safeguard the basic rights of the citizenry.

Alongside these constitutional amendments, changes were also introduced by way of statutory law to adversely affect the power of judicial review. For example,

1. Amendments were made to the Maintenance of Internal Security Act 1971 (MISA), the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 (COFEPOSA), both dealing with preventive detention, barring the furnishing of grounds for detention, extending the time limits on detention, permitting re-detentions, taking away the power of courts to release detainees on bail or bond, and excluding challenges to detention orders on grounds of natural justice.

2. Far-reaching retroactive amendments were made in the election laws which had the effect of validating the electoral offences committed by Mrs Gandhi, and these were given immunity from judicial challenge by being included in the Ninth Schedule to the Constitution.

The dominance of the executive was complete. Through these constitutional and statutory changes, Mrs Gandhi was able effectively to establish a personal dictatorship.

Another constitutional amendment, albeit one which was not carried to fruition, proposed to confer complete immunity against all legal proceedings, civil and legal, on the Prime Minister, the President and State Governors. The Bill containing this amendment was passed by the Rajya Sabha in August 1975. It sought to insert a new sub-clause in art 361 as follows:

No criminal proceedings whatsoever against or concerning a person, who is or has been President or the Prime Minister or the Governor of a State shall lie in any Court, or shall be instituted or continued in any Court, in respect of any act done by him, whether before he entered upon his office or during his term of office as President or Prime Minister or Governor of a State, as the case may be, and no process whatsoever including process for arrest or imprisonment shall issue from any Court against such person in respect of any such act.

Other sub-clauses sought to confer immunity from civil proceedings also. However, for reasons which are not clear, the Bill was never moved in the Lok Sabha and it thus never became law. It was nevertheless reminiscent of an attempt to revive the discredited doctrine of the divine right of kings.

However, Mrs Gandhi was soon to make a grave miscalculation. Based on reports from the intelligence agencies that she continued to enjoy widespread popular support, and overcome by a burning desire to win democratic legitimacy for her actions, particularly outside the
country, she ordered snap elections in January 1977. When these elections were held, in March 1997, the results surprised everyone. Both she and her party were soundly defeated and driven out of office. The two emergencies then extant were finally revoked on 21 March 1977.

- **THE AFTERMATH**

The new government which assumed power made it a high priority to reverse some of the worst excesses of the emergency. Shortly after taking office, they introduced the Constitution (44th Amendment) Bill for this purpose, which was passed by the Lok Sabha and the Rajya Sabha the following year. This amendment sought substantially to undo the mischief of the changes made to the Constitution during the emergency. The powers of judicial review were restored, and the emergency provisions themselves were tightened up as follows:

1. Article 352 was amended to substitute the words 'armed rebellion' for 'internal disturbance,' so that any future government would have to meet a higher threshold for the declaration of an emergency.
2. A requirement was introduced in the article that any advice to the President on the issue a Proclamation of Emergency must be in the form of a written communication from the Central Cabinet.
3. A further requirement was introduced that, for a proclamation to remain effective it will need to be approved by a majority of the total membership of each House of Parliament as well as a two-third majority of the members present and voting in each House.
4. Any extension of the emergency would require further approval by each House of Parliament every six months, failing which the Proclamation would lapse.
5. The Lok Sabha could bring an emergency to an end at any time by passing a resolution to that effect using a simple majority.
6. Art 359 was amended to ensure that the power of the President to issue Orders suspending the enforcement of fundamental rights shall not extend to the rights guaranteed under arts 21 and 22 (the right to life and liberty and to protection against arbitrary arrest).

7. Article 358 was amended to limit the automatic suspension of art 19 ('the seven freedoms' article) to emergencies arising out of war or external aggression, and not armed rebellion.
8. Article 22 was amended to introduce certain additional safeguards for those detained under preventive detention laws, including that: (a) the maximum period for which anyone could be so detained without reference to an Advisory Board would be 2 months; (b) all appointments to the Advisory Boards would be made in accordance with the recommendations of the Chief Justice of the appropriate High Court; (c) all members of Advisory Boards would be serving or retired judges of a High Court; and (d) Parliament would no longer have the power to pass laws allowing certain persons to be preventively detained without reference to an Advisory Board.
9. A new article, art 361 A, was inserted to give constitutional protection for the publication of fair and accurate reports of proceedings in Parliament and the State legislatures.

- **CONCLUSION**

Despite the traumatic events of 1975-77, the lessons of that emergency have now, alas, almost been forgotten by a vast majority of the Indian citizenry. It is said that people do not realise the benefits of freedom until they are lost. Twenty-five years have passed and a new generation of Indians is not even aware of what happened during those eventful months.

It is essential that if India is to preserve her democratic freedoms, each generation must be taught, educated and informed about those dark days. Every Indian needs to renew and refresh himself at the springs of freedom.

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44 The Constitution (41st) Amendment Bill 1975.
as cancellation of trading licenses but have been ignored when the liberty of the citizen is at stake.

The courts have also, unfortunately, held that a second order on the same grounds can be passed if an order of detention is found to be defective in law, \(^{40}\) with the result that there have been numerous cases where a detainee has been re-arrested the moment he is ordered by a High Court to be released.

A salutary principle laid down by the courts, namely, that a person already in jail cannot be ordered to be detained preventively if he is serving a sentence; \(^{41}\) (on the grounds, for example, that there was a possibility of his being granted bail), \(^{42}\) was, in a later case, reversed with the result that such detention is now permissible merely because 'it could not be predicted with certainty that the [detainee] would not be released on bail.' \(^{43}\) This unfortunate decision ignores the fact that, normally, a court would only grant bail if, under the appropriate law, the offence for which the person is detained is a bailable offence. The resultant situation is that a person can be in custody even for acts which, under the law, do not justify detention.

**INTERMENT AS AN ALTERNATIVE TO PROSECUTION**

Can a person who has committed acts which are punishable as crimes be detained? One would have thought that such a detention can never be proper because the very object of detention, keeping the culprit behind bars, can be achieved by having him convicted in an ordinary criminal court. Yet, the Courts have held that because such detention is preventive, rather than punitive, a person who has committed an offence can also be detained. To quote Ray, CJ:

An order of preventive detention may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal.**

The rationale adopted for such decisions is disturbing. It has been argued that whilst the object of a trial and a conviction is *punitive*, the object of detention without trial is *preventive* and this has led the juds to the conclusion that preventive detention laws create a new a different jurisdiction. To quote Dua J, in *Borjahan v State of W Bengal?*\(^{5}\)

The fields of these two jurisdictions are not co-extensive nor are they alternative. The jurisdiction under the Act may be invoked when the available evidence does not come up to the standard of judicial proof but is otherwise cogent enough to give rise to the suspicion in the mind of the authorities concerned that there is a reasonable likelihood of repetition of past conduct...

Similar views have been expressed in a number of other cases. \(^{46}\) The casuistic theory of different and separate jurisdictions has resulted in the Supreme Court permitting detention on mere suspicion, a suspicion formed in the minds of faceless government bureaucrats. Proofbeyond reasonable doubt to the satisfaction of a judge has been abandoned; a person can be detained for up to two years if the evidence is *cogent enough* to satisfy a bureaucrat.

An interesting example of the abdication by the court of responsibility to uphold the liberty of the citizen is *Shiv Ratan Makin v Union of India.*\(^{47}\) A person was preventively detained unc COFEPOSA for being found in the possession of two pieces of gold worth about Rs 75,000. The detention was upheld by Bhagwati, CJ. I observed:

If an order of detention is made only in order to bypass a criminal prosecution which may be irksome because of the inconvenience of

\(^{40}\) *Jagdev Singh v State of Jammu & Kashmir* AIR 1968 SC 327.

\(^{41}\) *ibid.*

\(^{42}\) *Ramesh Yadav v Dist Magistrate, Etah* AIR 1986 SC 315.

\(^{43}\) *Birendra Kumar Rai v Union of India* AIR 1993 SC 962,965.

\(^{44}\) *Haradhan Saha v State of West Bengal*, op cit note 13, at 2160 [emphasis supplied].

\(^{45}\) *AIR 1972 SC 2256, 2257.


\(^{47}\) Op cit, note 15.
proving guilt in a court of law, it would certainly be an abuse of the power of preventive detention and the order of detention would be bad. But if the object of making the order of detention is to prevent the commission in future of activities injurious to the community, it would be a perfectly legitimate exercise of power to make the order of detention.  

The court must, he further observed, look at the facts and circumstances of each case. The judgment does not indicate whether the court considered the somewhat draconian provisions of the Customs Act 1962, under which if the petitioner had been prosecuted, the trial could have been a summary trial, a guilty intention would have been presumed, and the rules of the admissibility of evidence would have been relaxed. The judgment assumes that the fact that he was caught smuggling gold was true; if that were so, he would almost certainly have been convicted and could have been sentenced to up to three years in jail. There was not the slightest need, in the circumstances, to resort to preventive detention.

What is even more disquieting about this judgment, and numerous others, is that they appear to accept the argument that a person who has once committed a crime is almost certain to do so again. It is this assumption which alone justifies the order of preventive detention of such persons. This assumption is pernicious; it destroys the presumption of innocence which lies at the root of all civilised systems of law.

The vast powers these laws have conferred on the executive, and the latitude with which the Courts have scrutinised orders of detention has, inevitably, led to abuses. There have been countless cases of persons being wrongly detained; there have also been cases of detention orders being passed out of personal spite and malice. Not that all persons detained have been wholly innocent; most have almost certainly been involved in some criminal offence or the other. But this cannot authorise the total subversion of the ordinary criminal law and procedure and permit detention without trial. The police rarely prosecute; why prosecute when you can just detain?

The very foundation of any civilised system of law is that no person can be put in jail unless he is fairly tried and convicted; arrest and detention on mere suspicion is a hallmark of a fascist or totalitarian system. The Supreme Court of India has, however, upheld orders of detention for acts which are admittedly ordinary criminal offences and justified recourse to internment rather than prosecution on the ground that there may not be sufficient admissible evidence to secure a conviction. There are fewer prosecutions; and thousands of persons are spending months and months in detention without any trial. This has made a farce of the rule of law.

• THE 1978 REFORMS

In 1975, Mrs Gandhi declared a state of emergency, and scores of leading opposition politicians were detained without trial. When she lost the elections, and those very opposition politicians came to power in 1977, they enacted the Constitution (44th Amendment) Act. This Act amended art 22 and 352. Whilst the amendment of art 352 has been brought into force so that an emergency can no longer be declared if there were internal disturbances, the very important amendments to art 22 have not been brought into force for 22 years even though there have been governments of several different complexions since.

Under the amended art 22, the advisory board has been made truly independent: the provision requires it to consist of sitting or retired High Court Judges selected by the appropriate Chief Justice. Further, it is provided that a person cannot be detained beyond two months, unless the detention has been approved by the advisory board, and the power conferred on Parliament to provide for a longer period has been taken away. In A K Roy v Union of India, the question was raised as to whether Supreme Court could issue a mandamus to the Central Government to bring the amending provisions in force. By a majority of three to two, the court held that it could not.

• THE WAY FORWARD

Where do we go from here? I would urge most earnestly that the Supreme Court, should, at the earliest opportunity, reconsider several of

48 ibid, at 613.
49 See 135 to 138B.