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JURIMETRICS AND DETENTION: UNDERSTANDING THE SUPREME COURT THROUGH DETENTION CASES DURING THE 1975 NATIONAL EMERGENCY

- Nitish Rai Parwani*

Abstract

*This paper employs the lens of jurimetrics to empirically analyse patterns in decision-making by the Supreme Court while deciding cases concerning personal liberty between 1974-1977, with the 1975 National Emergency as the point of reference. The paper investigates and analyses the functioning of the Supreme Court in this period by examining the numerical trends in the number of reportable and unreportable judgments in preventive detention matters during the 1975 Emergency, by contrasting it with the period immediately before the proclamation and after the revocation of the Emergency. First, the paper introduces the period of study and delineates its methodology, along with setting the legislative, political, and judicial context to these judgments. Second, the paper shows a decline in the number of reportable and unreportable judgments in such matters during the 1975 Emergency and explores various reasons for the same. Third, the paper analyses the Court's jurisprudence on the maintainability of habeas corpus petitions against preventive detentions during this period, with specific focus on *ADM Jabalpur v. Shivkant Shukla* (Habeas Corpus case). The paper shows how the Supreme Court had laid the groundwork for this decision even prior to the 1975 Emergency, and analyses the subsequent cases that reiterate its position of law. To conclude, the paper raises questions on the extent of judicial independence and accountability during the 1975 National Emergency and underscores the need to further study the working of the Supreme Court more closely and rigorously, for a better understanding of judicial decision-making.*

I. INTRODUCTION

It is an immutable fact that the personal and ideological biases of legislators influence their official functions (which often gets them votes as well), while judges and judicial officers — ostensibly far away from political passions, table thumping debates, and popular gaze — seem to be anonymous adjudicators who decide on merits.¹ These adjudicators, who are viewed as “virtually faceless

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¹ Although judges are isolated from the political wings of the State and are equipped with the power of judicial review, they are also under “psychodynamic kind of pressures” — primarily in the form of criticism from the Bar, academic critiques, and dissenting opinions from brother and sister judges. See Upendra Baxi, ‘Introduction’ in KK Mathew, *Democracy, Equality and Freedom* (Eastern Book Company 1978) v-vi.

litigation-admitting, decision-emitting institutions”² are often, as admitted by several members of the legal fraternity, bound within certain walls, lines, and limits that are unseen by the layman.³ The identity of a judge, especially in India, remains largely discreet from the public. Hence, seldom does one, except of course in court bar-rooms, come to comprehend the impact of values and prejudices of individual judges on the decisions they make.⁴ However, realist scholars,⁵ especially in jurisdictions where judges are elected, focus on the role of ‘prediction of law’ by analysing the judicial behaviour of judges. Nonetheless, in the Indian context, studies in this area are scant. To understand the theoretical framework of ‘life of law’, the statute books and juristic interpretations are sufficient;⁶ but to comprehend ‘law in action’,⁷ the conduct and opinion behaviour of judges provide certain insights. Apart from analysing judicial behaviour and judgment patterns of decision-makers, which is the traditional jurimetrical approach, this paper also takes into account the matrices and milieu in which these decisions are made.

Though the occupants of judicial benches are generally reticent, it is the task of a scholar to catch words from zipped lips and decipher their minds. This is done through analysing judicial pronouncements in light of contemporary circumstances in judicial trends, political circles, social values, and personal and career positions of judges. As a scientific method of investigating legal problems, jurimetrics takes into account, inter alia, the trends of judicial pronouncements, behavioural patterns of judges, and a quantitative analysis of their judicial behaviour through

² George H Gadbois, ‘Indian Judicial Behaviour’ (1970) 5(3-5) *Economic and Political Weekly* 149.

³ HR Khanna, ‘Law and Men of Law’ (1976) 4 SCC (Jour) 17.

⁴ With the advent of social media and alternative modes to conventional media, judges are also becoming subjects of popular discussion; albeit this phenomenon is quite recent and is still limited to the areas with exposure to social and legal institutions. In the period of study in this paper (1974-1977), the judiciary and judicial decision-making largely remained beyond popular gaze and discussions, particularly when compared to the popular exposure of political players of the legislature and executive.

⁵ The realist approach in jurimetrics is a perspective that focuses on empirically analysing and predicting judicial behaviour by examining how judges make decisions in practice, rather than solely relying on legal doctrine or theory. It seeks to understand how external factors, such as political influences or personal backgrounds, impact judicial decisions. Realist analysis often involves quantitative methods, data analysis, and statistical models to identify patterns in judges’ decisions. This approach aims to provide a more comprehensive understanding of the judicial decision-making process and its real-world implications. For further discussion, see Neil Duxbury, ‘Law and Prediction in Realist Jurisprudence’ (2001) 87 *Archives for Philosophy of Law and Social Philosophy* 402.

⁶ Upendra Baxi, ‘The Little Done and the Vast Undone’ (1967) 9 *Journal of Indian Law Institute* 374.

⁷ JR Cades, ‘Jurimetrics and General Semantics’ (1965) 22(3) *A Review of General Semantics* 279.

application of mathematical logic and socio-political factors to understand judicial decisions and the bearing of extraneous influences on them.⁸

In this study, the jurimetrical tool is adopted to study detention jurisprudence⁹ of the Supreme Court of India from January 1974 to December 1977 ('study period'), with the period of the 1975 National Emergency viz. from June 26, 1975 to March 21, 1977, as the 'period of reference'. A period preceding this reference period is also considered in this study for the following reasons: *first*, to compare general trends of decision making during the reference period vis-à-vis the period preceding it;¹⁰ *second*, though the period of the National Emergency of 1975 is generally highlighted the most by legal and political-science scholars but another National Emergency, which was invoked in 1971 and was in force until its revocation in 1977, was already in operation when the Emergency of 1975 was invoked.

However, detentions in the 1971 Emergency were qualitatively different than those in the 1975 Emergency. The 1971 Emergency was proclaimed because of external threat, i.e., a war. On December 3, 1971, amidst the Bangladesh-Liberation movement escalating in the East Pakistan, an airstrike mission named 'Operation Changez Khan' was launched by Pakistan on several airbases in North India. Following this, a war was declared between India and Pakistan; and consequently, a National Emergency under Article 352 was invoked by the Indian government. This war culminated with the surrender of Pakistani forces on December 16, 1971, and the independence of Bangladesh on the same day. Though the war was over, the Emergency invoked on December 3, 1971 was never revoked.

The internal-political influence of this Emergency on the detentions carried out during this period was *perceivably* unheeding, as could be noted from the judgments. On the other hand, the National

⁸ L Loevinger, 'Jurimetrics, the Next Step Forward' (1949) 33 Minnesota Law Review 455; Perry Meyer, 'Jurimetrics: The Scientific Method in Legal Research' (1966) 44 Canadian Bar Review 1; Rashesh Vaidya, 'Jurimetrics: An Introduction' (*Academia Letters*, 2021) <https://www.academia.edu/50139590/Jurimetrics_An_Introduction> accessed 18 December 2023.

⁹ Here, the cases of detention arising out of preventive detention statutes including Maintenance of Internal Security Act, 1971 and Defence of India Rules, 1971 (as they stood after the Thirty Ninth Constitutional Amendment), and also the matters for release from detention including regular bail, default bail and benefit of probation, are analysed. For preventive detention jurisprudence, also see PK Tripathi, 'Preventive Detention: The Indian Experience' (1960) 9 American Journal of Comparative Law 219.

¹⁰ The preceding period has been chosen instead of the period after the revocation of the Emergency as most of the judges who constituted the Court during the Emergency were there at the Supreme Court before the Emergency and decided some landmark cases; albeit many of them retired (resigned in case of Justice Khanna) during or immediately after the Emergency.

Emergency of June 1975 was followed by several preventive detentions, particularly with political underpinnings. The major focus of this study is on these detention matters, i.e., the liberty cases ensuing from these preventive detentions. In March 1977, both National Emergencies (of 1971 and of 1975) were revoked, fresh general elections were announced, and the arrested detenus were released. Hence, most of the detention matters were rendered infructuous after this period. Therefore, to draw a comparison of the Emergency ensuing from internal-politics vis-a-vis to that ensuing from external threat, and the period after the revocation of the Emergency, these three periods are considered.

While the first Emergency was declared in 1971, the period considered in this study is from January 1974 (i.e., 18 months prior to the proclamation of the 1975 Emergency). The 1973 criminal law reforms included the new Code of Criminal Procedure, 1973 ('CrPC'), which was operationalised from 1974. Hence, the criminal justice milieu of the period before 1974 was different from the reference period. To account for this difference, the period of study spans from January 1974 to December 1977.

For the purpose of this study, primary sources, including all the judgments of the Supreme Court of India, pronounced during the study period (1974 to 1977) on 'liberty matters'¹¹ of detention

¹¹ The concept of liberty, a vital tenet of modern democratic structures of State, is a concept which has been expanding since ages. The concept has exhibited a trajectory of expansion in the last few decades. Politically recognised as "the protection against the tyranny of political rulers" (Meany), the evolution of the concept has also been deeply influenced by philosophical, social, and legal developments, reflecting the multi-dimensional nature of liberty. As Berlin posited, liberty encompasses both negative liberty—which enshrines the traditional political view as discussed above—denoting freedom from external constraints; and positive liberty, signifying the ability to realise one's potential through self-determination. Over time, this conceptual dynamism has manifested in legal interpretations, particularly in the context of the Supreme Court of India as well. The Indian judiciary has adopted a nuanced approach, recognising liberty as an inalienable right enshrined in the Constitution of India. This interpretation has evolved, with the Court acknowledging economic and social rights, including privacy, livelihood, information, etc. as integral facets of liberty. The Court's jurisprudence has also encompassed diverse dimensions, such as personal liberty, religious freedom, and economic well-being. However, of particular note are instances where the Court has deliberated arrest and detention practices, underscoring their pivotal role as indicators of liberty. The Court's interventions in matters pertaining to preventive detention, habeas corpus petitions, and safeguards against arbitrary arrest reflects its acknowledgment of these aspects as crucial facets of liberty. In this vein, while admitting the limitations in analysing the whole trajectory of evolution of liberty, the metrics of liberty or the evolution of detention jurisprudence, this paper deals with the realm of arrest and detention—particularly as reflected through the judgments of the Apex Court during the period of National Emergency — as vital indicators of the intricate interplay between liberty

jurisprudence — which includes judgments on preventive detention, regular and default bail, and probation of offenders¹² — have been analysed.¹³ Initially, there was an impediment to this analysis, as there were scant judgments which were categorised as ‘reportable’ during this period (a discussion on this aspect forms part of the main argument of the paper as well). Thus, many pronounced judgments never appeared on the pages of any publicly circulated law report. I am highly grateful to the Judges’ Library of the Supreme Court of India, from where I could access the antique chronicles containing judgments of the Court, delivered during the study period, which were classified as ‘unreportable’. Therefore, I was able to complete the study with exhaustive primary data of the judgments pronounced during the study period.

The paper analyses the judges and their judgments in liberty matters during the study period by also referring to secondary sources, including interviews, biographies and autobiographies, lectures, and articles by these judges. I have also referred to the works of George Gadbois, including his paper titled ‘Indian Judicial Behaviour’,¹⁴ published in the *Economic and Political Weekly* in 1970 and his book, *Judges of the Supreme Court of India: 1950-1989*.¹⁵ In his 1970 paper, Gadbois had analysed the judicial patterns of the 35 judges of the Supreme Court of India who served the institution between 1950 to 1969. Based upon his findings that were rooted in factors including individual opinions of the judges, dissents, and distinct designs of decisions, he categorised these judges under four labels, viz., modern conservative, modern liberal, classical conservative, and classical liberal. He analysed all 12,338 appearances by these judges in all the 3,273 reported judgments of the Supreme Court of India in the research period of his study. Though the enormous data collected by Gadbois was not of much help in the present study, the inspiration was derived from the tools employed and academic rigour displayed in that work. His book, which is based on a series of interviews with 93 sitting and retired judges of the Supreme

and legal jurisprudence. The term ‘liberty matters’ is deployed in this paper to refer to liberty through the indicators of arrest and detention.

See Paul Meany, ‘An Introduction to John Stuart Mill’s on Liberty’ (Libertarianism, 20 March 2020) <<https://www.libertarianism.org/columns/introduction-john-stuart-mills-liberty>> accessed 12 January 2024; Isaiah Berlin, ‘Two Concepts of Liberty’ in *Four Essays on Liberty* (Oxford University Press 1969) 118-172.

¹² Probation is a reformatory system that facilitates re-education of the offender, without removing him from his natural surroundings. The offender is not incarcerated, to provide a chance of rehabilitation in society. See *Arvind Mohan Sinha v Amulya Kuma Biswas* (1974) 4 SCC 222.

¹³ The cases that are analysed in this paper are exhaustive, i.e., each case, whether classified as ‘reportable’ or ‘non-reportable’ has been included in this study. Nevertheless, as will be discussed in the following part of the paper, the probability of censoring judgments during the study period cannot be completely ruled out.

¹⁴ Gadbois (n 2).

¹⁵ George H Gadbois, *Judges of the Supreme Court of India: 1950-1989* (Oxford University Press 2011).

Court of India, provided an insight to the career graphs and a glance into the ideological leanings of these judges, some of whom were part of the bench during the period of this present study as well. Another secondary source which was referred to for this study was Abhinav Chandrachud's *Supreme Whispers*.¹⁶ In this work, Chandrachud carried forward Gadbois's work, and included several anecdotes and contemporary events to introduce these former judges to a larger audience.

A. Political and Legislative Context-Setting

Coming to the present paper, its study is plotted in the setting where India had just ended a war after assisting East Pakistan in its struggle for liberation from West Pakistan, which led to the constitution of a sovereign nation, Bangladesh; and the concomitant international pressures in the diplomatic sphere.¹⁷ A new Criminal Procedure Code was in operation from April 1974. The National Emergency imposed during the war of 1971 was still in operation,¹⁸ although it was dormant. The Union Legislature had treasury benches which were occupied by members of the party having more than a two-third majority in the House of the People; and they were continuously trying to amend the Constitution, especially with respect to the right to property. The Supreme Court had introduced a caveat to this amending power by way of the basic structure doctrine;¹⁹ and therefore, the position of the Chief Justice of India ('CJI'), perhaps in consequence to the executive's desire of a 'committed judiciary',²⁰ was occupied by an individual who superseded

¹⁶ Abhinav Chandrachud, *Supreme Whispers: Conversations with the Judges of Supreme Court of India - 1980-89* (Penguin Random House 2018).

¹⁷ Pakistan (West Pakistan), being a strategic partner of the United States, was receiving assistance from NATO powers. The United States leadership indicated international sanctions against India for its role in assisting East Pakistan. Despite mounting pressure during PM Indira Gandhi's visit to the US in November 1971, India assisted East Pakistan in its struggle for liberation. This started a full-fledged war between India and Pakistan — on the Eastern as well as Western fronts of India.

¹⁸ The second National Emergency under Article 352 was proclaimed on December 3, 1971, on the verge of the India-Pakistan war. This Emergency was never formally revoked until 1977, when the Emergency of 1975 was also revoked.

¹⁹ *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

²⁰ 'Committed judges' is a phrase that was framed by contemporary scholars and political players. This was the concept which was moved by the Union ministers of the day, suggesting that the judges must assist the government furthering their policy, and hence there must be a 'committed judiciary' — committed to support the government. Some of the members of the judicial fraternity accepted and advocated this concept. Talking about the judge who served as the CJI during the reference period, Justice Bhagwati, in his interview to Gadbois, remarked that Chief Justice Ray was an honest man, and he sincerely believed that Ms. Gandhi was the saviour of the nation. See Chandrachud (n 16) 20.

Wherever the connotation 'committed judiciary' is used henceforth, this concept is to be referred. The author borrows the term for this paper, without making any value judgment on the same.

three of his senior colleagues. Several works, including those which have been referred to in this paper, have suggested the influence of these circumstances on judicial appointments to the Supreme Court. As far as the constitution of benches and listing of the matters is considered, the practices seemed opaque, similar to what some notable jurists and judges of the Apex Court have urged in recent times.²¹ However, the hold of the CJI remained strong — a fact which is buttressed from the listing of sensitive cases, including that of *I. Jagadeeswara v. Union of India* (*'I. Jagadeeswara case'*) (discussed later, in detail), which was listed to reconsider the landmark *Kesavananda Bharati v. State of Kerala* (*'Kesavananda Bharati'*) judgment. Overall, the independence of the judiciary was tracing an insidious graph, but the public at large was unaware of this. Concerns regarding the same were raised, in a limited manner, at the bar, in legal conferences, and academic circles only.²²

Against this backdrop, certain legislations, including the Maintenance of Internal Security Act ('MISA') and Defence of India Act ('DOIA') were enacted in 1971. Both these laws provided for detention "in certain cases for the purpose of maintenance of internal security and matters connected therewith."²³ The MISA provided for preventive detention in cases where a person was suspected of committing an act prejudicial to:

the defence of India, the relations of India with foreign powers, or the security of India; or the security of the State or the maintenance of public order; or the maintenance of supplies and services essential to the community; or with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India.²⁴

Though the purpose of MISA was to operationalise the provision of preventive detention under Article 22 of the Indian Constitution, it also contained procedural safeguards including the constitution of an 'Advisory Board'²⁵ where a detenu could contest his detention. However, the right to approach a court of law at the first instance was barred.²⁶ For a major part of the first three

²¹ Fali S Nariman, *God Save The Hon'ble Supreme Court of India* (Hay House 2018) 39-70.

²² JP Goyal, *Saving India from Indira: Untold Story of the Emergency* (Rama Goyal ed, Rupa Publications 2019) Appendix II, 176.

²³ The Maintenance of Internal Security Ordinance was promulgated on May 7, 1971. The Parliament passed the MISA a couple of months later, which became effective from July 2, 1971.

²⁴ MISA 1971, s 2.

²⁵ MISA 1971, s 9.

²⁶ The detenu could still approach constitutional courts under writ jurisdiction. However, this was also curtailed during the Emergency with the suspension of Fundamental Rights, and this was endorsed by the Supreme Court in April 1976, as discussed later.

years of its operation, as data reveals²⁷, detentions under MISA were to prevent impediments to essential services and supplies. However, the prima facie innocuous judicial pronouncements in these cases proved detrimental to the fundamental rights of detenus at later times, particularly during the reference period of this study.

On the political side, an election matter, which was long forgotten due to the aforementioned events in national life, resurfaced again. Then Prime Minister Indira Gandhi's election as a Member of Parliament was challenged by Raj Narain, a candidate of the Samyukta Socialist Party, who alleged the use of governmental machinery and corrupt practices by Ms. Gandhi. This case was adjudicated by the Allahabad High Court. On June 12, 1975, Justice Jagmohan Lal Sinha, vide judgment in *Raj Narain v. Indira Gandhi* in Election Petition no. 5 of 1971, held Ms. Indira Gandhi guilty of corrupt electoral practices on two counts, and disqualified her for a period of 6 years. The vacation bench of the Supreme Court refused to grant a complete stay on the judgment. The order dated June 24, 1975 by the Apex Court allowed Ms. Gandhi to continue as Prime Minister, but debarred her from casting a vote in the Parliament. This increased the political pressure on her and there were demands for her to resign on moral grounds.²⁸ On the intervening night of June 25 and 26, 1975, Ms. Gandhi wrote a letter²⁹ to the then President, Mr Fakhruddin Ali Ahmed, requesting him to issue a proclamation under Article 352(1) of the Indian Constitution, to declare another National Emergency.

The President of India, as per Article 352 of the Indian Constitution as it stood before the 44th amendment, was empowered to declare and proclaim Emergency if he was 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 internal disturbance".³⁰ It is pertinent to note that the

²⁷ See Annexure 1.

²⁸ Kunja Medhi, 'Protecting Civil and Political Rights in India: Mrs Gandhi's Emergency and Thereafter' in David P Forsythe (ed), *Human Rights and Development* (Palgrave Macmillan 1989).

²⁹ The letter read as follows:

Dear Rashtrapati ji,

As explained to you a little while ago, information has reached us which indicates that there is an imminent danger to security of India being threatened by internal disturbances. The matter is extremely urgent, I would have liked to have taken this to the cabinet but unfortunately this is not possible today. I am therefore condoning or permitting a departure from the Government of India (Transaction of Business) Rule 1961....

See Goyal (n 22).

³⁰ The term "internal disturbance" was replaced with "armed rebellion" by the 44th Amendment to the Indian Constitution, which was enacted in 1978, after the revocation of the Emergency in 1977.

letter sent by the then Prime Minister Ms. Gandhi mentioned “internal disturbance” as a ground for imminent danger to the security of India. However, there was no description of this “internal disturbance”, nor was there any report by any state government that would indicate that the law and order situation was out of control. The economic situation was also not close to alarming. The Governors of the states, in their reports to the President, had also not made any adverse remarks;³¹ and even the Union Cabinet of Ministers was unaware of the proclamation until the following morning.³² Moreover, since one National Emergency (of 1971) was already in operation, it can be inferred that this new Emergency was to suppress political dissent against the incumbent government and political milieu by curtailing the liberty of dissenters.

From the early hours of June 26, 1975, a series of political detentions commenced. Leaders of opposition parties, social leaders, and press personnel were arrested and placed in custody through the invocation of powers under Section 151 of the CrPC and under the preventive detention provisions of MISA, DOIA, and the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (‘COFEPOSA’).³³

The new legislations and amendments which followed the proclamation not only insulated Ms. Gandhi from the consequences ensuing from the election petitions,³⁴ but also made several penal and preventive detention safeguards obsolete.³⁵ For instance, the period for referring a detention to the Advisory Board under MISA, which was earlier within 30 days, was amended to 3 months from the date of detention. This meant that the police could arrest or detain someone under MISA, without producing the detenu before any judicial authority for up to 3 months. The maximum period of detention which was earlier 12 months from the date of detention was increased to 3 years or until the expiry of the Emergency, whichever was later. Further, Section 17A was inserted

³¹ *ibid.*

³² This fact can be inferred from the letter of Ms. Gandhi to the President where she mentions that the matter has not been taken to the ‘cabinet’.

³³ Gyan Prakash, *Emergency Chronicles: Indira Gandhi and Democracy’s Turning Point* (Princeton University Press 2019).

³⁴ The Constitution (Thirty-ninth amendment) Act, 1975, which was passed by the Parliament on August 10, 1975, barred the jurisdiction of courts from entertaining election petitions challenging the elections of the President, Vice-President, Prime Minister, and Lok Sabha Speaker.

³⁵ The MISA and DOIA were amended, and these Acts were also put in the IX Schedule of the Constitution by way of 39th Amendment. Thus, they were placed outside the purview of judicial review.

in MISA, which provided for detention for a period not exceeding 2 years without obtaining any opinion of the Advisory Board, on certain grounds specified in the section.³⁶

B. Judicial Context-Setting

The judiciary, which had already determined the constitutional validity of MISA in 1974,³⁷ and laid down precedents on this statute, was a mere spectator to these political and legislative changes. In the past, several detentions under MISA were validated. The Court laid down jurisprudence under MISA while assessing preventive detentions for disruption of supply of goods and services.³⁸ However, this room for preventive detention provided a position of law that the government could use to suppress and curtail liberty under the garb of “internal security”. The Apex Court had earlier decided that it was not mandatory for the government or the Advisory Board to pass a speaking order while approving or advising continuance of detention (in aforementioned cases of preventive detention for supplies), and only “a brief expression of principal reason was desirable”.³⁹ This enabled the government to detain an individual on broad and vague grounds, and not present them before an advisory board for a long period, thereby transgressing their personal liberty in the sheerest sense.

It is in light of these events that the paper analyses the working of the Supreme Court of India. The Court, at that time, had rendered decisions against the government in at least two contemporaneous instances: one in *R.C. Cooper v. Union of India* (*Bank Nationalisation case*),⁴⁰ where the Twenty-Fifth Constitutional Amendment Act was declared unconstitutional; and in *Kesavananda Bharati*,⁴¹ where the Parliament’s power to amend the Constitution was limited and the basic structure doctrine was evolved to check its constitutional authority to amend. Within three days of the verdict in *Kesavananda Bharati*, the three senior-most judges of the Court were superseded and the next judge, Justice A.N. Ray, who dissented in both the aforementioned cases,

³⁶ Christophe Jaffrelot and Pratinav Anil, *India’s First Dictatorship: The Emergency, 1975 -1977* (Hurst 2020).

³⁷ *Haradhan Saha v State of West Bengal* AIR 1974 SC 2154.

³⁸ This jurisprudence evolved through the decisions of the Supreme Court of India vide unreported cases bearing cases numbers W.P. No. 473 of 1972; W.P. No. 657 of 1972; W.P. No. 573 of 1974; and W.P. No. 332 of 1974.

³⁹ *Bhut Nath Mete v State of West Bengal* (1974) 1 SCC 645 (*‘Bhut Nath Mete’*).

⁴⁰ *R.C. Cooper v Union of India*, AIR 1970 SC 564.

⁴¹ *Kesavananda Bharati* (n 19).

was appointed as CJI.⁴² As CJI, he was the “first amongst the equal judges” and the master of the roster of the Supreme Court till January 1977, i.e., almost throughout the reference period, before Justice M.H. Beg superseded Justice H.R. Khanna to become the next CJI.

In total, there were 18 judges in the Supreme Court during the period of study. Out of these judges, Justices P.J. Reddy and D.G. Palekar retired before the start of the ‘reference period’ (i.e., before the 1975 Emergency), and Justices P.N. Shinghal, Jaswant Singh, and P.S. Kailasam were appointed during the operation of the 1975 National Emergency. The appointment of judges to the Supreme Court was not free from political interference.⁴³ The present paper deals with how these judges of the Supreme Court interpreted the afore-discussed detention laws and how these laws were applied in cases.

The *first* section of the study is titled as ‘(Un)reportings’, where I have quantitatively analysed the ‘reportable’ and ‘non-reportable’ judgments during the study period. In this section, I also ponder upon the reasons for the decline in the number of liberty matter adjudications during the reference period. The *second* section of the study is titled ‘Maintainability of Habeas Corpus’, where I have analysed the pronouncements of the Supreme Court on the maintainability of writ petitions against detentions during the Emergency period. In this section, I will also show how the grounding for the infamous judgment in *A.D.M. Jabalpur v. Shivkant Shukla*⁴⁴ (famously known as the ‘*Habeas Corpus* case’) was laid down a few years before its pronouncement.

II. (UN)REPORTINGS

The present study began with searching for all the judgments on liberty matters that were pronounced by the Supreme Court during the period of study. It was observed that only 19 cases pertaining to liberty matters, which included preventive detention, bail, and probation, were reported from January 1974 to December 1977. Generally, the number of liberty matters listed before a single bench of the Supreme Court, before and after the study period, were more than this number, as is reflected by the data of matters disposed of by the Court. Therefore, to

⁴² Referring to Chief Justice Ray’s sole dissent in *RC Cooper (Bank Nationalisation case)* and minority opinion in *Kesavananda Bharti*, C.K. Daphtary, a former Attorney General of India, remarked on the floor of the Parliament: “the boy who wrote best essay got the first prize”. See Arghya Sengupta and Ritwika Sharma (eds), *Appointment of Judges to the Supreme Court of India: Transparency, Accountability and Independence* (Oxford University Press 2018) 16.

⁴³ See Nitish Rai Parwani, ‘Judicial Appointments and Judicial Delays: The inordinate delay in appointing the Judges adversely impacting the justice delivery system’ (2020) 2(1) *Lex Jura Law Journal* for a more detailed exposition.

⁴⁴ (1976) 2 SCC 521.

understand this gap, the judgments of the Supreme Court that were classified as ‘unreported’ were searched. Generally, the authoring judge has the discretion to classify a judgment as ‘reportable’ or ‘unreportable’. The journals and reporters, including Supreme Court Reporter (‘SCR’), All India Reporter (‘AIR’), and Supreme Court Cases (‘SCC’), which publish the Supreme Court judgments, only publish those judgments that are classified as ‘reportable’. The ‘non-reportable’ judgments are preserved, at least by the Supreme Court itself, in the form of bound chronicles.⁴⁵ The author found 56 such ‘non-reportable’ judgments pertaining to the study period.

It is difficult to comprehend that in a span of 3 years, when the State was detaining individuals at a frequent rate, the Supreme Court delivered only 75 judgments on liberty matters. There could be four probable reasons which could justify this figure: *first*, the detenus preferred approaching the High Courts rather than the Supreme Court under writ jurisdiction. This probability is analysed and refuted in the later portion of this part of the study. *Second*, liberty matters were not even listed for hearing during this period. *Third*, the Supreme Court dismissed the writ petitions and special leave petitions at the stage of admission itself, thereby not delivering any judgment on it. *Fourth*, reporting of Supreme Court judgments was censored and they were not even preserved by the court registry. In order to arrive at a more concrete reasoning to justify this data, a comparative analysis of judgments of the study period and the reference period is helpful.

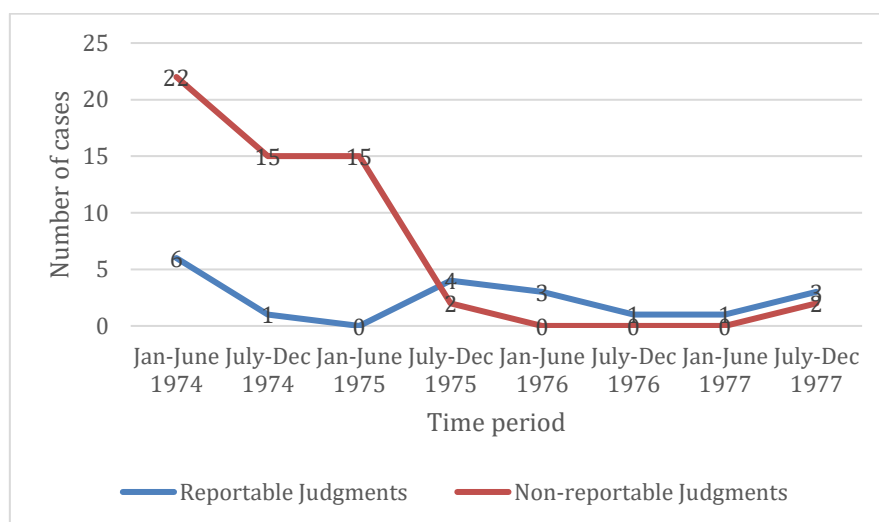
Period [HY]	Reportable Judgments	Non-reportable Judgments
Jan-June 1974	6	22
July-Dec 1974	1	15
Jan-June 1975	0	15
July-Dec 1975	4	2
Jan-June 1976	3	0
July-Dec 1976	1	0
Jan-June 1977	1	0
July-Dec 1977 ⁴⁶	3	2

⁴⁵ The author was able to access these judgments at the library of the Supreme Court of India as an LL.M student at the National Law University, Delhi.

⁴⁶ By this time, the Emergency was revoked (on March 21, 1977) and MISA was repealed (on July 2, 1971). Hence, the only liberty matters that came up for hearing were regular and default bail matters under the CrPC.

Total	19	56 ⁴⁷
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From January 1974 to June 1975 (the period before the 1975 Emergency), the Supreme Court decided (at least) 59 judgments on liberty-matters, out of which 57 were dealing with preventive detention alone. While the ‘reportable’ judgments during this period (7 out of 59) constituted 11.8% of the total number of judgments delivered on ‘liberty matters’, there were 52 judgments that were classified as ‘non-reportable’. The gap between the two is wide, but at least the judgments were preserved, irrespective of their classification, in the internal records of the Court. The curve of liberty matter judgments dropped suddenly after June 1975. There were only 11 judgments on liberty matters during the whole reference period (July 1975 to June 1977), which includes 2 unreportable and 9 reportable judgments (a significant change in the ratio of ‘non-reportable’ and ‘reportable’ judgments also raises questions, which we discuss later). The curves of judgments delivered during the study period, in the slots of six months, are plotted in the following graph:



Trend of reportable and non-reportable judgments on liberty matters from January 1974 to December 1977

A perusal of the graph reflects that the curve of the judgments, whether reportable or non-reportable, followed a downward slope from 1974 to 1977. Though there was a vast inter-se gap between the number of reportable and non-reportable judgments, the graphs also indicate that the number of pronouncements on liberty matters declined from the 1971 National Emergency to the reference period. The number of non-reportable judgments which were 22, 15, and 15 for the

⁴⁷ Annexure-1 contains the list of all the unreported judgments on detention decided by the Supreme Court of India during the study period and reference period.

three half-yearly (HY) terms (January 1974 – June 1975) abruptly fell to 2 judgments in HY June to December 1975, i.e., during first half yearly term after the proclamation of the 1975 Emergency, and subsequently remained at 0 for the next 3 HY terms, till the Emergencies were revoked.

The same trend is observed in reportable judgments, with one exception of a peak of 4 judgments in HY July to December 1975. Now, when we analyse the nature of these 4 judgments, we find that none of them concern preventive detention. 2 of these judgments are on parole, 1 on probation, and 1 set aside the dismissal order of a regular bail application by a High Court.⁴⁸ Hence, there were no reportable judgments on preventive detention during the first HY term (July to December 1975) after the proclamation of the 1975 Emergency, when the greatest number of political dissenters were detained.

In the following HYs during the reference period, the number of reportable judgments stood at 3, 1 and 1 respectively, which included the infamous *Habeas Corpus* case⁴⁹ and *Union of India v. Bhanudas Krishna Gawde* ('*Bhanudas*'),⁵⁰ which are analysed in the next part of this study. Interestingly, each of these judgments had at least one writ petition tagged to it that was filed by a political stalwart; and any unreasoned or non-speaking order by the Court would have led to outrage by the opposition. In the *Habeas Corpus* case, an appeal challenging the release of Atal Bihari Vajpayee from preventive detention was tagged.⁵¹ Similarly, in *Bhanudas*, the appeal challenging the release of Lal Krishna Advani was tagged.⁵²

The afore-discussed trend of judgments on detention matters seems uncanny, especially in light of the fact that the MISA was in operation and was already declared intra-vires the Constitution by the Apex Court in August 1974,⁵³ and it was not until April 1976 in the *Habeas Corpus* case that the Supreme Court held that writ petitions against preventive detentions are not maintainable during

⁴⁸ *Suresh Chandra v State of Gujarat* (1976) 1 SCC 654; *Krishan Lal v State of Delhi* (1976) 1 SCC 655; *Mohamed Aziz Mohamed Nasir v State of Maharashtra* AIR 1976 SC 730; *Munir Sayed Ibna Hussain v State of Maharashtra* (1976) 3 SCC 548.

⁴⁹ *Habeas Corpus* case (n 44).

⁵⁰ *Union of India v Bhanudas Krishna Gawde* AIR 1977 SC 1027 ('*Bhanudas*').

⁵¹ *Union of India v Atal Bihari Vajpayee* C.A. no. 1845-1849 of 1975.

It is pertinent to note that Mr. Vajpayee went on to become the Foreign Minister of India after the Emergency was revoked and a new government was elected. He also became the first person from a political party other than the Indian National Congress to complete full five-year tenure as the Prime Minister of India (1999-2004). He also led the Indian government as the Prime Minister in 1996 and 1998.

⁵² *Union of India v Lal Krishna Advani* C.A. no. 434 of 1976.

Mr. Advani became the Information and Broadcasting Minister in 1977, and later served as the Home Minister and Deputy Prime Minister of India.

⁵³ *Haradban Saha* (n 37).

the Emergency.⁵⁴ Hence, the number of writ petitions challenging the preventive detentions on the facts should have increased in this period, and consequently, there should have been a rise in the curve; however, the graph signifies exactly the opposite. The graph followed a stable curve from when the MISA was declared constitutional to the proclamation of the 1975 Emergency, as the Court pronounced 25 non-reportable judgments from August 1974 to June 1975. However, these declined abruptly after June 1975.

A primary reading also indicates that the reportable judgments have consistently been disproportionately lower than the non-reportable judgments during the study period.⁵⁵ The highest number of reportable judgments during the study period were 6, 4, and 3 in HY January to June 1974 (6), HY July to December 1975 (4), and HY January to June 1976 (3) and HY July to December 1977 (3) respectively; whereas no judgment was reported in HY January to June 1975, and 1 judgment was reported in HY July to December 1974, July to December 1976, and January to June 1977 each. Regarding the non-reportable judgments, there were 22 in HY January to June 1974 and they gradually declined to 2 in HY July to December 1975, and then remained at zero during the rest of the period of the National Emergency. This data indicates that though reportable judgments were low before as well as during the Emergency, the non-reportable judgments also treaded a downward path, and there were only 2 non-reportable judgments during the reference period of the 1975 Emergency.

The overall judgments in liberty and detention matters, whether reported or unreported, were low during the study period and followed a further downward trend during the reference period of this study. There were certain speculations in legal circles to understand this phenomenon. One of the prime speculations indicated a malice involved in the registry or the administrative side of the Court.⁵⁶ This malice was suspected to be in the nature of non-listing of these matters or censoring of the judgments. Neither of these two possibilities can be ruled out. There were instances where

⁵⁴ *Habeas Corpus* case (n 44).

⁵⁵ There is no clear answer to explain this anomaly. The discretion to categorise a judgment as reportable or un-reportable is within the authority of the judge authoring the judgment. There is no concrete explanation to the question that whether the Supreme Court of that time, as an institution, was reticent in reporting detention matters in general, or there were some unobtrusive reasons during the study period which impacted the reporting of the detention. However, this paper does analyse certain speculations and explanations on further drop of reportable as well as non-reportable judgments during the reference period.

⁵⁶ Goyal (n 22).

several cases, owing to their potent political repercussions, were never reported,⁵⁷ either as ‘reportable judgments’ or in the publication comprising ‘non-reportable judgments’. Even the judgment of Allahabad High Court, which convicted the then Prime Minister, Ms. Gandhi, of corrupt electoral practices, was not reported, though its copy is preserved by the Allahabad High Court registry and its true copy can be obtained.⁵⁸

There were even certain instances when some of the judges, especially Chief Justice Ray, who was the master of roster, got matters listed and de-listed out of their turn. For instance, he constituted a 13-judge bench on November 10, 1975 to reconsider the ratio of the *Kesavananda Bharati*,⁵⁹ which had laid down the ‘basic structure doctrine’ to restrict the Parliament’s Constitution amending power. This new matter, which was titled as *I. Jagadeeswara Rao v. Union of India*, involved a challenge to the Thirty-Second Constitutional Amendment Act, which pertained to service conditions of civil servants. There was no urgency to list the matter, and the petitioners had alternative remedies available. However, the matter was listed and a 13-judge bench that comprised 4 judges who penned the minority opinions in *Kesavananda Bharati* was constituted; it was most likely that the basic-structure doctrine would be reconsidered and over-ruled by this bench.⁶⁰ As things would have it, the oral-arguments were started by Mr. Nani Palkhivala who appeared for interveners, and he was able to establish the position that no case was made out to reconsider *Kesavananda Bharati*,

⁵⁷ There are several instances where written orders of the courts were censored. In a courtroom exchange between Nani Palkhivala and Justice Krishna Iyer, the former had pointed out, *inter alia*, an instance of non-publication of a Delhi High Court judgment on habeas corpus. This courtroom exchange is reproduced in the biography of Nani Palkhivala in the following words:

The Delhi High Court’s judgement on the habeas corpus petition of Mr. Nayar was not allowed to be published. It was BBC which reported parts of it, which I am saying now also will not be reported in tomorrow’s newspapers due to censorship. If I say anything about the recent amendments in public, I shall probably be arrested. In fact, the only place where there is any freedom of speech in this country is the few hundred square feet of various courtrooms. In fact, I am very grateful to the government for giving me the opportunity of expressing my views in the court.

See Soli Sorabjee and Arvind Datar, *Nani Palkhivala: The Courtroom Genius* (Lexis Nexis 2012) 155.

⁵⁸ The matter titled *Raj Narain v Indira Nehru Gandhi* was heard by the Allahabad High Court as Election Petition no. 5 of 1971.

⁵⁹ *Kesavananda Bharati* (n 19).

⁶⁰ Prime Minister Indira Gandhi wanted the ratio of *Kesavananda Bharati* to be over-ruled, and the Parliament to have a right to amend any part of the Constitution. Since Chief Justice Ray was perceived as “Chief Justice of Indi(r)a”, it was believed that he got this matter listed. When it was questioned in Court as to on whose mentioning this matter was listed and a 13-judge bench constituted, the Chief Justice had no answer. See Goyal (n 22) 126-128.

that too at a time when the National Emergency was in operation.⁶¹ The interference with the independent functioning of registry surfaced when, after the dissolution of the bench in *I. Jagadeeswara* on November 12, 1975, Justice Khanna questioned the reference pursuant to which this bench of 13-judges was constituted. Chief Justice Ray observed that a mentioning was made by the Advocate General of Tamil Nadu, Mr. Govind Swaminathan. He refuted, and likewise all the advocates appearing in this matter or in the connected matters to it refused to have made any mentioning.⁶² It was also found that this matter was not even referred by any of the smaller benches of the Court.⁶³ Eventually, when the deputy registrar of the Apex Court was confronted, it came to light that there was no order as to the reference, and the matter was listed before a bench of 13-judges on the oral instructions of Chief Justice Ray.⁶⁴

These anecdotes buttress the probability that either there were some extraneous factors interfering with the listing of matters, especially detention matters, or there was censoring of judgments in these matters, during the study period. If either or both of these reasons were the impetus behind the fall in curve of liberty matter judgments during the reference period, it raises suspicions over the accountability and independence of judiciary during that period.

As has been accepted by the judiciary, “Judicial independence and accountability go hand in hand as accountability ensures and is a facet of judicial independence.”⁶⁵ The vast inter-se gap between ‘reportable’ and ‘non-reportable’ judgments in and of itself, and the fall in the number of judgments on liberty matters as a whole, is indicative of the fact that the independence of the judiciary was thwarted during the 1975 Emergency.

III. THE MAINTAINABILITY OF HABEAS CORPUS PETITIONS

On June 28, 1975 (two days after the proclamation of the Emergency), Article 359 of the Indian Constitution, which provide(d) for suspension of enforcement of fundamental rights conferred

⁶¹ This bench, which was equal in strength to the bench which had delivered *Kesavananda Bharati*, was constituted to decide the question of whether *Kesavananda Bharati* required reconsideration, and whether a new (and larger) bench must be constituted to reconsider the same.

⁶² Goyal (n 22); Adil Rustomji, ‘The review that wasn’t: Forty years after Kesavananda Bharati vs the State of Kerala’ (First Post, 22 December 2015) <<https://www.firstpost.com/india/the-review-that-wasnt-forty-years-after-kesavananda-bharati-vs-the-state-of-kerala-2555020.html>> accessed 12 January 2024.

⁶³ As per practice and procedure, even if the validity of the Amendment Act was to be challenged, the matter should have been listed before a five-judge Constitution Bench at first instance, which would have, if the case was made out, referred it to a larger bench.

⁶⁴ Prashant Bhushan, *The Case that Shook India* (Vikas Publishing 1978) 256.

⁶⁵ *CPIO, Supreme Court of India v Subhash Chandra Aggarwal* (2020) 5 SCC 481.

under Part III during the Emergency, became operational. When detenus began approaching constitutional courts through writ petitions, the courts were in dilemma on whether they must decide these cases or not, especially with regard to habeas corpus cases, where detenus challenged their detention as being based on vague or no grounds. Whether the constitutional courts could issue a writ of habeas corpus during the operation of the Emergency was a question that left judges, especially of the High Courts, perplexed.

There were 9 High Courts that ruled that the writ petitions challenging detentions were maintainable and that constitutional courts could issue the writ of habeas corpus; while other High Courts either maintained a contrasting view or did not decide this question of law themselves. The Supreme Court finally decided this question in April 1976 in the *Habeas Corpus* case, but the foundation for the ratio of this case was laid down more than a year prior to the invocation of the 1975 National Emergency.

In May 1974, a Constitution Bench of 5-judges of the Supreme Court, headed by Chief Justice Ray decided a case on preventive detention under MISA, titled *Fendan Naha v. State of West Bengal*.⁶⁶ The detenu in this case was detained in March 1973 till the expiration of Emergency.⁶⁷ The period of detention was challenged on the ground that it was indefinite. The bench headed by the CJI dismissed the writ petition and upheld the detention in the light of Section 6(d) of the DOIA, which permitted preventive detention for a period of 12 months or until the expiration of DOIA, whichever is later. This single-page judgment, delivered as a unanimous verdict, did not seem to pose any major threat to liberty at that time, since most of the preventive detentions till June 1975 were to prevent any impediments to the supply of service and goods only. There were no 'political arrests' as preventive detentions⁶⁸, at least none that were contested before the Supreme Court (a claim that could be established by perusing the reported as well as unreported judgments of the Court).

Further, in 1973, in *Prabhu Dayal Deorah v. DM Kamrup*,⁶⁹ Justice M.H. Beg, who later sided with the majority opinion in the *Habeas Corpus* case, while writing a separate and dissenting opinion, watered down the scope of judicial review by the Supreme Court in preventive detention cases. He held that even if some grounds of detention are vague, the detention is not to be vitiated. If the detenu believes that some grounds are vague, he can approach the Advisory Board, but the

⁶⁶ *Fendan Naha v State of West Bengal* (1975) 3 SCC 30.

⁶⁷ During the Emergency of 1971, which was revoked only in 1977, along with the 1975 Emergency.

⁶⁸ See Annexure 1.

⁶⁹ *Prabhu Dayal Deorah v DM Kamrup* (1974) 1 SCC 103.

Supreme Court shall not interfere in these matters. The majority decision by Justices Mukherjee and Mathew saved the jurisdiction of the Supreme Court to entertain these matters under Article 32 of the Constitution, and prevented the opinion of Justice Beg from forming the ratio. However, Justice Beg referred to his minority opinion in *Prabhu Dayal* while writing his concurring judgment in the *Habeas Corpus* case, to reiterate and reaffirm his stance, which then became part of the ratio and limited the scope of judicial review in preventive detention matters.

These two propositions were supplemented by the ratio in *Fagu Shaw v. State of West Bengal*,⁷⁰ where the Court held that the Parliament was not obliged to provide a maximum term of detention in the preventive detention statute (speaking in the context of MISA only). It supplemented, in the context of a maximum period of detention, that “(there) is no limit to that period, except in case of its reasonableness”.⁷¹ The question of personal liberty was limited at that point in time; but post June 1975, when preventive detentions to curb dissent increased, the ghost of the precedents bound other judges too. The impact of these precedents was amplified in and after the *Habeas Corpus* case that came two years later, by a bench headed by the same Chief Justice, where even the judicial review of detention during the period of Emergency was barred.

Although the judges were constantly petitioned and forewarned of the effect of suspension of fundamental rights during Emergency and were apprised of the apprehension that detention may become perpetual if the Emergency remains a constant fact of Indian constitutional life, the Court shrugged its judicial shoulders. The ball was passed to the political court (i.e., to legislation and executive action) by stating this matter to be “outside the orbit of judicial control and wandering into the para-political sector.”⁷² The Court, while displaying judicial restraint, refuted the argument that their act is a display of “constitutional-taboo”, by terming the conduct as a “pragmatic response of the court to the reality of its inadequacy in deciding such issues”,⁷³ owing to the constitutional scheme of separation of powers. The country was engulfed in the mindset of the Emergency, and true to Cardozo’s words, this tide and current did not pass the judges idly by.⁷⁴ Be it the political executive or the judiciary, the language of rosy jargon was never renounced, even in this period; albeit the practice was nowhere near enough to realise these ideals.

⁷⁰ *Fagu Shaw v State of West Bengal* AIR 1974 SC 613.

⁷¹ *ibid* [158].

⁷² *Bhut Nath Mete* (n 39).

⁷³ *ibid*.

⁷⁴ HR Khanna, *Role of Judges* (1979) 1 SCC (Jour) 17.

There were certain judges who believed that “no amount of verbal praise and encomium for the rule of law by some votaries of law and intellectual theorists would win the respect of the masses for rule of law unless in its actual working the rule of law satisfies the quest for justice in concrete terms”.⁷⁵ But these judges were not assigned cases where the arbitrary curtailers of liberty may face embarrassment,⁷⁶ and therefore, whenever they got an opportunity to register their views, they did not hesitate to remark that “history will, we hope, serve the administration as a reminder of unwitting misuse while exercising near-absolute power”.⁷⁷

On April 28, 1976, a 5-judge Constitutional bench of the Supreme Court of India decided 9 appeals — these being against the judgments of the High Courts of Allahabad, Bombay, Madhya Pradesh, Karnataka, Delhi, Punjab, and Rajasthan, where the High Courts had issued the writ of habeas corpus. These appeals were tagged and pronounced as a judgment titled *Additional District Magistrate, Jabalpur v. Shivkant Shukla*.⁷⁸ The Court, by a majority of 4:1, held that an order of detention during the period of Emergency cannot be judicially reviewed even if the orders were sans authority of law or with mala-fide intention to detain. The Chief Justice went on to elucidate that: “Liberty is confined and controlled by law, whether common law or statute... It is not an abstract or absolute freedom... Liberty is itself the gift of the law and may by the law be forfeited or abridged.”⁷⁹

In his concurring opinion, Justice Y.V. Chandrachud, who later went on to become the longest serving CJI, endorsed the view of Chief Justice Ray, and concluded his remarks by observing:

Counsel after counsel expressed the fear that during the emergency, the Executive may whip and strip and starve the detenu and if this be our judgment, even shoot him down. Such misdeeds have not tarnished the record of Free India and I have a diamond-bright, diamond-hard hope that such things will never come to pass.⁸⁰

⁷⁵ HR Khanna, ‘Rule of Law’ (1977) 4 SCC (Jour) 11.

⁷⁶ For instance, Justice Krishna Iyer was not assigned more than 4 liberty matters during the reference period, while he decided more than 20 cases on preventive detention in the period of January 1974 to June 1975. Similarly, Justice Khanna — who was the senior most associate judge of the Court — was assigned only 2 liberty matters during the reference period.

⁷⁷ *Golam Hussain v Commissioner of Police, Calcutta* (1974) 4 SCC 530 (Khanna J).

⁷⁸ *Habeas Corpus* case (n 44).

⁷⁹ *ibid* [33]-[35].

⁸⁰ *ibid* [421].

Similar observations were made by the other two judges, Justices M.H. Beg and P.N. Bhagwati, while concurring with the majority judgment.

It was Justice Hans Raj Khanna who registered the sole dissent in this judgment, while siding with liberty and right to life. He refuted the view of Chief Justice Ray by observing:

Sanctity of life and liberty was not something new when the Constitution was drafted. It represented a facet of high values which mankind began to cherish in its evolution from a state of tooth and claw to a civilized existence. Likewise, the principle that no one shall be deprived of his life and liberty without the authority of law was not the gift of the Constitution. It was a necessary corollary of the concept relating to the sanctity of life and liberty, it existed and was in force before the coming into force of the Constitution.⁸¹

This dissent costed Justice Khanna his Chief-justiceship⁸². The 16 judges of those 9 High Courts who had earlier reflected the same views as Justice Khanna and had upheld the maintainability of

⁸¹ *ibid* [528].

⁸² Justice Khanna anticipated this while penning his judgment. In his autobiography, he mentions a conversation with his sister a few days before the pronouncement of this judgment, where he mentions that this dissent would cost him Chiefship. But Justice Khanna was ready for it. His conviction was strong; in one of his judgments, he had observed: "Abnegation in matters affecting one's own interest may sometimes be commendable but abnegation in a matter where power is conferred to protect the interest of others against measures which are violative of the Constitution is fraught with serious consequences." See *State of Punjab v Khan Chand* (1974) 1 SCC 549.

Justice Khanna was ready to abnegate the position of Chief Justice in order to prevent the consequences of allowing the arbitrary curtailment of individual liberty of the citizens. In his farewell speech, which he gave before the Supreme Court Bar Association and other Bar Associations on March 4, 1977, he stood with his stance and reflected no regret on losing out on the position. He noted:

Law, it has been said, knows no finer hour than when it cuts through the formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution.... A [Judge] has to put aside the ambitions which drives the politician to search for power and the thinker to the construction of abstract system.

See 'Farewell Speech' (1977) 1 SCC (Jour) 9.

habeas corpus petitions were transferred from their respective High Courts,⁸³ and several of them who were still ad-hoc judges were not made permanent judges of the High Courts.⁸⁴

The majority decision of *Habeas Corpus* case reflected how the “Emergency had a crippling effect on the decisional independence of the judges of higher judiciary.”⁸⁵ This judgment also serves as the indicator of how the innocuous trend of previous judgments of the Supreme Court on detention matters, which served as impetus for judicial deferral on liberty and detention matters, culminated as a complete bar on judicial review in detention matters under preventive detention laws during the Emergency period. The judgment in the *Habeas Corpus* case was not a sudden withdrawal from judicial scrutiny by the court; but a crafted denouement of the narrative that began being framed from much before. While the spirits of *Fendan Naba* and *Fagu Shaw* judgments were retained in this judgment, sans their explicit reference, the minority view of Justice Beg in *Prabhu Dayal Deorah* was reiterated by him in the *Habeas Corpus* case; and this time, it became part of the ratio and thus limited the scope of judicial review in preventive detention matters.

Bhanudas is another case, though lesser discussed, which was decided by the Supreme Court during the reference period and which had a similar ratio. A three-judge bench, led by Chief Justice Ray and having Justices Beg and Jaswant, in January 1977 (just three days before the Union government decided to deprive Justice Khanna of his due Chief-justiceship, and appoint Justice Beg as the CJI) reiterated its stance in the *Habeas Corpus* case and held that a writ petition challenging the detention is not maintainable during the period of Emergency.

In *Bhanudas*,⁸⁶ the bench observed that the proclamation of Emergency has imposed a “blanket ban on every judicial enquiry into the validity of an order depriving a person of his personal liberty irrespective of whether it stems from the initial order directing his detention or from an order laying down the conditions in his detention.”⁸⁷ This case, which had clubbed nine appeals that challenged the provisions of COFEPOSA and had sought a direction of the Court, inter alia, to

⁸³ Senior Advocate and jurist H.M. Seervai observed in his commentary on the Indian Constitution that “these sixteen judges were transferred not for doing anything wrong, but for doing right to all manner of people according to the constitution and law.” See HM Seervai, *Constitutional Law of India* (Law and Justice Publishing Company 2008) 2802.

⁸⁴ Granville Austin, *Working a Democratic Constitution: A History of Indian Constitution* (Oxford University Press 2003) 344.

⁸⁵ Sengupta and Sharma (n 42).

⁸⁶ *Bhanudas* (n 50).

⁸⁷ *ibid* [24].

allow detenus to get treatment by private doctors, permission to perform religious ceremonies, and obtain home cooked food, was dismissed by the Court, and it was elucidated that:

In all the cases now before us, the application considered by the High Court was for grant of a direction or order against the State or its officers, acting in the performance of their purported duties. The remedy sought against them was clearly covered by the Presidential inhibition which operates, under the Constitution, which is supreme, against the High Courts. Hence, whatever may be the grievances of the detenus, with regard to the place of their confinement, the supply of information to them, their desire to get treatment by their own private doctors or to obtain some special or additional food required by them from their own homes, or to leave the place of their confinement temporarily to go to some other place to perform some religious ceremony or other obligation, for which they had erroneously sought permission and directions of the court subject to any conditions, such as that the detenus could be accompanied by the police or remain in the custody of the police during the period, are not matters which the High Court had any jurisdiction to consider at all. It was, therefore, quite futile to invite our attention to the allegations of petitioners about supposed conditions of their detention. Indeed, on the face of it, the nature of the claims made was such that they are essentially matters fit to be left to the discretion and good sense of the State authorities and officers. It is not possible to believe, on bare allegations of the kind we have before us, that the State authorities or officers will be vindictive or malicious or unreasonable in attending to the essential needs of detenus. These are not matters which the High Court could consider in petitions under Article 226 of the Constitution, whatever be the allegations made on behalf of detenus so as to induce the High Court to interfere. The High Courts can only do so under Article 226 of the Constitution if they have authority or power to do it under the Constitution. Devoid of that power, the directions, which may be given by a High Court after such enquiries as it makes, would be

useless as they will not be capable of enforcement at all during the Emergency under the law as we find it in our Constitution.⁸⁸

(emphasis supplied)

The afore-cited judgments of the Supreme Court reflect the degree of sympathy and independence which was left in the 'independent judiciary'. The Court became a spectator to arbitrary infringement of individual liberty by the State, while perpetually observing that "their (Court's) power to proceed with a habeas petition against executive authorities of the State is itself impaired"⁸⁹ and "the suspension of the right to enforce the right conferred by Article 21 means and implies the suspension of the right to file a habeas corpus petition or to take any other proceeding to enforce the right to personal liberty conferred by Article 21."⁹⁰

IV. CONCLUSION

In this comprehensive analysis, I have examined the intricate interplay of unobtrusive and political influences on the judiciary while focusing on detention jurisprudence by the Supreme Court of India from January 1974 to December 1977. This study sheds light on the hitherto unexplored influences on judicial decision making, providing a nuanced understanding of how the law operates in practice. During this period, India grappled with the aftermath of the 1971 war, a lingering state of emergency, and political developments that raised questions regarding the independence of the judiciary. The legislative changes and amendments introduced after the proclamation of the Emergency significantly enhanced the government's powers, particularly in matters of preventive detention. These changes curtailed personal liberty and challenged the judiciary's role in upholding individual rights.

⁸⁸ *ibid* [47].

⁸⁹ *Habeas Corpus* case (n 39).

⁹⁰ In the *Habeas Corpus* case, Justice Y.V. Chandrachud observed the aforementioned remark. Forty-five years after this observation, an observation by a Supreme Court judge presented a contrasting view on the Court's responsibility in liberty matters. See *Arnab Manoranjan Goswami v Union of India*, 2020 SCC OnLine SC 964. Here, Justice D.Y. Chandrachud observed:

The doors of this Court cannot be closed to a citizen who is able to establish prima facie that the instrumentality of the State is being weaponized for using the force of criminal law. Our courts must ensure that they continue to remain the first line of defense against the deprivation of the liberty of citizens. Deprivation of liberty even for a single day is one day too many. We must always be mindful of the deeper systemic implications of our decisions.

My research relied on a jurimetrical approach, examining judicial behaviour and the quantitative analysis of judgments. Additionally, I considered socio-political factors, career trajectories of judges, and the impact of extraneous influences on judicial decisions to unveil the layers of complexity that influence court judgments. This piece comprised two sections, exploring different facets of the judiciary's response to the evolving legal landscape during the specified period. The first section examined quantifiable data, providing insights into reporting and non-reporting of judgments, while probing into reasons for the decline in the number of liberty-related cases adjudicated during the reference period. While examining the judgments on liberty matters by the Supreme Court from January 1974 to June 1977, this section underscored a distinct decline in the number of judgments, particularly following the declaration of the National Emergency in June 1975. The significant drop in reported as well as non-reported judgments in this category prompts a closer inquiry into the circumstances surrounding this phenomenon. Speculations regarding non-listing and potential censorship warrant a meticulous investigation as they raise critical questions regarding the judiciary's autonomy and accountability during this turbulent period. This section also underscored the need for a rigorous analysis of the factors contributing to listing and reporting of matters, particularly with implications for understanding the legal landscape of that era, and generally as well.

The second section delved into the Supreme Court's pronouncements on the maintainability of habeas corpus writ petitions during the Emergency period. These judgments demonstrate how the Emergency profoundly affected the judiciary's independence and its role in safeguarding individual liberties, representing a departure from established principles of justice and freedom. The consequences of these decisions underscore the profound challenges faced by India's judicial system during this tumultuous period. An insidious pattern was observed where judicial functioning was influenced by the political executive, selective decision-makers were preferred by the executive through appointments and by the judiciary itself through listing of matters and constitution of benches. The pattern also indicated how seemingly innocuous judicial decisions, like *Fendan Naba*, *Prabhu Dayal Deorah*, and *Fagu Shaw* gradually prepared a base for deferring discretion to the political executive and curtailing judicial review, which culminated in the infamous *Habeas Corpus* case.

In conclusion, the analysis uncovers nuanced patterns of judicial decisions during the study period. It reveals the influence of certain (potentially) political factors at play. These findings contribute to a deeper understanding of the functioning of the Supreme Court during this critical time and

raise the need for a more rigorous and systematic analysis in these areas for other courts and periods as well.

**ANNEXURE-1: LIST OF UNREPORTED JUDGMENTS IN DETENTION MATTERS FROM
JANUARY 1974 TO DECEMBER 1977**

	Case Number	Description of matter (in head-note format)	Decision (and any other observation)	Month and year of decision
1.	WP 1972 of 1973	WP - MISA - supply of food services	WP dismissed	February 1974
2.	WP 20 of 1973	WP - MISA - single act of daring removing instruments	WP dismissed	February 1974
3.	Criminal Appeal no. 23 of 1974	MISA - preventive detention order where prosecution already going on same facts	Detention upheld	February 1974
4.	WP 508 of 1972	WP - MISA - supplies	WP allowed	February 1974
5.	WP 1678 of 1973	WP - MISA - supply of tele service	WP allowed (no body is born as veteran or habitual criminal)	February 1974
6.	WP 555 of 1972	WP - MISA - disrupt in supply- long duration of detention-state to consider	WP dismissed	February 1974
7.	WP 603 of 1972	WP - MISA - failure to communicate grounds	Detention invalidated	February 1974
8.	WP 26 of 1973	WP - MISA - detention on material not communicated	WP allowed	February 1974
9.	WP 657 of 1972	WP - MISA - Cutting communication line	Detention upheld	February 1974
10.	WP 506 of 1972	WP - MISA - single activity which required skills	Detention upheld	February 1974
11.	WP 344 of 1972	WP - MISA - detention on 7-month-old acts	Detention invalidated	February 1974
12.	WP 1857 of 1973	WP - MISA	Detention upheld	February 1974
13.	WP 1995 of 1973	WP - MISA - communication	Detention upheld	February 1974

14.	WP 1856 of 1973	WP - Habeas corpus - Art 22 - no communication of instances	Detention invalidated	February 1974
15.	WP 1679 of 1973	WP - MISA - vague grounds - single instance	WP allowed	February 1974
16.	WP 613 of 1972	WP - MISA - single ground communicated	Detention invalidated	February 1974
17.	WP 473 of 1972	WP - MISA - disruption of service	WP dismissed	February 1974
18.	WP 2023 of 1973	WP - MISA	Detention upheld	March 1974
19.	WP 527 of 1972	WP - MISA - authority to explain the delay	Detention invalidated	March 1974
20.	WP 961 of 1974	WP - MISA - previous detention order revoked - new order	Detention invalidated	April 1974
21.	WP 1466,1500, etc of 1973	WP - MISA - revocation of revocation order	Liberty granted to all detenus	May 1974
22.	WP 2053 of 1972	WP - MISA - detention till expiration of emergency - whether valid	Detention upheld	May 1974
23.	WP 30 of 1974	WP - MISA - order of police commissioner - valid grounds	Detention upheld	August 1974
24.	WP 801 of 1973	WP - MISA - discharge/acquittal by criminal court does not affect the detention if detaining authority satisfied	Detention upheld	September 1974
25.	WP 292 of 1974	WP - MISA - adulteration	WP allowed	October 1974
26.	WP 278 of 1974	WP - MISA - language of grounds	Detention upheld	October 1974
27.	WP 380 OF 1974	WP - habeas corpus - preventive detention under MISA	Detention upheld	November 1974

28.	WP 319 of 1974	WP - MISA - all grounds not revealed to DM	WP allowed	November 1974
29.	WP no. 332 of 1974	WP - habeas corpus - Preventive detention under MISA - accused in possession of material that may hamper telegraph lines and thus the communication system	Dismissed the WP after appreciating the evidence	November 1974
30.	Writ Petition 453 of 1974	MISA - detention where the facts show that person could have been prosecuted under ordinary law - preventing essential commodities being served	Detention set aside after appreciating evidence	December 1974
31.	WP 407 of 1974	Habeas corpus - MISA	WP dismissed	December 1974
32.	WP 481 of 1974	MISA - Habeas corpus - Hoarding	WP dismissed	December 1974
33.	WP 318 of 1974	MISA - Detention without explaining reasons for arrest and without mentioning the name of associates involved in alleged offence	Dismissed WP (Held: though detenu illiterate, grounds were explained in Hindi)	December 1974
34.	WP 231 of 1974	WP - MISA	WP dismissed	December 1974
35.	WP 573 of 1974	WP - MISA - Hoarding	WP dismissed	December 1974
36.	WP 446 of 1974	WP - MISA - delay in detention order and arrest - one month delay	WP dismissed	December 1974
37.	WP 463 of 1974	WP - MISA - Justification of continuance of detention - grievance seems justified but court cannot decide whether detention to be continued	WP dismissed	December 1974
38.	WP 307 of 1974	WP - MISA - Detention	WP dismissed	January 1975

39.	WP 458 of 1974	WP - MISA - 2 incidents - detention	WP dismissed	January 1975
40.	WP 508 of 1974	WP - MISA - stealing railway equipment, armed with weapons and bombs which they hurled at police	WP dismissed	January 1975
41.	WP 447 of 1974	WP - MISA - Stealing fish plates from railway tracks	WP dismissed	January 1975
42.	WP 538 of 1974	WP - MISA - Ground that witness was afraid to give evidence - incredulous	Detention invalidated	January 1975
43.	WP 444 Of 1974	WP - MISA - Section 15 MISA - temporary release	Upheld detention (observed that humanist provision of temporary release under s.15 MISA should not rust in statute books, but should be used by the government to humanise fellow men)	January 1975
44.	WP 374 of 1974	WP - MISA - detention order can be issued while the detenu is in custody in a trial	Upheld detention (Held Court cannot decide whether the detenu committed dacoity or not)	January 1975
45.	WP 476 of 1974	WP - MISA - public disorder - grounds conveyed had direct nexus to it	Upheld detention	January 1975
46.	WP 456 of 1974	WP - MISA - Detention on solitary incident	WP dismissed	January 1975
47.	WP307 of 1974	WP - MISA - Detention	WP dismissed	January 1975
48.	WP 522 of 1974	WP - MISA - Infringement of procedural safeguards,	Detention invalidated	January 1975

		approval communicated before it was granted		
49.	WP 389 of 1974	WP - MISA - Detention on single ground where grounds shown are dangerous, organised loot of coal from train after breaking open the coach	WP dismissed	February 1975
50.	WP 568 of 1974	WP - MISA - Single instance of dacoity in a house insufficient to construe public order breach	WP allowed	March 1975
51.	WP 556 of 1974	WP - MISA - Grounds having no nexus with activity	WP allowed	March 1975
52.	Criminal Appeal 359 of 1974	Benefit of statutory bail under S.167 CrPC - investigation pending before April 1974 - benefit of provision cannot be taken	Appeal dismissed	April 1975
53.	Criminal appeal 129 of 1971	Supreme Court bound to take notice of Probation of Offenders Act, even though not brought to notice of TC or HC.	Benefit of bail granted to accused in offence under S.379/34 IPC	September 1975
54.	Criminal Appeal 172 of 1971	S.439 CrPC - appeal by State against HC giving relief to applicant	Appeal dismissed, bail upheld	October 1975
55.	Criminal appeal 100 of 1977	Probation of Offenders Act	Sentence remitted, probation granted	August 1977
56.	Cr. Misc. Petition 1907 of 1976	Bail - appeal admitted by SC but not likely to be heard soon	Bail granted	September 1977